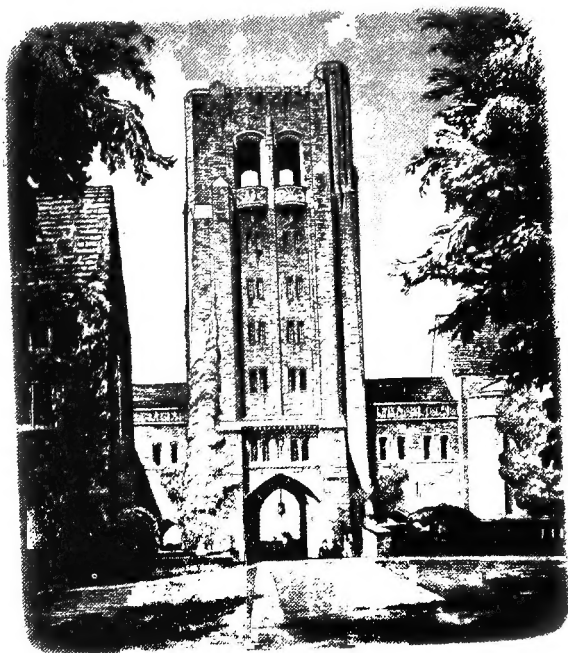


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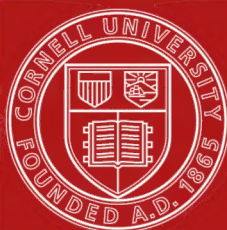
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COMMENTARIES
ON THE
LAW OF EVIDENCE
IN
CIVIL CASES

BY

BURR W. JONES

of the Wisconsin Bar

Professor of the Law of Evidence in the College of Law of the University

of Wisconsin

Viresque acquirit eundo

—Verg. Aen.

WITH THE LAW APPLICABLE TO EACH SECTION OF THE ORIGINAL
TEXT, REWRITTEN, ENLARGED AND BROUGHT WITH
AUTHORITIES UP TO THE PRESENT DATE

BY

L. HORWITZ

of the San Francisco Bar

VOLUME III

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§ 393 (395). **Real evidence—In general.**—At this date there is no longer any serious doubt as to either the admissibility or importance of what is not only called, but *is*, real evidence. We have already defined real evidence,¹ known either by that name or “immediate” evidence, or

¹ See § 8, *ante*, for full discussion of the names applied to this species of evidence.

"autoptic proference." For obvious reasons there is no class of evidence so convincing and satisfactory to a court or a jury as that which is addressed directly to the senses of such court or jury. Although, comparatively speaking, but a small portion of the evidence received in court is of this character, yet, as will be seen from the illustrations which follow in this chapter, it is a familiar practice to supplement other proof by presenting for the inspection of the judge or jury objects to which the testimony refers. Such objects are, when it is convenient, brought into the courtroom for such inspection. If this is not convenient or possible, the judge or jury may, if it seems practicable and necessary, leave the courtroom and take a view of the object or premises in question. Evidence thus addressed directly to the senses of the tribunal has been described as *real or natural evidence*. That the courts early paid a high tribute to this class of evidence is shown by the fact that, where the point or issue was evidently the "object of sense," the judges sometimes dispensed with a jury and decided the question in dispute upon the testimony of their own senses.² As a fact, trial by inspection or examination was one of the seven species of trials in civil cases, and was used when, for the greater expedition of a cause, in some point or issue, being either the principal question, or arising collaterally out of it, but being evidently the object of sense, the judges, upon the testimony of their own senses, decided the point in dispute.³ The right to use real evidence scarcely needs authority to support it. It is true that evidence for the most part is by the oral testimony of witnesses and by documents, but when the thing testified to can be seen by the jury, subject always to the control of the presiding judge, consistency demands that if the ends of justice can be furthered by its production, it should be produced to them. It is not calling for any unusual exercise of any of their senses. No jury ever decided any controverted question of fact without using

² 3 Bl. Com. 331.

³ 3 Bl. Com. 331.

one or more of their five senses. The senses of hearing and sight are used in every case for more purposes than that of simply seeing the witnesses and hearing their words. Through these senses impressions are made upon the minds of the jurors which cause them to accept as true, or reject as false, the statements made by the several witnesses. Thus, the exercise of these senses, on the part of the jurors, affects their verdicts. In a recent Oklahoma case,⁴ Furman, P. J., has dealt with the subject exhaustively and collected the best authorities. In that case the court held it was not error to permit a jury to inspect, look at, and smell the contents of a bottle which had been properly identified and admitted in evidence and was alleged to contain whisky. The opinion says: "But this does not make them witnesses in the case. They have simply tested the credibility of the witnesses by the personal experience and observations of the jurors. A thousand things in the lives and observations of the jurors may influence them in doing this, but a knowledge of these things has never been regarded as making the jurors witnesses in the case. In this case the jurors were permitted to smell the contents of the bottle offered in evidence, to enable them to decide as to whether the prosecuting witness had told the truth about its being whisky. By this the jurors did not learn any facts independent of the evidence; they simply tested the facts in evidence by the use of one of their senses. Or, in other words, they were permitted to hold an autopsy on part of the evidence already before them, to test its true character." And as there was no error in allowing the jury to smell liquor, so it has been held there would have been none in allowing them to taste it to tell if it were sweet or fermented cider.⁵

⁴ Reed v. Territory, 1 Okl Cr. 481, 129 Am. St. Rep. 861, 98 Pac. 583.

⁵ People v. Kinney, 124 Mich. 486, 83 N. W. 147; although in Commonwealth v. Brelsford, 161 Mass. 61, 36 N. E. 677, Field, C. J., said there were grave reasons against giving to a jury liquor to drink for the pur-

pose of determining whether it was or was not intoxicating. In that case the intoxicating nature of the liquor was not in issue, but only whether it contained more than one per cent of alcohol. Of course, there is a marked distinction between calling upon the jury to use any of their senses, and

In a frequently cited case,⁶ which involved the question as to whether the plaintiff was a white or negro woman, Robertson, C. J., said: "The counsel denies that personal inspection by the jurors on the trial is proper or allowable evidence. . . . To a rational man of perfect organization the best and highest proof of which any fact is susceptible is the evidence of his own senses. This is the ultimate test of truth, and is therefore the first principle in the philosophy of evidence. . . . Hence autopsy, or the evidence of one's own senses, furnishes the strongest probability, and indeed the only perfect and indubitable certainty of the existence of any sensible fact. . . . (Jurors), when they decide altogether on the testimony of others, do so only because the fact to be tried is unsusceptible of any better proof. Their own personal knowledge of the fact would always be much more satisfactory to themselves, and afford much more certainty of truth and justice . . . Hence, the policy of having a jury in the vicinage; and hence, too, jurors have not only been permitted, but required, to decide on autoptical examination wherever it was practical and convenient." Wharton, in his work on Criminal Evidence, says: "The remains of a deceased person may be produced, when in a fit condition, for the purpose of showing the nature of an injury. So all instruments by which an offense is alleged to have been committed; all clothes of parties concerned, from which inference may be drawn; all materials in any way part of the *res gestae* may be produced at the trial of the case. Injury to the person may also be proved by inspection. Thus, in an action to recover damages for an injury to a limb, the injured limb may be exhibited on trial, to be inspected by the court and jury while the surgeon who was employed to set it testifies as to the injury. When the issue is infancy, on an indictment, the court and jury may decide by inspection, and so when the question

to dull or otherwise affect those senses by tasting what might prove noxious. It is in such cases that the

discretion of the presiding judge is called into action.

⁶ Gentry v. McGinnis, 3 Dana (Ky.), 382.

arises as to the color of a person. On an issue of bastardy, the jury may judge of likenesses by inspection; and so on an issue of adultery, for the purpose of connecting a child with a putative father.”^{6a}

§ 394 (396). Same—The ancient practice.—The ancient practice is thus explained by Blackstone: “As in case of a suit to reverse a fine for nonage of the cognizer, or to set aside a statute or recognizance entered into by an infant, here and in other cases of a like sort, a writ shall issue to the sheriff, commanding him that he shall constrain the said party to appear, that it may be ascertained by the view of his body by the king’s justices whether he be of full age or not; *ut per aspectum corporis sui constare poterit justiciariis nostris, si praedictus A sit plenae aetatis necne*. If, however, the court has, upon inspection, any doubt of the age of the party (as may frequently be the case), it may proceed to take proofs of the fact; and, particularly, may examine the infant himself upon an oath *voir dire, veritatem dicere*, that is, to make true answer to such questions as the court shall demand of him; or the court may examine his mother, his godfather or the like. In like manner if the defendant pleads in abatement of the suit that the plaintiff is dead, and one appears and calls himself the plaintiff, which the defendant denies, in this case the judges shall determine by inspection and examination whether he be the plaintiff or not. Also if a man be found by a jury an idiot,

^{6a} Wharton on Criminal Evidence, 9th ed., § 312. In *Reed v. Territory*, *supra*, Furman, P. J., said: “When the trial court is of the opinion that the ends of justice will be advanced by permitting the jury to examine or inspect anything that has been introduced in evidence, the court may permit this to be done, but the examination or inspection must be in open court, and in the presence of the defendant, and at all times subject to the control of the court. Our statute, permit-

ting an inspection by the jury of places or premises, when in the judgment of the court the ends of justice will be promoted thereby, is simply an extension of the power of inspection to places and premises which cannot be brought into court. Thus we see that our statute recognizes, indorses and extends the power of inspection. There was no abuse of the power of the trial court in permitting the jury in this case to smell the contents of the bottle introduced in evidence.”

a nativitate, he may come in person into the chancery before the chancellor, or be brought there by his friends to be inspected and examined, whether idiot or not; and if upon such view and inquiry it appears he is not so, the verdict of the jury and all the proceedings thereon are utterly void and instantly of no effect. Another instance in which the trial by inspection may be used is when, upon an appeal of mayhem, the issue joined is whether it may be mayhem or no mayhem, this shall be decided by the court upon inspection, for which purpose they may call in the assistance of surgeons. And by analogy to this in an action of trespass for mayhem, the court (upon view of such mayhem as the plaintiff has laid in his declaration, or which is certified by the judges who tried the cause to be the same as was given in evidence to the jury) may increase the damages at their own discretion; as may also be the case upon view of an atrocious battery. But then the battery must likewise be alleged so certainly in the declaration, that it may appear to be the same with the battery inspected. Also to ascertain any circumstances relative to a particular day past, it hath been tried by an inspection of the almanac by the court. Thus upon a writ of error from an inferior court, that of Lynn, the error assigned was that the judgment was given on a Sunday, it appearing to be on 26 of February, 26 Eliz., and upon inspection of the almanacs of that year, it was found that the 26th of February in that year actually fell upon a Sunday: this was held to be a sufficient trial, and that a trial by a jury was not necessary, although it was an error in fact; and so the judgment was reversed. But in all these cases, the judges, if they conceive a doubt, may order it to be tried by jury.”⁷

§ 395 (397). Inspection other than by the court or jury. The practice referred to by Blackstone was not confined to the cases set out in the preceding section. It was soon found that there were cases where it would have been im-

⁷ 3 Bl. Com. 333.

practicable to have any inspection in the presence of the court or jury, either within or outside the courtroom, and yet where, in the absence of any inspection, there would be a manifest failure of justice. Thus it was the ancient practice of the courts of divorce, in determining a question of impotency as affecting the validity of a marriage, to order an inspection of the person of either party by surgeons.⁸ This proceeding had its origin in the ecclesiastical courts, and was allowed because of the necessity of the case, and because of the interest which the public, as well as individuals, had in upholding the marriage state.⁹ There was, however, an analogous practice in the common-law tribunals by which the writ *de ventre inspiciendo* was issued to ascertain whether a woman convicted of capital crime was quick with child. By virtue of the writ a jury of matrons was sworn to make inspection and make report to the court.¹⁰ In like manner the writ was allowed to protect the rightful inheritance, when a widow was suspected of feigning pregnancy for the purpose of establishing a fraudulent claim of heirship for the pretended child.¹¹ The persons appointed to perform this duty were thus made officers of the court; it was their duty to make report to the court and, if required, to give evidence in open court.¹² The order requiring the party to submit to the examination could be enforced by an order withholding alimony, or suppressing testimony, or continuing the cause, or staying the

⁸ *Newell v. Newell*, 9 Paige Ch. (N. Y.) 25; *Devanbagh v. Devanbagh*, 5 Paige Ch. (N. Y.) 554, 28 Am. Dec. 443; *Le Barron v. Le Barron*, 35 Vt. 365; *Anonymous*, 35 Ala. 226; *Shafte v. Shafte*, 28 N. J. Eq. 34; 2 Bish. Mar. & Div., §§ 1298, 1299.

⁹ *Union Pacific Ry. Co. v. Botsford*, 141 U. S. 250, 35 L. Ed. 734, 11 Sup. Ct. Rep. 1000, and cases cited; *Briggs v. Morgan*, 1 Phill. 325.

¹⁰ *Union Pacific Ry. Co. v. Bots-*

ford, 141 U. S. 250, 35 L. Ed. 734, 11 Sup. Ct. Rep. 1000; *Reg. v. Wycherly*, 8 Car. & P. 262.

¹¹ 1 Bl. Com. 456; *Union Pacific Ry. Co. v. Botsford*, 141 U. S. 250, 35 L. Ed. 734, 11 Sup. Ct. Rep. 1000. The writ was denied by supreme court of New York in 1874: 10 Alb. L. Jour. 3.

¹² 2 Bish. Mar. & Div., § 1308, more fully as to practice; 1 *Thomp. Trials*, § 855.

proceedings, or other like orders.¹³ We have now to see how the idea of thus assisting the ends of justice has developed in the light of modern thought and practice, aided by progressive legislation.

§ 396 (398). Inspection of person in personal injury cases.—We have seen that the practice of requiring a party to submit his person to inspection was well established in the ecclesiastical courts, and was occasionally resorted to in the courts of the common law. In this country, nevertheless, there is a great dearth of early precedents. Quite recently, however, the subject has frequently arisen in the courts in actions for personal injury, where the defendant has demanded that the plaintiff be required to submit to a physical examination. In a case in the *supreme court of the United States* the defendant made a motion before the trial judge three days before the trial for an order requiring the plaintiff to submit to an examination by a surgeon in the presence of her own surgeon and counsel, if she desired their presence. The motion was made on the ground that it was necessary to enable a correct diagnosis of the case, and that it was necessary to enable the defendant to prepare for trial. It was *held*, however, that *the court had no power to make such an order*; and this view was sustained on appeal by the supreme court. Mr. Justice Gray in the opinion of the court urged that any such order compelling a party to submit to an examination of the person would be an indignity and a violation of personal right; that in the federal courts it is not a question which is governed by the law or practice of the state in which the trial is had, but depends upon the power of the national courts under the constitution and laws of the United States; and that the practice is not according to the common law, to

¹³ Newhall v. Newhall, 9 Paige Ch. (N. Y.) 25; Anonymous, 35 Ala. 226; Shepard v. Missouri Pac. Ry. Co., 85 Mo. 629, 55 Am. Rep. 390.

It has been suggested that disobedience might be punished by contempt proceedings; 2 Bish. Mar & Div., § 1305.

common usage, or to the statutes of the United States.¹⁴ This view is sustained by the state courts in several instances. It is there held that in the absence of statutes, a compulsory inspection of the person of a party cannot be had, although the refusal to submit to such examination may perhaps be a proper subject of comment before a jury.¹⁵ But this view is *not sustained by the weight of au-*

¹⁴ Union Pacific Ry. Co. v. Botsford, 141 U. S. 250, 35 L. Ed. 734, 11 Sup. Ct. Rep. 1000, the leading case, which contains an able review of the authorities on this subject. See, also, a discussion of this case by Howard Benton Lewis in 32 Am. L. Reg. 550. The leading case has been followed in a number of federal decisions. In Hanks Dental Assn. v. International Tooth Crown Co., 194 U. S. 303, 48 L. Ed. 989, 24 Sup. Ct. Rep. 700, the question was elaborately discussed with no variation of the law as stated by Mr. Justice Gray; and this, too, notwithstanding the fact that since the leading case was decided, the act of March 9, 1892 (27 Stats. at Large, 7, c. 14, U. S. Comp. Stats. 1901, p. 664, 3 Fed. Stats. Ann. 22), was passed, declaring that in addition to the mode of taking the depositions of witnesses in causes pending in the federal district and circuit courts, it should be lawful to take the depositions or testimony of witnesses in the mode prescribed by the laws of the state in which the courts are held. Fuller, C. J., held that the words "mode of taking" depositions did not enlarge the scope of the authority, and that although the New York statutes permitted an order for the physical examination of a witness, the power of the federal court was to be read only as assimilating the procedure and not as enlarging the causes or

grounds for taking depositions. See, also, McQuigan v. Delaware etc. R. Co., 129 N. Y. 50, 26 Am. St. Rep. 507, 14 L. R. A. 466, and extended note, 29 N. E. 235, and Cleveland etc. R. Co. v. Huddleston, 151 Ind. 540, 68 Am. St. Rep. 238, and note thereto, 36 L. R. A. 681, 46 N. E. 678, and the notes to Sidekum v. Wabash etc. Ry. Co., 3 Am. St. Rep. 554, and to Sioux City & Pacific R. Co. v. Finlayson, 49 Am. Rep. 726. It must be borne in mind that the question was not squarely presented in Hanks Dental Assn. v. International Tooth Crown Co., *supra*, which presented only the issue above referred to. In Mutual Life Ins. Co. v. Griesa, 156 Fed. 398, it is said that the force of the holding in United States v. Bosford, *supra*, is lessened by the later case, Camden etc. R. Co. v. Stetson, 177 U. S. 172, 44 L. Ed. 721, 20 Sup. Ct. Rep. 617, but in the last-named case Mr. Justice Peckam merely drew attention to the fact that there was no intimation in the opinion that a statute of a state directly authorizing such examination would be a violation of the federal constitution, or invalid for any other reason.

¹⁵ McQuigan v. Delaware, L. & W. Ry. Co., 129 N. Y. 50, 26 Am. St. Rep. 507, 14 L. R. A. 466, 29 N. E. 235 (but the rule has since been changed by statute, Code Civ. Proc., § 873); Peoria, D. & E. Ry. Co. v. Rice, 144 Ill. 227, 33 N. E. 951; Par-

thority. In the important case in the supreme court of the United States already referred to, Justices Brewer and Brown dissented. In their dissenting opinion and in numerous decisions of the state courts, it is urged that the supposed inconvenience or embarrassment to the party must yield to the higher consideration that the end of litigation is justice.¹⁶ As the dissenting justices referred to put it, it was the first time the question was presented to the court, and it was therefore an open question, and, in our opinion, the dissent expresses such cogent reasoning that it may be hoped the establishment of the federal law on the same basis as that now adopted in many states may not be far distant. The dissenting opinion contains this strong passage: "The end of litigation is justice. Knowledge of the truth is essential thereto. It is conceded and it is a matter of frequent occurrence, that in the trial of suits of this nature the plaintiff may make in the courtroom, in the presence of the jury, any not indecent exposure of his person to show the extent of his injuries; and it is conceded, and also a matter of frequent occurrence, that in private he may call his personal friends and his own physicians into a room, and there permit them a full examination of his person, in order that they may testify as to what they see and find. In other words, he may thus disclose the actual facts to the jury if his interest require; but by this decision, if his interests are against such a disclosure, it cannot be

ker v. Enslow, 102 Ill. 272, 40 Am. Rep. 588; Stack v. New York etc. R. Co., 177 Mass. 155, 83 Am. St. Rep. 269, 52 L. R. A. 328, 58 N. E. 686.

¹⁶ Dissenting opinion in Union Pac. Ry. Co. v. Botsford, 141 U. S. 250, 35 L. Ed. 734, 11 Sup. Ct. Rep. 1000; Graves v. Battle Creek, 95 Mich. 266, 35 Am. St. Rep. 561, 19 L. R. A. 641, 54 N. W. 757; City of Ottawa v. Gilliland, 63 Kan. 165, 88 Am. St. Rep. 232, 65 Pac. 252; St. Louis S. W. Ry. Co. v. Dobbins, 60 Ark. 481, 30 S. W. 887, 31 S. W. 147;

White v. Milwaukee Ry. Co., 61 Wis. 536, 50 Am. Rep. 154, 21 N. W. 524; Stuart v. Havens, 17 Neb. 211, 22 N. W. 419; Richmond & D. Ry. Co. v. Childress, 82 Ga. 719, 14 Am. St. Rep. 189, 3 L. R. A. 808, 9 S. E. 602; Miami Turnpike Co. v. Baily, 37 Ohio St. 104; City of South Bend v. Turner, 156 Ind. 418, 83 Am. St. Rep. 200, 54 L. R. A. 396, 60 N. E. 271; Faivre v. Mandercheid, 117 Iowa. 724, 90 N. W. 76; King v. State, 100 Ala. 85, 14 South. 878. See note to McQuigan v. Delaware etc. Ry. Co., 14 L. R. A. 466.

compelled. It seems strange that a plaintiff may, in the presence of a jury, be permitted to roll up his sleeve and disclose on his arm a wound of which he testifies; but when he testifies as to the existence of such a wound, the court, though persuaded that he is perjuring himself, cannot require him to roll up his sleeve, and thus make manifest the truth, nor require him, in the like interest of truth, to step into an adjoining room, and lay bare his arm to the inspection of surgeons. It is said that there is a sanctity of the person which may not be outraged. We believe that truth and justice are more sacred than any personal consideration; and if in other cases in the interests of justice, or from considerations of mercy, the courts may, as they do, require such personal examination, why should they not exercise the same power in cases like this, to prevent wrong and injustice?" The only foundation upon which the leading case rests is the fact that the federal courts, other than the supreme court, possess no jurisdiction except what is given them by Congress, and that no federal statute gives to those courts power to order a discovery; and that in the opinion of the majority of the court, the statute of the United States prescribes the mode of proof in the trial of actions at law, and that it shall be oral testimony and examination of witnesses in open court, except as in the statute provided—the only exception being the one for taking depositions and for compulsory production of books or writings in the possession of a party, and therefore that the statute inhibits any form of examination or discovery, and removes from the courts the power to require it. It is very clear that the practice of requiring a party, in proper cases, to submit to physical inspection has ample warrant in English cases from early times.¹⁷ We must now proceed to inquire into the condition of the state laws with regard to this important species of evidence.

§ 397 (399). **Same, continued.**—The state courts were for a long time without any uniformity of decision, but there

¹⁷ See §§ 394, 395, *ante*.

was gradually asserted a general tendency of legislation and of judicial decision in the direction of increasing the facilities of arriving at the truth. For example, the courts now exercise powers in requiring parties to testify and in compelling the inspection of books and papers which would have been deemed a bold usurpation half a century ago. It seemed more consistent with this general tendency for the courts to exercise, in a reasonable manner, the power of compelling a party to submit to an inspection of the person where it seems necessary to serve the ends of justice.¹⁸ As we have pointed out, in the federal courts, where this power is so strenuously denied, there is no statute similar to those in many states compelling a party to give testimony before trial; and the fact that in the federal courts the practice does not prevail may have some bearing on the want of state uniformity.¹⁹ In a well-considered opinion in an Iowa case,²⁰ so long ago as 1877, the right to physical examination was announced with no uncertain sound, and this was followed in a large number of states.²¹ These cases show that the

¹⁸ *White v. Milwaukee City Ry. Co.*, 61 Wis. 536, 50 Am. Rep. 154, 21 N. W. 524; *Schroeder v. Chicago, R. I. & P. Ry. Co.*, 47 Iowa, 375. See, also, *Durgin v. Danville*, 47 Vt. 95, 105.

¹⁹ *Chateaugay Ore & Iron Co., Petitioner*, 128 U. S. 544, 32 L. Ed. 508, 9 Sup. Ct. Rep. 150; *Union Pac. Ry. Co. v. Botsford*, 141 U. S. 250, 35 L. Ed. 734, 11 Sup. Ct. Rep. 1000; *Camden & Suburban Ry. Co. v. Stetson*, 177 U. S. 172, 44 L. Ed. 721, 20 Sup. Ct. Rep. 617.

²⁰ *Schroeder v. Chicago etc. R. Co.*, 47 Iowa, 375.

²¹ In 1877, in the well-considered case of *Schroeder v. Chicago etc. Ry. Co.*, 47 Iowa, 375, the power was affirmed, and the rule there announced has been followed in the following cases: *King v. State*, 100 Ala. 85, 14 South. 878; *Alabama G. S. R. Co. v. Hill*, 90 Ala. 71, 24 Am.

St. Rep. 764, 9 L. R. A. 442, 8 South. 90; *St. Louis etc. R. Co. v. Dobbins*, 60 Ark. 481, 30 S. W. 887, 31 S. W. 147; *Sibley v. Smith*, 46 Ark. 275, 55 Am. Rep. 584; *Richmond & D. R. Co. v. Childress*, 82 Ga. 719, 14 Am. St. Rep. 189, 3 L. R. A. 808, 9 S. E. 602; *City of South Bend v. Turner*, 156 Ind. 418, 83 Am. St. Rep. 200, 54 L. R. A. 396, 60 N. E. 271; *Pennsylvania Co. v. Newmeyer*, 129 Ind. 401, 28 N. E. 860; *Hall v. Incorporated Town of Manson*, 99 Iowa, 698, 34 L. R. A. 207, 68 N. W. 922; *Dickinson v. Kansas City etc. R. Co.*, 74 Kan. 863, 86 Pac. 150; *Atchison etc. Ry. Co. v. Palmore*, 68 Kan. 545, 64 L. R. A. 90, 75 Pac. 509; *City of Ottawa v. Gilliland*, 63 Kan. 165, 88 Am. St. Rep. 232, 65 Pac. 252; *Atchison etc. Ry. Co. v. Thul*, 29 Kan. 466, 44 Am. Rep. 659; *Belt Electric R. Co. v. Allen*, 102 Ky. 551, 80 Am. St. Rep. 374, 44 S. W. 89; *Graves v.*

judiciary recognized, that if the court is powerless, in actions for personal injuries, to require a plaintiff to submit himself to a physical examination, to the end that the truth as to their nature, effect and possible duration may be ascertained, when he, by his suit, has made them the subject of judicial investigation, then the law is actually permitting him to disclose just so much and such parts of the facts as, in his judgment, would benefit his case, at the expense of his adversary, and to invoke the court's aid to compensate him for the injury through a partial and one-sided investigation. Under such circumstances, the court would be an instrument for the accomplishment of the grossest injustice, and, therefore, the object for which courts are instituted would be defeated. On the other hand, if the plaintiff's claim is meritorious; if he has suffered the injuries he complains of, and on account of which he prosecutes his action, he has nothing to fear from the most rigid examination. His case will only be strengthened thereby.²² In a Colorado opinion, which is a monument to the ability

Battle Creek, 95 Mich. 266, 35 Am. St. Rep. 561, 19 L. R. A. 641, 54 N. W. 757; Wanek v. Winona, 78 Minn. 98, 79 Am. St. Rep. 354, 46 L. R. A. 448, 80 N. W. 851; Hatfield v. St. Paul & D. R. Co., 33 Minn. 130, 53 Am. Rep. 14, 22 N. W. 176; Owens v. Kansas City etc. R. Co., 95 Mo. 169, 6 Am. St. Rep. 39, 8 S. W. 350; Sidekum v. Wabash etc. R. R. Co., 93 Mo. 400, 3 Am. St. Rep. 549, 4 S. W. 701; Shepard v. Missouri Pac. Ry. Co., 85 Mo. 629, 55 Am. Rep. 390; Stuart v. Havens, 17 Neb. 211, 22 N. W. 419; Sioux City & P. R. Co. v. Finlayson, 16 Neb. 578, 49 Am. Rep. 724, 20 N. W. 860; Brown v. Chicago etc. R. Co., 12 N. D. 61, 102 Am. St. Rep. 564, 95 N. W. 153; Miami & M. T. Co. v. Bailey, 37 Ohio St. 104; Hess v. Lake Shore etc. R. Co., 7 Pa. Co. Ct. 565; Lane v. Spokane Falls etc. Ry. Co., 21 Wash. 119, 75 Am. St. Rep. 821, 46 L. R. A.

153, 57 Pac. 367; O'Brien v. La Crosse, 99 Wis. 421, 40 L. R. A. 831, 75 N. W. 81; White v. Milwaukee City R. Co., 61 Wis. 536, 50 Am. Rep. 154, 21 N. W. 524. On the power to compel plaintiff in a suit to submit to a physical examination, see note to Larson v. Salt Lake City, 23 L. R. A., N. S., 463. On waiver of right to object to physical examination or exhibition of person, see note to Houston etc. R. Co. v. Anglin, 2 L. R. A., N. S., 386. On order to a veterinary surgeon to enter premises for examination of cattle, see Martin v. Elliott, 106 Mich. 130, 31 L. R. A. 169, 63 N. W. 998.

²² From the able opinion of Maxwell, J., in Western Glass Mfg. Co. v. Schoeninger, 42 Colo. 357, 126 Am. St. Rep. 165, 15 L. R. A., N. S., 663, 94 Pac. 342. As to when a refusal of an order for physical examination amounts to an abuse of discretion,

of the judge who wrote it,²³ the result of an examination of the decisions supporting the right of the court to order a physical examination discloses that the following propositions may be deduced from the opinions: 1. That trial courts have the power to order a medical examination by experts of the person of a plaintiff seeking a recovery for personal injuries. 2. That a defendant has no absolute right to demand the enforcement of such an order, but that the motion therefor is addressed to the sound discretion of the trial court. 3. That the exercise of such discretion is reviewable by the appellate court, and corrected in case of abuse. 4. That the examination should be applied for and made before entering upon the trial, and should be ordered and had under the direction and control of the court, whenever it fairly appears that the ends of justice require the disclosure or more certain ascertainment of important facts, which can only be disclosed, ascertained and fully elucidated by such an examination, and when the examination may be made without injury to plaintiff's life or health or the infliction of serious pain. 5. That the refusal of the motion where the circumstances appearing in the record present a reasonably clear case for the examination, under the rule stated, is such an abuse of the discretion lodged in the trial court as will result in a reversal of the judgment in plaintiff's favor. That such order may be enforced, not by punishment as for a contempt, but by staying or dismissing the action. It will be noticed that most of the cases which assert this power of compulsory inspection hold that it is a matter resting in the sound *discretion of the court*; hence it follows that the order will not be made unless it seems necessary to do justice between the parties.²⁴ And, on the other hand, the refusal of the

see note to Western Glass Mfg. Co. v. Schoeninger, 15 L. R. A., N. S., 663.

²³ Western Glass Mfg. Co. v. Schoeninger, *supra*.

²⁴ Shepard v. Missouri Pac. Ry. Co., 85 Mo. 629, 55 Am. Rep. 390;

Sidekum v. St. Louis Ry. Co., 93 Mo. 400, 3 Am. St. Rep. 549, and note, 4 S. W. 701; O'Brien v. La Crosse, 99 Wis. 421, 40 L. R. A. 831, 75 N. W. 81; Hatfield v. St. Paul etc. R. Co., 33 Minn. 130, 53 Am. Rep. 14, 22 N. W. 176; Chicago & A. R. Co. v. Clau-

trial court in an action for personal injuries to order the plaintiff to submit to a physical examination by experts, where he alleges permanent injury, but the accident produced no visible wound, and an examination would disclose the nature and extent of the injuries, is such an abuse of discretion as will result in a reversal by the supreme court of a judgment in his favor.²⁵ In Illinois, in a late case,²⁶ we find the court saying that it was "committed to the doctrine that the court had no power to make or enforce such an order"; that is, to compel the plaintiff to submit to a medical examination. In Utah, in a similar case,²⁷ Straup, J., makes the best of the case against the ante-trial examination in a well-considered opinion, in which he attacks the dissenting opinion of Mr. Justice Brewer in the United States supreme court case already referred to.²⁸ But it is only the best of a weak case, and that part of the learned judge's opinion may not be adopted, which, while conceding that the "end of litigation is justice and that knowledge of the truth is essential thereto," and that courts are organized "to establish and enforce equal and exact justice," brands these propositions as "plastic phrases and pointless truisms," which "do not argue anything, nor elucidate or answer the point of inquiry." The learned judge concedes, too, the power of the court to order the not indecent exhibition of the body at the trial. The issue thus becomes more narrowed; and the otherwise temperate opinion of the learned judge may be fairly used as a distinct progression

sen, 173 Ill. 100, 50 N. E. 680; *Swift & Co. v. Rutkowski*, 182 Ill. 18, 54 N. E. 1038; *McGuff v. State*, 88 Ala. 147, 16 Am. St. Rep. 25, 7 South. 35; *St. Louis S. W. Ry. Co. v. Dobbins*, 60 Ark. 481, 30 S. W. 887, 31 S. W. 147; *Walsh v. Sawyre*, 52 How. Pr. (N. Y.) 334. But it has been held to be a matter of right: *Miami Turnpike Co. v. Baily*, 37 Ohio St. 104; *Atchison Ry. Co. v. Thul*, 29 Kan. 466, 44 Am. Rep. 659; *City of Ottawa v. Gilliland*, 63 Kan. 165, 88

Am. St. Rep. 232, 65 Pac. 252; *Terre Haute & I. Ry. Co. v. Brunker*, 128 Ind. 542, 26 N. E. 178.

²⁵ *Western Glass Mfg. Co. v. Schoeninger*, *supra*.

²⁶ *Richardson v. Nelson*, 221 Ill. 254, 77 N. E. 583.

²⁷ *Larson v. Salt Lake City*, 34 Utah, 318, 23 L. R. A., N. S., 462, 97 Pac. 483.

²⁸ *Union Pacific Ry. Co. v. Botsford*, *supra*.

in the general trend toward the exercise of the power. As has been stated, we think the courts have the power and have no need to wait for the special legislative enactment referred to by Straup, J. The learned judge points to the consensus of opinion among text-writers that it would be "more enlightened" for the courts to exercise the control, and with equal fairness, he could have pointed to the increasing number of state jurisdictions adopting the "enlightened" course. If there is presented a case of proper necessity to attain the sure and exact justice to which the parties to a cause lay claim, then, armed with the inherent authority of high courts, and with the large number of sister state precedents, "*Viam inveniam aut faciam*" becomes part of the judicial duty, and the comparatively small voice of opposing decisions may be safely disregarded. Without trenching on the domain of practice and procedure, it may be said that the onus of the application calls for proof showing the necessity or propriety of the proposed examination and that the ends of justice would be thereby promoted—showing also what evidence is already in the possession of the applicant to prove the nature and permanency of the injuries, whether there has already been any examination of the party the results of which are or are not available to the applicant; whether the injuries are of such a nature that the examination will throw light upon the question of their severity or probable permanency, and that the party was unwilling to submit to such examination.²⁹ In some states where the practice is regulated by statute, it is not necessary to set out all these circumstances, and reference to the local statute is therefore required. For example, in New York it is only necessary for the applicant to present to the court "satisfactory evidence that he is ignorant of the nature and extent of the injuries complained

²⁹ St. Louis Bridge Co. v. Niller, 138 Ill. 465, 28 N. E. 1091; International I. & G. N. R. Co. v. Underwood, 64 Tex. 463; Lexington R. Co. v. Cropper, 142 Ky. 39, 133 S. W. 968; Terre Haute etc. R. Co. v. Brunker, 128 Ind. 542, 26 N. E. 178.

of.”³⁰ Although in most of the cases where an examination has been ordered it was during the trial, courts exercising the power would doubtless also make the order *before the trial*, if deemed necessary to enable the opposite party to prepare for trial. Of course, if the order is made, it should contain reasonable safeguards against offending the feelings of the party to be examined.³¹ And the party to be examined will be allowed to have friends or physicians of his own choosing present.³² In addition, the examination must be made with due regard to the life and health of the party. The use of painful tests, anesthetics, opiates or drugs of any kind would be improper.³³ In a Missouri case³⁴ the court properly refused to order the party to submit to an X-ray photograph process, because it was advised that sometimes the subjecting of a person to that process resulted in danger to him. Where a party has been once examined under an order of the court, a second examination was held rightly refused.³⁵

§ 398 (400). Inspection by the jury—Personal injury cases.—So far we have considered only the examination of the injured party before the trial of the cause, and although

³⁰ *Green v. Middlesex R. Co.*, 10 Misc. Rep. 473, 32 N. Y. Supp. 177. The order must also contain provision for the oral examination of the party: *Landau v. Citron*, 47 Misc. Rep. 354, 93 N. Y. Supp. 1111. See N. Y. Code Civ. Proc., § 873, for the special method in that state.

³¹ *White v. Milwaukee Ry. Co.*, 61 Wis. 536, 50 Am. Rep. 154, and note, 21 N. W. 524; *City of South Bend v. Turner*, 156 Ind. 418, 83 Am. St. Rep. 200, 54 L. R. A. 396, 60 N. E. 271; *Sibley v. Smith*, 46 Ark. 275, 55 Am. Rep. 584; *Schroeder v. Chicago etc. R. Co.*, 47 Iowa, 375; *McGovern v. Hope*, 63 N. J. L. 76, 42 Atl. 830. See, also, *Potter v. Village of Hammondsport*, 112 App.

Div. 91, 98 N. Y. Supp. 186, as to women being examined by female doctors. See, also, *Wunsch v. Weber*, 31 Abb. N. C. 365, 29 N. Y. Supp. 1100, as to the right of the examining physician to ask the party such questions as, in his opinion, are necessary to enable him to ascertain the nature and extent of the injuries.

³² *Louisville Ry. Co. v. Falvey*, 104 Ind. 409, 3 N. E. 389, 4 N. E. 908.

³³ *Schroeder v. Chicago etc. R. Co.*, *supra*.

³⁴ *Dean v. Wabash R. Co.*, 229 Mo. 425, 129 S. W. 953.

³⁵ *Dunkin v. City of Hoquiam*, 56 Wash. 47, 105 Pac. 149.

the evidence, considered in the last three sections, is generally classified as real or natural, it is not the best illustration of that kind of evidence. We have seen, indeed, that formerly the practice prevailed of calling a jury for the special purpose of making an inspection; but in the cases already mentioned the inspection has been made, not by the tribunal determining the cause, but by persons who reported the result of their inspection to the court. The more satisfactory and the more usual illustration of real evidence is where the very object, whose condition or qualities are being investigated, is presented for the *inspection of the court or jury*. Thus in actions for *personal injuries*, it is the constant practice for the plaintiff to voluntarily exhibit the injured part to the jury; and where *identity, resemblance* or the *appearance of things* is in question, it is a familiar practice to present such things for the inspection of the jury, if it is practicable. It has been urged that a plaintiff should not be allowed to exhibit his injuries to the jury, for the reason that all the evidence submitted should admit of being reproduced in the bill of exceptions, on which the appellate court may be called to pass; and that, if such a practice is allowed, the appellate court can form no accurate opinion as to the influences which may have operated upon the minds of the jury, and hence cannot properly determine whether a new trial should be allowed.³⁶ Thus it has been held that there is no impropriety in permitting the jury to look at the party's injured hand, but that it is improper for the jurors to manipulate the hand to determine its mobility.³⁷ The objection has also been urged that such exhibitions tend to unduly excite the feelings of the jury. But it is the *well-settled practice* in such cases to permit the jury to see the injuries complained of. It has been said that it brings before the jury part of the *res gestae*, and enables them to determine the nature and the character of the injury in a more satisfactory manner than when the

³⁶ *Ihinger v. State*, 53 Ind. 251;
Hagee v. Grossman, 31 Ind. 223.

³⁷ *Vance v. Monroe Drug Co.*, 149
Ill. App. 499.

facts are merely described by witnesses.³⁸ In a recent Washington case, the plaintiff, who had suffered internal injuries resulting in protrusion of the bowel from his side, was permitted to exhibit to the jury, twice, the injured parts, including an artificial anus, notwithstanding the objection that it was likely to enlist the sympathy of the jury, and was indecent.³⁹ The court said: "Upon the first contention we assume that, had the injury complained of been a broken leg or arm, the contention would not be tenable. The fact that the injury occurred to some other part of the body would not change the rule of evidence. We apprehend that no court would permit the introduction of indecent evidence unless it was so connected with the *res gestae* as to become necessary to the administration of justice. Indecency depends upon the purpose of the utterance or act." It has, however, been held that the court should not permit an indecent exposure of the person in the presence of the jury. In a Wisconsin case⁴⁰ the court expressed its

³⁸ *Mulhado v. Brooklyn City Ry. Co.*, 30 N. Y. 370; *Barker v. Town of Perry*, 67 Iowa, 146, 25 N. W. 100; *Brown v. Swineford*, 44 Wis. 282, 28 Am. Rep. 582; *Louisville Ry. Co. v. Wood*, 113 Ind. 544, 14 N. E. 572, 16 N. E. 197; *Arkansas River Packet Co. v. Hobbs*, 105 Tenn. 29, 58 S. W. 278; *Omaha S. R. Co. v. Emminger*, 57 Neb. 240, 77 N. W. 675; *Faivre v. Mandercheid*, 117 Iowa, 724, 90 N. W. 76; *Newport News & M. V. Ry. Co. v. Carroll* (Ky.), 31 S. W. 132; *Cunningham v. Union Pac. Ry. Co.*, 4 Utah, 206, 7 Pac. 206; *Disotell v. Henry Luther Co.*, 90 Wis. 635, 64 N. W. 425; *Nebonne v. Concord R. R. Co.*, 68 N. H. 296, 44 Atl. 521; *Lanark v. Dougherty*, 153 Ill. 163, 38 N. E. 892; *Barker v. Perry*, 67 Iowa, 146, 25 N. W. 100; *City of Crete v. Hendricks*, 2 Neb. (Unof.) 847, 90 N. W. 215; *Anderson v. Seropian*, 147 Cal. 201, 81 Pac. 521. See, also, *Sornberger v. Canadian Pac. R.*

Co., 24 A. R. (Can.) 263. See, also, the following late cases: *Barfoot v. White Star Line*, 170 Mich. 349, 136 N. W. 437; *Willis v. City of Brown-ing*, 161 Mo. App. 461, 143 S. W. 516; *Continental Casualty Co. v. Wynne* (Okl.), 129 Pac. 16; *Cleveland etc. R. Co. v. Colson* (Ind. App.), 99 N. E. 433. Where there are no wounds visible, held improper to exhibit plaintiff's body to jury to show that on certain manipulations he groaned with pain: *Landro v. Great Northern R. Co.* (Minn.), 135 N. W. 991.

³⁹ *Dunkin v. City of Hoquiam*, 56 Wash. 47, 105 Pac. 149.

⁴⁰ *Brown v. Swineford*, 44 Wis. 282, 28 Am. Rep. 582. In Canada it has been held that in an action for malpractice, the exhibition of the particular part of the body operated upon may not be made to the jury: *Laughlin v. Harvey*, 24 A. R. 438.

strong disapproval, that a party was permitted, without apparent objection of court or counsel, to uncover and exhibit to the jury his organs of generation. Ryan, C. J., said: "The court would be wanting in self-respect, to decide this appeal without some word of censure for an indecency committed on the trial. . . . No such indecency is ever necessary, or should be tolerated in court. If the condition of any private part of the body of any party, male or female, is material on any trial, it should be privately examined by experts out of court, and expert testimony be given of it. Such an exposure as was made in this case, if made without leave of the court, might well be punished as a contempt; made with the sanction of the court, it is none the less improper and indecent, well calculated to disgrace the administration of justice, and to bring it into ridicule, if not into contempt."⁴¹ The cases referred to show that if an inspection is necessary to the ends of justice a *private examination* can be had out of court. In the Washington case to which we have referred in the earlier part of this section, the exhibition was considered necessary, otherwise the objection would have been upheld; for it is of the very essence of the production of real evidence that the exhibition shall be necessary for the ends of justice. It is clear that in civil cases, a party may be compelled to uncover the face in such manner as to be identified by a witness; for example, to remove a veil at the request of the opposite party.⁴² The necessity of the case requires that witnesses and parties should appear in court in ordinary garb and with face uncovered so that they may be known and identified. But where real evidence is produced merely for the purpose of arousing feeling, it has been held error. Where the plaintiff, a little girl, sued for

⁴¹ See, also, *Guhl v. Whitcomb*, 109 Wis. 69, 83 Am. St. Rep. 889, 85 N. W. 142; *Aspy v. Botkins*, 160 Ind. 170, 66 N. E. 462; *Warlick v. White*, 76 N. C. 175, and *Garvik v. Burlington etc. R. Co.*, 124 Iowa, 691, 100 N. W. 498. The last-named case followed *Brown v. Swineford*, *supra*,

and the case discloses as well an entire absence of necessity for the examination. In *Knowles v. Crampton*, 55 Conn. 336, 11 Atl. 593, the court refused to permit an unnecessary and offensive exhibition.

⁴² *Rice v. Rice* (N. J.), 19 Atl. 736.

the loss of her leg, and the defendant admitted the fact of its amputation, and the child was present in court, the introduction of the amputated limb in a jar preserved in spirits was held to be unnecessary and sufficient to warrant a new trial.⁴³ The court said: "It may, however, be assumed that technically the rule of evidence authorized the exhibition of the foot. Such rule, however, is without force when the legitimate purpose for which the exhibit may be made is slight, and the strong tendency is to work improper and illegitimate results. It is perfectly clear in the present case that the direct tendency of the exhibition of this mangled foot, coupled with the other considerations already noted, was to arouse the prejudice and inflame the passions of the jury into an angry resentment against the author of the misfortune. This condition far over-balanced any legitimate purpose for which the exhibit might have been made, and made the exhibition of this foot, under the circumstances of this case, improper."

§ 399 (401). Inspection of articles by jury.—What has already been said with regard to corporal inspection applies with necessarily greater force to the exhibition of chattels to the jury. The questions of decency and indignity can rarely be raised with regard to articles, and hence it is the well-settled rule daily followed in the courts that, if the material facts in issue may be better explained by the production of articles to which the testimony relates, such articles may be shown to the jury.⁴⁴ On general principles it

⁴³ *Rost v. Brooklyn Heights R. Co.*, 10 App. Div. 477, 41 N. Y. Supp. 1069.

⁴⁴ *Phillips v. State*, 156 Ala. 140, 47 South. 245; *Mitchell v. State*, 94 Ala. 68, 10 South. 518; *Whaley v. Vannatta*, 77 Ark. 238, 7 Ann. Cas. 228, 91 S. W. 191; *Linforth v. San Francisco Gas etc. Co.*, 156 Cal. 58, 19 Ann. Cas. 1230, 103 Pac. 320; *People v. Westlake*, 134 Cal. 505, 66 Pac. 731; *Adams v. State*, 93 Ga. 166,

18 S. E. 553; *Goodrich v. Chicago etc. Ry. Co.*, 148 Ill. App. 579; *Morgantown Mfg. Co. v. Hicks*, 43 Ind. App. 32, 86 N. E. 856; *Moore v. Des Moines City Ry. Co. (Iowa)*, 123 N. W. 324; *State v. Nordmark*, 84 Kan. 628, 114 Pac. 1068; *State v. Keenan*, 7 Kan. App. 813, 55 Pac. 102; *Boucher v. Robeson Mills*, 182 Mass. 500, 65 N. E. 819; *Warren v. City Electric R. Co.*, 141 Mich. 298, 104 N. W. 613; *State v. Goddard*, 146

would seem that when the question is whether a certain object is black or white, the best evidence of the color would be the exhibition of the object to the jury. The eyes of the members of the jury must be presumed to be as good as those of medical men. Why should a jury be confined to hearing what other men think they have seen and not be allowed to see for themselves?⁴⁵ Thus in an action by a servant against his master for negligence resulting in personal injuries to the plaintiff, the court may allow the torn clothing worn by him at the time of the injury to be shown to the jury.⁴⁶ Building material alleged to be defective,⁴⁷ or defective tools or appliances in actions for negligence, may be so shown.⁴⁸ Where the issue related to the question whether a certain mirror was defective in workmanship and construction, such inspection was held proper.⁴⁹ In many cases articles, the description of which became material in the litigation or other similar articles, have been exhibited to the jury in order that they might obtain clearer views, and be able to form a better opinion.⁵⁰ Cinders have been

Mo. 177, 48 S. W. 82; *Stone v. Boston etc. R. Co.*, 72 N. H. 206, 55 Atl. 359; *People v. Flanigan*, 174 N. Y. 356, 66 N. E. 988, 17 N. Y. Cr. 300; *Choctaw Electric Co. v. Clark*, 28 Okl. 399, 114 Pac. 730; *Byers v. Baltimore etc. R. Co.*, 222 Pa. 547, 556, 72 Atl. 245; *Udderzook v. Commonwealth*, 76 Pa. 340; *Robson v. Miller*, 12 S. C. 586, 32 Am. Rep. 518; *St. Louis etc. R. Co. v. Ewing* (Tex. Civ. App.), 126 S. W. 625; *Jackson v. State*, 28 Tex. App. 370, 19 Am. St. Rep. 839, 13 S. W. 451; *State v. Ward*, 61 Vt. 153, 17 Atl. 483; *Roberts v. Port Blakely Mill Co.*, 30 Wash. 25, 70 Pac. 111; *Bloch v. American Ins. Co.*, 132 Wis. 150, 112 N. W. 45; *Paulson v. State*, 118 Wis. 89, 94 N. W. 771.

⁴⁵ *Warlick v. White*, 76 N. C. 175.

⁴⁶ *Tudor Iron Works v. Weber*, 129 Ill. 535, 21 N. E. 1078; *Quincy Gas & Electric Co. v. Bauman*, 203 Ill.

295, 67 N. E. 807. See, also, the late cases: *Bimel Co. v. Harter* (Ind. App.), 98 N. E. 360 (clothing worn at time of injury); *State v. Baltimore etc. R. Co.*, 117 Md. 280, 83 Atl. 166 (shoe worn by decedent at time of injury).

⁴⁷ *People v. Buddensieck*, 103 N. Y. 487, 57 Am. Rep. 766, 9 N. E. 44.

⁴⁸ *King v. New York C. & H. R. Ry. Co.*, 72 N. Y. 607; *Kinney v. Folkerts*, 84 Mich. 616, 48 N. W. 283. See, also, the late case: *Adams v. Crim* (Ala.), 58 South. 442.

⁴⁹ *Hudson v. Roos*, 76 Mich. 173, 42 N. W. 1099. In this case the plaintiff had brought the mirror into the courtroom and witnesses had testified in relation to it; and it was held error to refuse to allow the jury to inspect it.

⁵⁰ *Express Co. v. Spellman*, 90 Ill. 455; *Jupitz v. People*, 34 Ill. 516; *Commonwealth v. Brown*, 121 Mass.

received in evidence in an action for damages for fire caused by a locomotive engine, on testimony that they were similar to cinders which the witness had seen coming from an engine in the vicinity where the fire occurred.⁵¹ In an action for personal injuries caused at a crossing by a collision between a train and the plaintiff's vehicle, it was stated that a view of the line was obstructed by a growth of weeds from two to six feet high. The plaintiff's surveyor in making measurements for use at the trial picked up a great many which the defendant had mown down soon after the collision. He tied them together and fastened a card to them. Subsequently he identified them in court and they were held properly admitted in evidence.⁵² Of course, it should appear that the *condition* of the article has remained substantially *the same*.⁵³ It has even been held admissible in a few cases to allow *domestic animals*, when the subject of litigation, to be brought into the presence of the jury for exhibition. This was permitted in an action against the owner of a vicious dog; and in an action against the owner

69; *People v. Buddensieck*, 103 N. Y. 487, 498, 57 Am. Rep. 766, 9 N. E. 44; *State v. Mordecai*, 68 N. C. 207; *Stone v. Boston etc. R. Co.*, 72 N. H. 206, 55 Atl. 359; *Flynn v. Washburn Brewing Co.*, 110 Wis. 172, 85 N. W. 666; *Rose v. Harlee*, 69 S. C. 523, 48 S. E. 541; *Boucher v. Robeson Mills*, 182 Mass. 500, 65 N. E. 819; *Roszczyńska v. State*, 125 Wis. 414, 104 N. W. 113; *Evarts v. Middlebury*, 53 Vt. 626, 38 Am. Rep. 707 (where the shoes of a horse were shown, the issue being whether the horse was properly shod); *Morton v. Fairbanks*, 11 Pick. (Mass.) 368 (where shingles were exhibited); *Stevenson v. Michigan Log Towing Co.*, 103 Mich. 412, 61 N. W. 536 (piece of tow-line shown); *Thomas Fruit Co. v. Start*, 107 Cal. 206, 40 Pac. 336 (defective fruit boxes introduced); *Roberts v. Port Blakely Mill Co.*, 30 Wash. 25, 70 Pac. 111

(piece of broken flange introduced); *Pennsylvania Coal Co. v. Kelly*, 156 Ill. 9, 40 N. E. 938 (where a coal bucket and its working shown); *King v. New York etc. R. Co.*, 72 N. Y. 607 (iron hook the weakness of which was material to the action); *Boucher v. Robeson Mills*, 182 Mass. 500, 65 N. E. 819 (driving belt which had been altered since the accident, the subject matter of the action, but which was identified and the part substituted pointed out to the jury).

⁵¹ *Ide v. Boston & M. R. R.*, 83 Vt. 66, 74 Atl. 401.

⁵² *Connor v. Wabash R. Co.*, 149 Mo. App. 675, 129 S. W. 777. See, also, the late case of *Dudley v. Wabash R. Co.*, 167 Mo. App. 647, 150 S. W. 737.

⁵³ *Walker v. Ontario*, 118 Wis. 564, 95 N. W. 1086; *State v. Goddard*, 146 Mo. 177, 48 S. W. 82; *King v. New York etc. R.*, 72 N. Y. 607.

of an elephant for negligence in frightening the plaintiff's horse, the defendants in an English case were allowed to bring the young elephant into court in order that the jury might see whether it was in fact of unsightly and unusual appearance as was alleged.⁵⁴ The courts have, however, sometimes declined to make orders compelling the production of chattels in court for inspection.⁵⁵ It rests in the *discretion of the court* to deny applications for the production of real evidence in those cases where the order would cause great inconvenience, or where for other reasons it would be impracticable. Thus in a Mississippi case, the court refused to order the exhumation of a dead body, although the defendant, an insurance company, claimed that the deceased had made admissions that he had in childhood received a severe injury to the skull which could only be proven by an examination. It was intimated, however, that under some circumstances such an order might be proper.⁵⁶ It may happen that it would be impracticable to bring an animal into the room where the court is sitting, and in such cases the examination by the jury need not necessarily be had in the courtroom, so long as it is under the direction of the court and in the presence of the parties.⁵⁷ It has been so held also with reference to articles of great weight, such as large steel bars.⁵⁸ But the discretion of the court should be exercised to prevent the jury being used as experts. It

⁵⁴ See amusing account of this case in 20 Alb. L. J. 150. A comparatively recent case, *Bender v. Appelbaum*, 123 App. Div. 563, 108 N. Y. Supp. 318, contains a valuable compendium of the authorities on this subject. It relates to the inspection and making evidence of a horse, the identity of which was challenged.

⁵⁵ *Coke v. Lalance etc. Mfg. Co.*, 29 Hun (N. Y.), 641; *Hunter v. Allen*, 35 Barb. (N. Y.) 42.

⁵⁶ *Grangers' Life Ins. Co. v. Brown*, 57 Miss. 308, 34 Am. Rep. 446; *State v. Burnham*, 56 Vt. 445,

48 Am. Rep. 801 (boxing-gloves not allowed to be exhibited); *Hood v. Bloch*, 29 W. Va. 244, 11 S. E. 910 (party not allowed to exhibit cheese, the quality being in issue). For cases in which skull was introduced in evidence, see *People v. Besold*, 154 Cal. 363, 97 Pac. 871; *McNaier v. Manhattan R. Co.*, 51 Hun, 644, 4 N. Y. Supp. 310; on the right of the court to order disinterment of corpse for evidential purposes, see note to *Gray v. State*, 22 L. R. A., N. S., 513.

⁵⁷ *Dillard v. State*, 58 Miss. 368.

⁵⁸ *Flaig v. Andrews Steel Co.*, 141 Ky. 391, 132 S. W. 1015.

has been properly held that on the trial of an issue as to whether hay alleged to have been sold was good merchantable hay as provided by the contract of sale, it was error to admit as an exhibit a bundle of such hay for the inspection of the jury, as the jurors had not qualified on the question of whether they knew what good merchantable hay was in the market where the hay was sold; and especially was that true in that case, as the sample introduced was not proven to be a fair sample of the hay alleged to have been sold. The merchantable quality of said hay should have been determined or established by the evidence of experts or by men who knew what merchantable hay was in the markets where the hay was sold, and who had inspected it or an average sample of it.⁵⁹

§ 400 (402, 403). Inspection of person and articles in criminal cases.—The principle is firmly ingrafted upon our federal and state constitutions that no accused person shall be compelled to give evidence against himself in any criminal case. This constitutional provision clearly distinguishes criminal from civil cases in such a manner that the same rules of evidence do not necessarily govern in the two classes of cases. There is a line of authorities which hold that in a criminal action the accused may be compelled to furnish evidence by being compelled to submit in some degree to the inspection of his person for the purpose of ascertaining *identity* or for other purposes. Thus, a defendant was compelled to exhibit his bare arm to the jury to ascertain whether certain tattoo marks, concerning which testimony had been given, existed.⁶⁰ In other cases accused persons have been compelled by officers to submit to such experiments as having the foot placed in tracks to which the testimony related, or to other similar experiments; and the officers or other persons have, under such circumstances, been allowed to state the result.⁶¹ These cases proceed on

⁵⁹ Trego v. Arave, 20 Idaho, 38, 116 Pac. 119.

⁶⁰ State v. Ah Chuey, 14 Nev. 79, 33 Am. Rep. 530, and extended note.

⁶¹ State v. Graham, 74 N. C. 646, 21 Am. Rep. 493; Walker v. State, 7 Tex. App. 245, 32 Am. Rep. 595; State v. Sanders, 68 Mo. 202, 30 Am.

the view that the constitutional provision to the effect that no person shall be compelled in a criminal case to be a witness against himself is to be construed merely to mean that the defendant cannot be compelled, in the strict meaning of the term, to *testify* against himself. But a far more liberal and, in the opinion of the author, a better construction has been placed upon the constitutional provision in other cases, where this class of testimony has been rejected on the ground that the court could not compel a witness to furnish testimony against himself.⁶² But the right of the accused to refuse to submit to such an inspection is *waived* when he voluntarily furnishes such evidence, in the same manner that he waives his constitutional privilege when he voluntarily gives testimony that may criminate himself.⁶³ In criminal cases, it is the familiar practice to show to the jury *articles* which tend to illustrate or explain the material facts to be proved.⁶⁴ Objection is often made that this practice

Rep. 782, where it was held error for the jury, without leave of court, to make this experiment outside the courtroom. The other rule has been adopted by some courts: *Stokes v. State*, 5 Baxt. (Tenn.) 619, 30 Am. Rep. 72; *Day v. State*, 63 Ga. 667; *People v. Mead*, 50 Mich. 228, 15 N. W. 95.

⁶² *McGinnis v. State*, 24 Ind. 500; *State v. Jacobs*, 5 Jones (50 N. C.), 259; *Stokes v. State*, 5 Baxt. (Tenn.) 619, 30 Am. Rep. 72; *People v. Mead*, 50 Mich. 228, 15 N. W. 95; *Day v. State*, 63 Ga. 667. Compulsory examination of a female as to pregnancy: *People v. McCoy*, 45 How. Pr. (N. Y.) 216; *Agnew v. Johnson*, 13 Cox C. C. 625, 19 Eng. Reprint, 612, and note. See, also, *Spicer v. State*, 69 Ala. 159. Where a prisoner was ordered to show his limb: *Blackwell v. State*, 67 Ga. 76, 44 Am. Rep. 717.

⁶³ *State v. Woodruff*, 67 N. C. 89; *Gallagher v. State*, 28 Tex. App. 247,

12 S. W. 1087; *Johnson v. Commonwealth*, 115 Pa. 369, 9 Atl. 78, where the district attorney called upon the prisoner to stand up and repeat certain words before a witness and the prisoner did so without objection.

⁶⁴ In prosecutions for *forgery*, the production of a document on which the action is based is usual and important, if not indispensable: 2 Bish. Crim. Proc., § 433; for *abortion*, the surgical instruments, alleged to have been used: *Commonwealth v. Brown*, 121 Mass. 69; as well as portions of a woman's body on whom it was alleged that an abortion was performed, which had been preserved in spirits: *Commonwealth v. Brown*, 14 Gray (Mass.), 419; for *homicide*, courts have permitted production of the bones: *State v. Wieners*, 66 Mo. 13; *Turner v. State*, 89 Tenn. 547, 15 S. W. 338; *State v. Moxley*, 102 Mo. 374, 14 S. E. 969, 15 S. W. 556; the clothing worn by deceased: *Hart v. State*, 15 Tex. App. 202, 49 Am.

is likely to unduly excite the *sympathy* or indignation of the jury, but this objection is generally overruled.⁶⁵

§ 401 (404). Inspection as proof of resemblance—Race—Age, etc.—We have already partially dealt with the relevancy of personal resemblances.⁶⁶ The reports afford numerous illustrations of real evidence in cases where the attempt has been made to prove resemblance between two persons by directing the attention of the jury to such per-

Rep. 188; *Dorsey v. State*, 107 Ala. 157, 18 South. 199; *People v. Westlake*, 134 Cal. 505, 66 Pac. 731; *Story v. State*, 99 Ind. 413; *Gardiner v. People*, 6 Park. Cr. (N. Y.) 155; *People v. Knapp*, 71 Cal. 1, 11 Pac. 793; *Watkins v. State*, 89 Ala. 82, 8 South. 134; *People v. Wright*, 89 Mich. 70, 50 N. W. 792; *Davidson v. State*, 135 Ind. 254, 34 N. E. 972; *State v. Cushing*, 14 Wash. 527, 53 Am. St. Rep. 883, 45 Pac. 145. See, also, *State v. Baker*, 33 W. Va. 319, 10 S. E. 639; *People v. Fernandez*, 35 N. Y. 49 (as to the examination of such clothing, see *Commonwealth v. Twitchell*, 1 Brewst. (Pa.) 561); the bedclothes in the room where the deceased was murdered: *Painter v. People*, 147 Ill. 444, 35 N. E. 64; the weapons or bullets used by the prisoner: *Moon v. State*, 68 Ga. 687; *Siberry v. Smith*, 133 Ind. 677, 33 N. E. 681; *Wynne v. State*, 56 Ga. 113; *Crawford v. State*, 112 Ala. 1, 21 South. 214; *People v. Sullivan*, 129 Cal. 557, 62 Pac. 101; *State v. Mordecai*, 68 N. C. 207; *Commonwealth v. Brown*, 121 Mass. 69; *Hornsby v. State*, 94 Ala. 55, 10 South. 522; *People v. Fernandez*, 35 N. Y. 49; *Leonard v. Railway Co.*, 21 Or. 555, 15 L. R. A. 221, 28 Pac. 887; the horse upon which the deceased was riding when he received his death wounds: *Dillard v. State*, 58 Miss. 368; the teeth

of the deceased: *Commonwealth v. Webster*, 5 Cush. (Mass.) 295, 52 Am. Dec. 711; the skull of deceased: *Thrawley v. State*, 153 Ind. 375, 55 N. E. 95; *Savary v. State*, 62 Neb. 166, 87 N. W. 34; for *burglary*, the tools of the prisoner: *People v. Larned*, 7 N. Y. 445; *Starchman v. State*, 62 Ark. 538, 36 S. W. 940; *People v. Hope*, 62 Cal. 291; *State v. Ellwood*, 17 R. I. 763, 24 Atl. 782; *State v. Minot*, 79 Minn. 118, 81 N. W. 753; for *larceny* and kindred actions, the articles stolen, and in some cases articles similar to those stolen: *Jupitz v. People*, 34 Ill. 516; and such articles may be shown, even though obtained in an irregular or illegal manner: *Commonwealth v. Tibbetts*, 157 Mass. 519, 32 N. E. 910; *Gindrat v. People*, 138 Ill. 103, 27 N. E. 1085; for *robbery*, the articles taken: *People v. Winthrop*, 118 Cal. 85, 50 Pac. 390; for *perjury* as to pantaloons, the pantaloons exhibited: *Adams v. State*, 93 Ga. 166, 18 S. E. 553; for *assault*, the rock thrown: *Dill v. State*, 106 Ga. 683, 32 S. E. 660; for *rape*, underclothing: *State v. Peterson*, 110 Iowa, 647, 82 N. W. 329; *State v. Murphy*, 118 Mo. 7, 25 S. W. 95.

⁶⁵ This section is reproduced from the original work for uniformity only, the commentaries being limited to evidence in civil cases.

⁶⁶ See § 96a, *ante*.

sons while they are in court. Thus on the issue of the *paternity of a child*, juries have been frequently allowed to inspect the child in question, and to compare its features with those of the alleged father. In such cases the courts have held that the resemblance is relevant to the issue and that it may be determined by inspection.⁶⁷ In respect to this class of evidence, Judge Mansfield used the following language: "I have always considered likeness as an argument of a child's being the son of a parent; and the rather as the distinction between individuals in the human species is more discernible than in other animals. A man may survey ten thousand people before he sees two faces perfectly alike; and in an army of a hundred thousand men, every one may be known from the other. If there should be a likeness of feature, there may be a discriminancy of voice, a difference in the gestures, the smile and various other things. Whereas the family likeness runs generally through all these, for in everything there is a resemblance, as in features, size, attitude and action."⁶⁸ But in this case the question of parentage arose as to a person of full age. Even in such cases the language of Judge Mansfield has been disapproved; and where the question arose concerning very young children, the practice of allowing an inspection, for the purpose of determining resemblance, has been condemned by very high authority on the ground that the evidence is of too fanciful and unsatisfactory a char-

⁶⁷ *State v. Smith*, 54 Iowa, 104, 37 Am. Rep. 192, 6 N. W. 153 (child two years old); *Gilmanton v. Ham*, 38 N. H. 108; *Crow v. Jordan*, 49 Ohio St. 655, 32 N. E. 750; *State v. Woodruff*, 67 N. C. 89; *Scott v. Donovan*, 153 Mass. 378, 26 N. E. 871; *Kelly v. State*, 133 Ala. 195, 91 Am. St. Rep. 25, 32 South. 56 (child about a year old); *Scott v. Donovan*, 153 Mass. 378, 26 N. E. 871; *State v. Saidell*, 70 N. H. 174, 85 Am. St. Rep. 627, 46 Atl. 1083; *Gaunt v. State*, 50 N. J. L. 490, 14

Atl. 600 (a leading case with an extended discussion of real evidence); *Finnegan v. Dugan*, 14 Allen (Mass.), 197. See note to *Scott v. Harvey*, 52 L. R. A. 500-505. Right to exhibit to jury child whose paternity is in issue: See notes to *State v. Danforth*, 6 Ann. Cas. 560; *Rex v. Hughes*, 19 Ann. Cas. 536.

⁶⁸ *Douglas Case*, quoted from *Wills Cir. Ev.*, 5th Am. ed., 117; *Hanawalt v. State*, 64 Wis. 84, 54 Am. Rep. 588, 24 N. W. 489.

acter to be received.⁶⁹ So it has been held inadmissible to prove by the testimony of witnesses that the child looks like the alleged father.⁷⁰ But Lord Chief Justice Cockburn held in the Tichborne case that the resemblance of the claimant to a family daguerreotype of Roger Tichborne was relevant, and intimated that comparison of features between the claimant and the sister of Arthur Orton would be permitted.⁷¹ Where the question is one in which *race or color* is concerned, the child may be exhibited for the purpose of showing that it is or is not of the race of the alleged father.⁷² And outside of the family relation, such matters may properly be referred to the sense of the jury upon sight of the person the subject of inquiry.⁷³ If the *age* of a person is in issue, it should be proved by sworn testimony,⁷⁴ and not by exhibition or inspection. That sworn testimony may be either of the person himself⁷⁵ or, of course, that of one able

⁶⁹ Clark v. Bradstreet, 80 Me. 454, 6 Am. St. Rep. 221, 15 Atl. 56 (child six weeks old); State v. Danforth, 48 Iowa, 43, 30 Am. Rep. 387 (babe of three months); Hanawalt v. State, 64 Wis. 84, 54 Am. Rep. 588, 24 N. W. 489 (child less than one year of age); Risk v. State, 19 Ind. 152; State v. Harvey, 112 Iowa, 416, 84 Am. St. Rep. 350, 52 L. R. A. 500, and note, 84 N. W. 535 (a child nine months old); Ingram v. State, 24 Neb. 33, 37 N. W. 943; Keniston v. Rowe, 16 Me. 38; Beck's Med. Juris. 650.

⁷⁰ Eddy v. Gray, 4 Allen (Mass.), 435; Jones v. Jones, 45 Md. 144; Keniston v. Rowe, 16 Me. 38; Cook v. State, 96 Ark. 552, 132 S. W. 455. See note to State ex rel. Scott v. Harvey, 52 L. R. A. 500-505.

⁷¹ Gaunt v. State, 50 N. J. L. 490, 14 Atl. 600. See note to Scott v. Harvey, 52 L. R. A. 500-505.

⁷² Warlick v. White, 76 N. C. 175; Clark v. Bradstreet, 80 Me. 454, 6 Am. St. Rep. 221, 15 Atl. 56; Gar-

vin v. State, 52 Miss. 207; State v. Arnold, 35 N. C. 184. See, also, State v. Jacobs, 5 Jones (50 N. C.), 359.

⁷³ Jones v. Jones, 45 Md. 144; Garvin v. State, 52 Miss. 207; Alms-house Commrs. v. Whistelo, 3 Wheel. Cr. (N. Y.) 194; Warlick v. White, 76 N. C. 175; William's Case, Fed. Cas. No. 17,709, Crabbe, 243. As to judging of mental capacity, see Benson v. Raymond, 142 Mich. 357, 105 N. W. 870, 108 N. W. 660.

⁷⁴ Stephenson v. Arnold, 28 Ind. 272; Ihinger v. State, 53 Ind. 251.

⁷⁵ Rogers v. De Bardeleben Coal etc. Co., 97 Atl. 154, 12 South. 81; People v. Ratz, 115 Cal. 132, 46 Pac. 915; State v. McClain, 49 Kan. 730, 31 Pac. 790; Commonwealth v. Phillips, 162 Mass. 504, 39 N. E. 109; Houlton v. Manteuffel, 51 Minn. 185, 53 N. W. 541; State v. Bowser, 21 Mont. 133, 53 Pac. 179; Stevenson v. Kaiser, 29 N. Y. Supp. 1122; Vaughn v. State, 62 Tex. Cr.

to testify directly, or failing that by relevant circumstantial proof.⁷⁶ In fixing the date of a person's birth, a witness has the right to refer to an event contemporaneous, or nearly so, with the date in question, and the date of such event may then be proven.⁷⁷ But the jury may, when age is an issue, take into consideration the *appearance* of the person as seen in court.⁷⁸ There is, however, authority for the proposition that the jury may, without any other evidence than mere inspection, determine whether a person to whom liquor has been sold is a minor,⁷⁹ or whether a person is of sufficient age to be capable of performing the work given him to do.⁸⁰ It is hardly necessary to add that in case of conflicting testimony a court or jury might consider the appearance of the person whose age is in question in connection with other evidence.

§ 402 (405). Effect of nonproduction of real evidence.— Although the failure or refusal to allow a jury to inspect the subject under investigation, when such inspection would be entirely practicable and would afford the most satisfac-

App. 24, 136 S. W. 476; *State v. Cain*, 9 W. Va. 559. See § 300, *ante*.

⁷⁶ *People v. Ratz*, *supra*; *Supreme Council G. S. F. v. Conklin*, 60 N. J. L. 565, 41 L. R. A. 449, 38 Atl. 659; *Wiseman v. Cornish*, 53 N. C. 218; *Pearce v. Kyzer*, 16 Lea (Tenn.), 521, 57 Am. Rep. 240.

⁷⁷ *Levels v. St. Louis etc. R. Co.*, 196 Mo. 606, 94 S. W. 275.

⁷⁸ *Capacity to consent to rape*: *Jones v. State*, 106 Ga. 365, 34 S. E. 174; *infancy*: *Commonwealth v. Hollis*, 170 Mass. 433, 49 N. E. 632; *State v. Thompson*, 155 Mo. 300, 55 S. W. 1013; *Hermann v. State*, 73 Wis. 248, 9 Am. St. Rep. 789, 41 N. W. 171. See, also, *Williams v. State*, 98 Ala. 52, 13 South. 333; *People v. Elco*, 131 Mich. 519, 91 N. W. 755, 94 N. W. 1069; *State v. Arnold*, 35 N. C. 184; and the late case of

First Nat. Bank v. Casey (Iowa), 138 N. W. 897.

⁷⁹ *Commonwealth v. Emmons*, 98 Mass. 6. In New York a statute provides for an inspection to determine the age of a child: N. Y. Pen. Code, § 19. It is improper to put other boys on the stand and prove their age for the purpose of comparison: *Poynor v. Holzgraf*, 35 Tex. Civ. App. 233, 79 S. W. 829. In *Bird v. State*, 104 Ind. 384, 3 N. E. 827, the contrary opinion was expressed, but the court added that if the question under consideration could be properly considered as an open one, some of the members of the court, as then constituted, would be inclined to take a different view of such question from those expressed in previous Indiana decisions.

⁸⁰ *Keith v. New Haven & N. Co.*, 140 Mass. 175, 3 N. E. 28.

tory evidence, may be a proper subject for comment before the jury,⁸¹ a party is not obliged to *produce* such evidence, because at present there is no form of process to compel him to bring it before the court. There is no corresponding form to the *subpoena duces tecum* which compels him to produce documents. In other words, it is said that it is *not* in the technical sense the *best evidence* within the meaning of the rule on that subject. Thus in an action on a policy of life insurance, where the issue is upon the death of the insured, testimony of witnesses that they have seen the insured alive since the time of his alleged death is competent; and the insurer is not bound to bring him bodily before the court.⁸² The distinction in such case is highly technical, and can only be taken as meaning that if the production of the person was to be regarded as the best evidence, he should be produced. The converse of the proposition proves this. Suppose in the illustration given the person were produced, could it be objected that he was not the best evidence and that someone should testify thereto instead of him? It is evidently meant that, his presence not being procurable, the testimony of those who saw and identified him is competent. With chattels it is, as above pointed out, impossible to bring them into court under any process of subpoena. In his work on evidence, Taylor, after discussing the importance of producing real evidence when it is convenient and practicable to do so, illustrates the sub-

⁸¹ In *Clark v. Tulare Lake Dredging Co.*, 14 Cal. App. 414, 112 Pac. 564, it was held that evidence was admissible to show the refusal of the persons in charge of the dredger on which the deceased was killed to allow an inspection thereof by an expert witness for the plaintiff. It was properly proved as a circumstance tending to disclose an effort on the part of the defendant to suppress or conceal pertinent facts from being presented to the court and jury.

⁸² *Schneider v. Aetna Life Ins. Co.*, 32 La. Ann. 1049, 36 Am. Rep. 276; but it is intimated that if the person whose identity was in issue had been himself a party as claimant of some right based on such identity, as in the *Tichborne* case, the opposite party might have demanded a view of his person and the opportunity of personal examination in the presence of the court. In addition it was proved that the person whose identity was in issue was beyond the jurisdiction of the court.

ject as follows: "These observations apply to all cases in which the guilt or innocence of a prisoner depends upon the *identity or comparison* of two articles found in different places, as, for example, the wadding of a pistol with portions of a torn letter found on the person of the accused, or the fractured bone of a sheep with mutton found in his house, or fragments of dress with his rent garment, or damaged property with the instrument by which the damage is supposed to have been effected. In all these and the like cases, it is highly expedient, if possible, to produce to the court the articles sought to be compared; and although the law in demanding the best evidences does not expressly require that this course should be adopted, but permits a witness to testify as to his having made the comparison without first proving that the articles cannot be produced at the trial, their nonproduction, when unexplained, may often *generate a suspicion* of unfairness, and will always furnish an occasion for serious comment. In illustration of this subject reference may be made to an old case. A boy having found a diamond took it to a jeweler, who refused to return it to him. An action of trover was brought, and as the jeweler declined to produce the diamond at the trial, the judge directed the jury to presume that it was of the finest water and they found accordingly. So in the case of *Wood v. Peel*, where the point at issue was whether the plaintiff's horse, 'Running Rein,' who had won the Derby in 1844, was foaled by Mab in 1841, the production of the horse, in order to test the accuracy and credit of the witnesses who had sworn to its identity, was considered so material that the plaintiff, being unable to comply with the order of the court to produce it, submitted very prudently to a nonsuit, rather than run the almost inevitable risk of a verdict in favor of the defendant."⁸³ The party, however, seeking the production of chattels, is not barred from the benefit which a view by the jury would create, for where he can make out a proper case to the court for such examination, the court

⁸³ *Tayl. Ev.*, 10th ed., § 555.

in its discretion may order a view, so that with the exception of the delay and the expense necessarily incidental to the view his end can be attained by that means. The fact of a party refusing to produce a chattel raises so strong a presumption against him that there have been comparatively few decisions recorded. Now that in most states the procedure for view of chattels is regulated by statutes, there exists practically no apprehension of a failure of justice in that regard. The process, however, might be still further simplified by allowing to be included in *subpoena duces tecum* readily transportable chattels.⁸⁴ In addition, there exists the power of the court to make an order that

⁸⁴ There are decisions as to what must be produced under the subpoena. In *Sheppard's Case*, 3 Fed. 12, 18 Blatchf. 225, it was held that stove castings were not the subject of the writ, and in *Johnson Steel etc. Co. v. North Branch Steel Co.*, 48 Fed. 191, that a piece of metal in the nature of a form or model could not be included. But there can be no doubt if a writing were upon metal, the party to whom the writ was addressed would be bound to produce it if practicable. See § 205b, *ante*, as to giving secondary evidence of mural writings, etc., and see § 404 et seq., *post*, as to view. The question of the power of the court to order the production of chattels has not been raised, but in *United States v. Mullaney*, 32 Fed. 370, *Brewer, J.*, touched upon the power of the court to compel a witness on cross-examination to do other than answer questions—namely, to compel him to write words for comparison with other writings. He said: "This was a physical act which he was called upon to do in the presence of the jury. It is a matter of common experience in a courtroom that wit-

nesses are often called upon either for some exposure of their person or to do some physical act supporting or contradicting their direct testimony. A chemist who has stated that a certain test discloses the presence of poison may be called upon to repeat that test in the presence of the jury, that they may see whether the testimony is true, and the test accurate. A person who testifies as to his physical condition may be compelled, there being no improper exposure of person, to uncover his body, that the jury may see whether there be such a physical condition as he has testified to. The witness may say, for instance, that he never was wounded in the arm, and on cross-examination it would be competent to compel him to lift up his sleeve, that the jury may see whether or no there was a scar or mark of wound on his arm." The powers of the courts should be sufficiently large to order production of a chattel by a party on proper conditions and to enforce obedience to their orders by dismissing an action for failure, if a plaintiff, or striking out the defense, if a defendant.

a witness be allowed to inspect or examine a chattel. In a California case, already cited,⁸⁵ it was contended that the court had no power to order that a witness be allowed to inspect or examine certain machinery. The remarks of the court are so in accord with the spirit of the law as to call for reproduction. "There is," said Hart, J., "so far as we know, no express provision of law authorizing the course adopted by the court. But every court has certain inherent power—power which, exercised within reasonable and proper limits, authorizes it to go beyond its express powers where the interest of justice imperatively demands such a course. Moreover, by section 128, subdivision 5, of the Code of Civil Procedure, every court is in general language clothed with full control and power over every person connected with a judicial proceeding before it, in so far as said proceeding is concerned, and we fail to see in the action of a court compelling the production of any relevant and competent testimony which will make clear or tend to make clear the truth as to a disputed question of fact anything in contravention of either the letter or spirit of subdivision 5 of that section of our code. . . . Our conclusion is, that the court in no manner or degree transcended its power or authority in ordering defendant to allow plaintiff's expert to examine the machinery and give testimony relative thereto."

§ 403 (406). Experiments and tests in the presence of the jury.—Closely allied to the subject of the preceding sections, that of experiments in open court to aid the jury in a clear understanding of the issues calls for consideration. Upon the merits of the procedure there can be only one opinion. No matter how graphically the object may be described, the minds of the jury cannot be equally impressed by a verbal description, whereas the view of what is demonstrated will convey them immediately to the sharper consideration of the circumstances surrounding the subject

⁸⁵ Clark v. Tulare Lake Dredging Co., *supra*.

matter of the action. It has been well said that when a question arises as to the working of a mechanical device, for instance, as to whether it was possible for a certain link to stay on a certain knob, the safer plan is to produce the device itself in court and demonstrate its operation.⁸⁶ And where the principal fact of negligence against a defendant was his failure to read a document when he had the ability to read, though he said he read badly, proof of his ability was important; and an actual test in the courtroom before the jury was both satisfactory and proper.⁸⁷ But when the article to be experimented upon is an original document, such as a will, in order to test the age of the ink, the discretion of the court is properly exercised in refusing permission to make the test.⁸⁸ It is proper in the discretion of the court to allow parties reasonable latitude in making experiments or tests in the presence of the jury to illustrate the testimony in the case.⁸⁹ It would be practically impossible to formulate a rule for the allowance or disallowance of such experiments, as the matter is almost wholly within

⁸⁶ *Spurlock v. Shreveport Traction Co.*, 118 La. 1, 42 South. 575. See note on "Admissibility in Evidence of Experiments Made in Presence of Jury," to *Spires v. State*, 7 Ann. Cas. 216. See note on "Admissibility in Evidence of Experiments Made in Presence of Jury," to *Langdon Creasy Co. v. Rause*, Ann. Cas. 1912B, 296.

⁸⁷ *Ort v. Fowler*, 31 Kan. 478, 47 Am. Rep. 501, 2 Pac. 580.

⁸⁸ *In re Gartland*, 60 Misc. Rep. 31, 112 N. Y. Supp. 718.

⁸⁹ *Birmingham etc. Power Co. v. Rutledge*, 142 Ala. 195, 39 South. 338; *People v. Hope*, 62 Cal. 291; *Hindry v. McPhree*, 11 Colo. App. 398, 53 Pac. 389; *Innis v. State*, 42 Ga. 473; *Chicago Telephone Supply Co. v. Marne etc. Tel. Co.*, 134 Iowa, 252, 111 N. W. 935; *National Cash Register Co. v. Blumenthal*, 85 Mich. 464, 48 N. W. 622; *Brown v. Doug-*

las Lumber Co., 113 Minn. 67, 129 N. W. 161; *Clark v. Brooklyn Heights R. Co.*, 78 App. Div. 478, 79 N. Y. Supp. 811, 12 N. Y. Ann. Cas. 333; *Leonard v. Southern Pac. Co.*, 21 Or. 555, 15 L. R. A. 221, 28 Pac. 887; *St. Louis etc. Ry. Co. v. Ewing* (Tex. Civ. App.), 126 S. W. 625; *Burr v. Duryee*, 1 Wall. (U. S.) 531, 17 L. Ed. 650. In a recent Alabama case, *United States etc. Foundry Co. v. Granger*, 172 Ala. 546, 55 South. 244, it was stated that a single experiment, even when offered to be made in the presence of the court and jury, with inanimate objects has been pronounced, in both civil and criminal cases, not acceptable as evidence: *Tesney v. State*, 77 Ala. 33; *Alabama etc. R. Co. v. Collier*, 112 Ala. 681, 14 South. 327. See, also, *Miller v. State*, 107 Ala. 40, 19 South. 37.

the discretion of the trial judge; but the following illustrations of the permission and denial of an order for such experiments will suffice to show in what cases they are likely to be allowed. Thus after testimony is given as to the identity and similarity of conditions,⁹⁰ a *machine* may be *operated* in the presence of the jury, as bearing upon the issue whether it is suitable to the use intended;⁹¹ and on the question whether a suit of clothes is a good fit, the court may allow a party to wear the *clothing* in the presence of the jury.⁹² An expert may illustrate his testimony concerning *handwriting* by the use of a blackboard;⁹³ and when his handwriting was relevant, the English courts have allowed a party to write in the presence of the jury, but this has been questioned in this country.⁹⁴ In a recent case a

⁹⁰ Bruggeman v. Illinois Cent. R. Co., 147 Iowa, 187, Ann. Cas. 1912B, 876, 123 N. W. 1007; Matter of West Farms Road, 47 Misc. Rep. 216, 95 N. Y. Supp. 894.

⁹¹ National Cash Register Co. v. Blumenthal, 85 Mich. 464, 48 N. W. 622. As to experiments out of court, see § 410, *post*. In St. Louis etc. Ry. Co. v. Ewing (Tex. Civ. App.), 126 S. W. 625, an action to recover the value of certain typewriting machines which had not been delivered according to contract, the defendant having sold them for salvage after an unprecedented flood, evidence having been given that one of the machines was in the same order and condition as when it was delivered to the defendant, and the machine was displayed and used before the jury, the appeal court said that if the machine had not undergone repairs after the flood, but was in the same condition at the time of the trial it was after the flood, they saw no reason why it could not be manipulated before the jury and its parts explained.

⁹² Brown v. Foster, 113 Mass. 136,

18 Am. Rep. 463. See, also, the late case: Berbarry v. Tombacher (N. C.), 77 S. E. 412 (clothing to show texture).

⁹³ McKay v. Lasher, 121 N. Y. 477, 24 N. E. 711; State v. Henderson, 29 W. Va. 147, 1 S. E. 225. In State v. Cottrell, 56 Wash. 543, 106 Pac. 179, a prosecution for forgery, a witness for the state was permitted to use a blackboard and chalk to illustrate his testimony in comparing the handwriting on the forged check with the admitted handwriting of the accused. The statement of the court that the course pursued was one that could not be commended cannot be challenged, but the reason is unsound, namely, that "the illustrations were not, and from their very nature could not be, preserved in the record." Seeing that very few, if any, of such experiments can be so preserved, the reason given would mean the practical abolition of a highly useful form of assistance to the jury.

⁹⁴ Osbourne v. Hosier, 6 Mod. 167, 87 Eng. Reprint, 924; Williams' Case, 1 Lew. C. C. 137; Reg. v. Taylor, 6

railroad company was allowed in the trial court to make *experiments under practically similar* conditions and circumstances, to show that a rail could not have injured the plaintiff in the manner claimed.⁹⁵ So a physician has been allowed by the use of a pin to demonstrate to the jury the plaintiff's loss of feeling in an action for personal injury, when it was claimed that paralysis had taken place.⁹⁶ The same rule has been applied as to other experiments by experts in the presence of the jury.⁹⁷ On the same principle operas have been performed in court and comic songs sung, plagiarized papers have been read and the so called materialization of spirits exhibited.⁹⁸ It has been held not improper in a personal injury case for the plaintiff to uncover the portion of his body injured; while a physician demonstrated where the nerves were located and the course of

Cox C. C. 58. See, also, *Hayes v. Adams*, 2 *Thomp. & C. (N. Y.)* 593, where a party was by consent of the parties allowed to write his name. But the rule is different in America: *Commonwealth v. Allen*, 128 *Mass.* 46, 35 *Am. Rep.* 356. See § 550, *post*.

⁹⁵ *Leonard v. Southern Pac. Co.*, 21 *Or.* 555, 15 *L. R. A.* 221, and note, 28 *Pac.* 887. See, also, *Stockwell v. Chicago C. & D. R. Co.*, 43 *Iowa*, 470; *Smith v. St. Paul Ry. Co.*, 32 *Minn.* 1, 50 *Am. Rep.* 550, 18 *N. W.* 827, where the court refused to allow the jury to leave the courtroom to witness an experiment. See § 410, *post*. See, also, the late cases: *Birmingham etc. Power Co. v. Saxon*, (*Ala.*), 59 *South.* 584, where motorman allowed to show action of his hands in stopping his car: *Mann's Admr. v. Reynolds*, 150 *Ky.* 313, 150 *S. W.* 329 (test for substitution of bichloride of mercury for calomel by druggist).

⁹⁶ *Osborne v. City of Detroit*, 32 *Fed.* 36.

⁹⁷ *State v. Smith*, 49 *Conn.* 376; *Leonard v. Southern Pac. Ry. Co.*, 21 *Or.* 555, 15 *L. R. A.* 221, 28 *Pac.* 887; *People v. Hope*, 62 *Cal.* 291; *McMahon v. Dubuque*, 107 *Iowa*, 62, 70 *Am. St. Rep.* 143, 77 *N. W.* 517; *Brown v. Foster*, 113 *Mass.* 136, 18 *Am. Rep.* 463; *Taylor v. United States*, 89 *Fed.* 954, 32 *C. C. A.* 449; *Armstrong Packing Co. v. Clem* (*Tex. Civ. App.*), 151 *S. W.* 576.

⁹⁸ *Gaunt v. State*, 50 *N. J. L.* 490, 14 *Atl.* 600; *Innis v. State*, 42 *Ga.* 473; *State v. Linkhaw*, 69 *N. C.* 214, 12 *Am. Rep.* 645, where a witness was allowed to sing in court, the charge being the disturbance of a religious meeting by singing in a peculiar way. See, also, *Commonwealth v. Scott*, 123 *Mass.* 222, 25 *Am. Rep.* 81, as to the identification of a prisoner by his voice. But in *United States v. Ried*, 42 *Fed.* 134, the court refused to allow exhibitions of spiritualistic powers. See an interesting series of articles by *Irving Browne*, 5 *Green Bag*, 131, 185, 222.

their location.⁹⁹ Where a plaintiff had suffered the loss of both legs by reason of a personal injury on a railroad, and testified on the trial of a suit because of it that he could walk a little on his knees, and that he also used a rolling-chair, there was no error in permitting him to walk before the jury and exhibit to them the loss of his limbs and the effect thereof on his ability to walk.¹⁰⁰ Obviously, if the experiment is *too complicated* to afford any fair inference, or if it cannot be performed in such a manner as to fairly illustrate the fact to be found, it should be *excluded*.¹ In civil cases the courts may require the party to do some *physical act* in the presence of the jury for the purpose of disclosing identity, or showing the physical health or condition of such person, or his ability to read or write,² or the appearance of his handwriting when such matters are relevant to the issue.³ But the propriety of such an order must usually rest largely in the *discretion* of the trial court; and it would only be in case of a plain abuse of such discretion that the appellate court would interfere.⁴

§ 404 (407). **View**—The former practice.—A very common illustration of real evidence is afforded by the practice

⁹⁹ *Houston v. Chicago etc. R. Co.*, 118 Mo. App. 464, 94 S. W. 560.

¹⁰⁰ *Southern Ry. Co. v. Brock*, 132 Ga. 858, 64 S. E. 1083. While proper for witness to show injured limb, held reversible error to have demonstration how she walked with and without crutches: *Willis v. City of Browning*, 161 Mo. App. 461, 143 S. W. 516. See, also, *Daniels v. Stock*, 23 Colo. App. 529, 130 Pac. 1031 (exhibition of how injury occasioned).

¹ *Jumpetz v. People*, 21 Ill. 375; *Hardwick Saving Bank & Trust Co. v. Drenan*, 72 Vt. 438, 48 Atl. 645.

² *Ort v. Fowler*, 31 Kan. 478, 47 Am. Rep. 501, 2 Pac. 580, where the defendant was required to read in court. See § 402, note 84.

³ *Huff v. Nims*, 11 Neb. 363, 9 N. W. 548; *State v. Henderson*, 29 W. Va. 147, 1 S. E. 225. See § 550, *post*.

⁴ *Hatfield v. St. Paul Ry. Co.*, 33 Minn. 130, 53 Am. Rep. 14, 22 N. W. 176, where it was held no error for the court to refuse to compel the plaintiff to walk across the floor; *Commonwealth v. Allen*, 128 Mass. 46, 35 Am. Rep. 356, as to handwriting; *United States v. Ried*, 42 Fed. 134. In *Smith v. St. Paul Ry. Co.*, 32 Minn. 1, 50 Am. Rep. 550, 18 N. W. 827, it was held not error to refuse to permit the jury to leave the courtroom to witness experiments with cars.

of allowing the jury to go and examine or take a view of the premises or property concerning which the controversy exists. To a limited extent this seems to have been the practice at common law before statutes were adopted on the subject.⁵ Before discussing the present practice, however, a brief reference to the old law on the subject will tend to a better appreciation of the modern development. By the ancient practice there could be no view until the cause had been brought on for trial; and the view was confined at first to real actions, but was afterward extended by statute to several personal actions for injuries to the realty, as trespass *quare clausum fregit*, trespass on the case and nuisance.⁶ By statutes it was afterward provided that, by special order of the court, a portion of the jurors to be agreed upon by the parties or, in case of disagreement, to be appointed by the proper officers of court, should at a convenient time before the trial take a view of the premises in question.⁷ Under these statutes the number of viewers was generally six; and the statutes provided that such persons were to be the first persons sworn as jurors in the case, and that only a sufficient number of jurors should be drawn to make the requisite number of twelve.⁸ Although the practice for a time prevailed of allowing a view as a matter of course upon the demand of either party, the statutes were finally construed to mean that the view should not be allowed unless, in the judgment of the court, the circumstances made it necessary and proper.⁹

§ 405 (408). Statutes regulating view.—The foregoing reference to the origin of the practice of viewing property shows that, to a certain extent, it sprang from the common law. At the present date, however, it is regarded as purely

⁵ 4 Bac. Abr., tit. "Juries"; Springer v. City of Chicago, 135 Ill. 552, 12 L. R. A. 609, 26 N. E. 514. See full note to People v. Thorn, 42 L. R. A. 368-395.

⁶ Burrow's Note, 1 Burr. 253;

Springer v. City of Chicago, 135 Ill. 552, 12 L. R. A. 609, 26 N. E. 514.

⁷ Stat. 4 Anne, c. 16, § 8; Stat. 3 George II, c. 25, § 14; Stat. 6 George IV, c. 50, § 23.

⁸ See statutes last cited.

⁹ Burrow's Note, 1 Burr. 253.

statutory, and the view is granted and conducted under the statute laws in force, and generally not otherwise.¹⁰ By recent statutes in England the judge is now allowed to make an order for the *detention, preservation or inspection of any property or thing* which is the subject of the action in order that the judge or jury may take a view of the same; and for this purpose persons may enter upon the premises of a party to make such inspection.¹¹ It has been held in Illinois and other states that a view cannot be ordered by the court against objection, unless provided for by statute.¹² Yet in a later Illinois case it was held that, as a view was allowed by the common law independent of any statute, a view could be so granted in that state as it had adopted the common law. It was also held that the fact that an express statute had been enacted requiring a view in condemnation proceedings did not raise the inference that the court could not permit a view in other cases.¹³ *In this country* the subject is generally *regulated by statute*. These statutes substantially agree in providing that the view may be allowed when, in the opinion of the court, it is proper, or, in the language used in some instances, when it is *necessary*. Usually the statutes are so framed as not to confine the view to any particular class of actions or to any particular form of property. The view may be "of the property which is the subject of litigation or of the place in which any material fact occurred."¹⁴ In other instances, according to the statute,

¹⁰ Abbott, Trial Brief, p. 72. Although in *Springer v. Chicago*, 135 Ill. 552, 12 L. R. A. 609, 26 N. E. 514, it was held that a statute making it obligatory on a court to permit a jury in eminent domain proceedings to view the premises on application of either party does not preclude the common-law right of a court in other cases to permit a view in its discretion.

¹¹ 46 & 47 Vict., c. 57, cited in *Tayl. Ev.*, 10th ed., § 560.

¹² *Doud v. Guthrie*, 13 Ill. App. 653. See, also, *Commonwealth v.*

Webster, 5 Cush. (Mass.) 295, 52 Am. Dec. 711; *Smith v. State*, 42 Tex. 444; *State v. Bertin*, 24 La. Ann. 46; *Bostock v. State*, 61 Ga. 635.

¹³ *Springer v. City of Chicago*, 135 Ill. 552, 12 L. R. A. 609, and note 611, 26 N. E. 514, 37 Ill. App. 711; *Vane v. City of Evanston*, 150 Ill. 616, 37 N. E. 901.

¹⁴ The California Code of Civil Procedure, section 610, may be regarded as typical of the statutory provision in most of the states, and reads: "When, in the opinion of the court, it is proper for the jury to have

it may be "of the premises or place in question, or any property, matter or thing relating to the controversy between the parties." The knowledge thus gained by the view has formed the subject of considerable discussion whether it was to be used only as an aid to the jury or as evidence. We deal with this subject later,¹⁵ but it is well to state here that it has been recently held that the knowledge gained by the court from a view of the premises is independent evidence to be taken into consideration by the court in determining the issues of the case,¹⁶ though the proposition is challenged in other jurisdictions.¹⁷ Some of the statutes provide that the view shall be at the *expense* of the party asking it; in such cases, however, the expenses may be taxed like other legal costs if the party who advanced them prevail in the action. Some of the statutes expressly include *criminal* as well as *civil actions*, and in a few instances the details of the procedure are prescribed.¹⁸

§ 406 (409). View discretionary.—As under the common law,¹⁹ so under statutes of this character there is general concurrence in the view that the granting or refusing the view rests in the sound discretion of the trial judge.²⁰ Ac-

a view of the property which is the subject of litigation, or of the place in which any material fact occurred, it may order them to be conducted, in a body, under the charge of an officer, to the place, which shall be shown to them by some person appointed by the court for that purpose. While the jury are thus absent, no person, other than the person so appointed, shall speak to them on any subject connected with the trial."

¹⁵ § 408, *post*.

¹⁶ *Hatton v. Greig*, 4 Cal. App. 537, 88 Pac. 592; *People v. Milner*, 122 Cal. 171, 54 Pac. 833 (overruling *Wright v. Carpenter*, 49 Cal. 607).

¹⁷ *Equitable Powder Mfg. Co. v. Cleveland etc. R. Co.*, 155 Ill. App. 265.

¹⁸ The practitioner should refer to the statutes and decisions of his own state for further details.

¹⁹ *Fitzgerald v. La Porte*, 67 Ark. 263, 54 S. W. 342; *Bibb County v. Reese*, 115 Ga. 346, 41 S. E. 636; *Chiles v. Alton etc. Traction Co.*, 158 Ill. App. 508; *Cleveland etc. R. Co. v. Penketh*, 28 Ind. App. 210, 60 N. E. 1095; *Williams v. City of Grand Rapids*, 53 Mich. 271, 18 N. W. 811; *Piper v. Murray*, 43 Mont. 230, 115 Pac. 669; *Lydston v. Rockingham County Light etc. Co.*, 75 N. H. 23, 21 Ann. Cas. 1236, 70 Atl. 385; *Mintzer v. Greenough*, 192 Pa. 137, 43 Atl. 465; *Koepke v. Milwaukee*, 112 Wis. 475, 88 N. W. 238.

²⁰ *People v. White*, 116 Cal. 17, 47 Pac. 771; *Saint v. Guerrerio*, 17 Colo. 448, 31 Am. St. Rep. 320, 30

cordingly, the appellate court in numerous instances has refused to review the order of the trial judge denying a view.²¹ There is clearly no abuse of discretion in denying a view when it appears that the condition of the premises or property has changed before the demand for a view;²² or that the facts involved are such that they can be accurately described to the jury by oral testimony,²³ or by the use of maps or diagrams with proper explanations,²⁴ or if the view be unreasonably expensive, or cause unreasonable delay, or would serve no useful purpose.²⁵ Nor is the rule changed by the fact that there may be a conflict in the testimony.²⁶ On the principle already stated the decision of the trial judge granting a view will not be reviewed, unless there

Pac. 335; *Johnson v. Winship Mach. Co.*, 108 Ga. 554, 33 S. E. 1013; *Hagge v. Grossman*, 31 Ind. 223; *Pike v. Chicago*, 155 Ill. 656, 40 N. E. 567; *Springer v. Chicago*, 135 Ill. 552, 12 L. R. A. 609, 26 N. E. 514, 37 Ill. App. 206; *King v. Iowa Midland R. Co.*, 34 Iowa 458; *Coughlen v. Chicago etc. R. Co.*, 36 Kan. 422, 13 Pac. 813; *Kansas Cent. Ry. Co. v. Allen*, 22 Kan. 285, 31 Am. Rep. 190; *Memphis & C. R. Co. v. Buckner*, 108 Ky. 701, 57 S. W. 482; *Commonwealth v. Webster*, 5 Cush. (Mass.) 295, 52 Am. Dec. 711; *Commonwealth v. Knapp*, 9 Pick. (Mass.) 496, 20 Am. Dec. 491; *Mulliken v. Corunna*, 110 Mich. 212, 68 N. W. 141; *Brown v. Kohout*, 61 Minn. 113, 63 N. W. 248; *Malony v. King*, 30 Mont. 158, 76 Pac. 4; *Beck v. Staats*, 80 Neb. 482, 16 L. R. A., N. S., 768, 114 N. W. 633. See, also, *Warner v. State*, 56 N. J. L. 686, 44 Am. St. Rep. 415, 29 Atl. 505; *Jenkins v. Wilmington Ry. Co.*, 110 N. C. 438, 15 S. E. 193; *Mintzner v. Greenough*, 192 Pa. 137, 43 Atl. 465; *State v. Hunter*, 18 Wash. 670, 52 Pac. 247; *Klepsch v. Donald*, 4 Wash. 436, 31 Am. St. Rep. 936, 30 Pac. 991; *Davis v. American Tel. & Tel. Co.*, 53 W.

Va. 616, 45 S. E. 926; *Gunn v. Ohio River R. Co.*, 36 W. Va. 165, 32 Am. St. Rep. 842, 14 S. E. 465; *Koepke v. Milwaukee*, 112 Wis. 475, 88 N. W. 238; *Andrews v. Youmans*, 82 Wis. 81, 52 N. W. 23; *Boardman v. Westchester F. Ins. Co.*, 54 Wis. 364, 11 N. W. 417; *Owens v. Missouri Pac. Ry. Co.*, 38 Fed. 571.

²¹ *Board of Commrs. of Jackson County v. Nichols*, 139 Ind. 611, 38 N. E. 526, and cases last cited.

²² *Stewart v. Cincinnati Ry. Co.*, 89 Mich. 315, 17 L. R. A. 539, 50 N. W. 852; *Leidlein v. Meyer*, 95 Mich. 586, 55 N. W. 367.

²³ *Ohio Ry. Co. v. Wrape*, 4 Indt App. 100, 30 N. E. 428 (action for setting fires by locomotive); *Richmond v. Atkinson*, 58 Mich. 413, 25 N. W. 328 (action for labor on building).

²⁴ *Clayton v. Chicago Ry. Co.*, 67 Iowa, 238, 25 N. W. 150 (condemnation proceeding).

²⁵ *Springer v. City of Chicago*, 135 Ill. 522, 12 L. R. A. 609, 26 N. E. 514, where the whole subject is fully discussed.

²⁶ *Baltimore etc. R. Co. v. Polly*, 14 Gratt. (Va.) 447.

appears to have been a clear abuse of discretion.²⁷ Thus, such an order will not be held error, for the mere reason that the view is allowed at a time considerably subsequent to the time when the damages are claimed to have been sustained,²⁸ or that the view was not allowed at a particular stage of the trial.²⁹ Where drawings of machinery were presented to the jury, and upon inquiry by the court, they all said they understood the situation, it was no abuse of discretion to refuse a view, more especially when a considerable distance would have had to be traveled to obtain it.³⁰ And where both sides had presented diagrams of machinery and testimony had been freely given concerning it, the judge was entitled to refuse an application for a view *even where all parties concurred in the application*.³¹ When a number of years had elapsed between the damage complained of and the time of the trial, and the conditions were not the same as at the time of the injury, and where plats in evidence correctly showed but a slight difference in the levels of the land, the court was under these circumstances justified in refusing a view.³²

§ 407 (410). When view may be granted.—As we have shown in the preceding section, the granting of an order for a view lies practically within the sole discretion of the trial

²⁷ *Gunn v. Ohio R. Ry. Co.*, 36 W. Va. 165, 32 Am. St. Rep. 842, 14 S. E. 465; *Davis v. American Tel. & Tel. Co.*, 53 W. Va. 616, 45 S. E. 926. See cases already cited.

²⁸ *Springer v. City of Chicago*, 135 Ill. 522, 12 L. R. A. 609, 26 N. E. 514.

²⁹ *Kentucky Cent. Ry. Co. v. Smith*, 93 Ky. 449, 18 L. R. A. 63, 20 S. W. 392. In Kentucky a view was allowed upon request of the jury after they had retired to find the verdict: *Louisville N. A. & C. R. Co. v. Schick*, 94 Ky. 191, 21 S. W. 1036.

³⁰ *Stephens v. Elliott*, 36 Mont. 92, 92 Pac. 45.

³¹ *McCarley v. Glenn-Lowry Mfg. Co.*, 75 S. C. 390, 56 S. E. 1. See, also, *United States Cast Iron etc. Foundry Co. v. Granger*, 172 Ala. 546, 55 South. 244; *Whelan v. City of Plattsmouth*, 87 Neb. 824, 128 N. W. 520 (an action for damages for lowering the surface of a street); *Central of Georgia R. Co. v. Dukes*, 134 Ga. 588, 68 S. E. 321 (scene of railway accident in action for death by negligence of railroad company's servants).

³² *Reams v. Clopine*, 87 Neb. 673, 127 N. W. 1070.

judge, and the cases are rare where any interference with them is countenanced by appellate tribunals. From the statement already given of the general purport of the statutes of this country, it is evident that considerable latitude is allowed in the practice of granting a view. Although the view is much oftener ordered in actions in which information is desired in respect to land, or the scene of an accident than in other cases, there is no restriction limiting it to such cases. The view may include buildings, machinery, animals or other *personal property*.³³ For obvious reasons the view if taken should be authorized by the court and under its direction. The statutory mode of conducting the view has been already referred to.³⁴ If jurors were allowed to make their investigations in their own manner there would be no mode of redress for the mistakes which would often follow. The courts have often ruled that *unauthorized views* by the jury or part of the jury were improper.³⁵ But minor deviations from the statutory provisions have been held harmless error, such as the omission of the appointment of the official who should show the jury that which was to be viewed, when they found and viewed it for themselves;³⁶ or the fact of the plaintiff furnishing lanterns for the jury at the sheriff's request, he not interfering by word or deed with the jury and the sheriff being present throughout.³⁷ And the rule as to unauthor-

³³ Buildings: *People v. White*, 116 Cal. 17, 47 Pac. 771; machinery: *Johnson v. Winship M. Co.*, 108 Ga. 554, 33 S. E. 1013; sidewalks: *Mulliken v. Corunna*, 110 Mich. 212, 68 N. W. 141; *Koepke v. Milwaukee*, 112 Wis. 475, 88 N. W. 238. And see, also, preceding section in this chapter. See, also, Canadian case: *Star Mining etc. Co. v. Byron N. White Co.*, 12 B. C. R. 162, 13 B. C. R. 234.

³⁴ § 405, n. 14, *ante*. See, also, *Webber v. Emmerson*, 3 Colo. 248; *Moore v. Chicago etc. R. Co.*, 93 Iowa, 484, 61 N. W. 992.

³⁵ *Harrington v. Worcester etc. Ry. Co.*, 157 Mass. 579, 32 N. E. 955; *Pierce v. Brennan*, 83 Minn. 422, 86 N. W. 417; *Peppercorn v. City Black River Falls*, 89 Wis. 38, 46 Am. St. Rep. 818, 61 N. W. 79; *Aldrich v. Wetmore*, 52 Minn. 164, 53 N. W. 1072.

³⁶ *Emporia v. Juengling*, 78 Kan. 595, 19 L. R. A., N. S., 223, 96 Pac. 850.

³⁷ *Maysville etc. R. Co. v. Dover Christian Church*, 18 Ky. Law Rep. 1111, 39 S. W. 35.

ized view has been applied with equal force to the judge. In a Colorado case³⁸—a trial by the court—the trial judge, without the knowledge or consent of either of the parties, visited the scene of action, and, in disposing of the case, stated that from his examination it appeared the statements of one of the principal witnesses could not be true, and for that reason concluded, as he stated, that little credit could be given to anything else the witness had said. In condemning the action of the judge and reversing the judgment in consequence of it, the court said: “We know of no rule of law or practice which authorizes a trial judge, after a cause has been submitted to him for determination, to search, of his own motion and without the consent of the parties, for extrinsic testimony and circumstances, and apply what he may learn in this way to corroborate the testimony upon one side or to cast discredit on the testimony of the adverse party. In view of the decided conflict in the testimony, it is apparent that what the trial judge assumed to have learned as the result of visiting the premises where the alleged collision took place was applied to the prejudice of the defendant in determining the weight of the testimony of the respective parties and the facts which should have been determined from the testimony submitted to him alone.” But it has been held that the trial judge, by the consent of parties, may visit the *locus in quo*.³⁹ It is the constant practice to allow a view in *condemnation proceedings* which involve the issue of the value or the condition of land.⁴⁰ The practice is also common in actions for *negligence* where in the judgment of the court a view of the place or property to which the testimony relates may throw light upon the subject. In an action on a policy of fire *insurance* it was held admissible to allow the jury to take a view of the ruins of premises destroyed by fire.⁴¹

³⁸ Denver Omnibus & Cab Co. v. Ward Auction Co., 47 Colo. 446, 19 Ann. Cas. 577, 107 Pac. 1073.

³⁹ Preston v. Culbertson, 58 Cal. 198.

⁴⁰ Washburn v. Milwaukee etc. R.

Co., 59 Wis. 364, 368, 18 N. W. 328; Toledo etc. Ry. Co. v. Dunlap, 47 Mich. 456, 11 N. W. 271; Springfield v. Dalby, 139 Ill. 34, 29 N. E. 860.

⁴¹ Boardman v. Westchester F. Ins. Co., 54 Wis. 364, 11 N. W. 447;

The view may extend to *personal property* as well as *realty*; thus, in a controversy relating to horses the trial court allowed the jury to go into the courthouse yard and inspect the horse in question;⁴² and in another case the jury were allowed to leave a courtroom and inspect an engine similar to the one which had caused the injury.⁴³ We have seen that the courts frequently allow experiments to be made in the courtroom in the presence of the jury.⁴⁴ But the statutes under consideration do not extend to *experiments made out of the courtroom* in the presence of the jury; thus, it was held no error for the court to refuse an application for the jury to proceed to the car-house of the defendant to witness experiments with its cars as bearing upon the question of the nature of an alleged collision.⁴⁵ And in general it is held to be error to allow the admission of statements or the performance of experiments during the view, unless such experiments or evidence are performed or given with the consent of both parties.⁴⁶

§ 408 (411). Is the view evidence in the case?—If the question heading this section were, “Has the view been judicially pronounced to be evidence in the case?” it would need to be answered that there is a direct conflict in the opinions; but dealing with it as it stands, we feel it cannot be answered other than in a pronounced affirmative. Under such circumstances the relative weight of the decisions must be taken into consideration. The rule is declared in numerous decisions that the information acquired by a jury in making a view or inspection is not evidence in the case. According

Northwestern Mut. L. Ins. Co. v. Sun. Ins. Office, 85 Minn. 65, 88 N. W. 272.

⁴² Nutter v. Ricketts, 6 Iowa, 92.

⁴³ Owens v. Missouri Pac. Ry. Co., 38 Fed. 571.

⁴⁴ See § 403, *ante*.

⁴⁵ Smith v. St. Paul City Ry. Co., 32 Minn. 1, 50 Am. Rep. 550, 18 N. W. 827. In Stockwell v. Chicago etc.

R. Co., 43 Iowa, 470 (experiments were allowed with an engine by consent of parties, and it was held that the experiment was without prejudice to the plaintiff).

⁴⁶ Hayward v. Knapp, 22 Minn. 5; Garcia v. State, 34 Fla. 311, 16 South. 223; State v. Lopez, 15 Nev. 407; Jones v. State, 51 Ohio St. 331, 38 N. E. 79.

to the rule in these cases, the view is allowed merely to enable the jury to better understand and apply the evidence given in the case.⁴⁷ In support of this claim it is urged that if the facts which come to the knowledge of the jury are to be treated as evidence, the trial judge or appellate court would have no adequate means of determining what evidence has been presented to the jury. It is further urged that if the jurors are allowed to include their personal examination and to thus become silent witnesses in the case, burdened with testimony unknown to the parties or the court, it would be impossible for the court to act understandingly in determining whether the verdict should stand or be set aside.⁴⁸ In an Iowa case we find it laid down that when a view is permitted, the jury should not only be instructed as to the purpose, but cautioned not to consider their own observations as evidence. It is upon the evidence as understood in the light of their view that they must decide.⁴⁹ Perhaps the strongest argument adduced in support of this view is to be found in a well-known Californian case (since overruled).⁵⁰ The court in emphatically pronouncing

⁴⁷ *Wright v. Carpenter*, 49 Cal. 607 (since overruled: See *Hatton v. Gregg*, 4 Cal. App. 537, 88 Pac. 592); *Dady v. Condit*, 188 Ill. 234, 58 N. E. 900; *Vane v. Evanston*, 150 Ill. 616, 37 N. E. 901; *Rich v. Chicago*, 187 Ill. 396, 58 N. E. 306; *Pittsburgh etc. Ry. Co. v. Swinney*, 59 Ind. 100; *Heady v. Vevay etc. Turnpike Co.*, 52 Ind. 117; *Close v. Samm*, 27 Iowa, 503; *Northwestern M. L. F. Co. v. Sun Ins. Co.*, 85 Minn. 65, 88 N. W. 272; *Brakken v. Minneapolis Ry. Co.*, 29 Minn. 41, 11 N. W. 124; *Machader v. Williams*, 54 Ohio St. 344, 43 N. E. 324 (see, however, the reference to this case in *Schwein-furth v. Cleveland etc. R. Co.*, 60 Ohio, 215, 54 N. E. 89); *Laffin v. Chicago etc. R. Co.*, 33 Fed. 415; *Flower v. Baltimore etc. R. Co.*, 132 Pa. 524, 19 Atl. 274; *Seattle & M. R. Co. v.*

Roeder, 30 Wash. 244, 94 Am. St. Rep. 864, 70 Pac. 498; *Fox v. Baltimore & O. R. Co.*, 34 W. Va. 466, 12 S. E. 757; *Sasse v. State*, 68 Wis. 530, 32 N. W. 849. See note on impressions made in minds of jurors by view as evidence in case: *Zanesville etc. R. Co. v. Bolen*, 10 Ann. Cas. 663.

⁴⁸ See cases last cited.

⁴⁹ *Morrison v. Burlington etc. R. Co.*, 84 Iowa, 663, 51 N. W. 75. See, also, *Keller v. Harrison*, 151 Iowa, 320, Ann. Cas. 1913A, 300, 128 N. W. 851; 131 N. W. 53; *Cox v. Chicago etc. Ry. Co.*, 95 Iowa, 54, 63 N. W. 450.

⁵⁰ *Wright v. Carpenter*, 49 Cal. 607 (since overruled. See *Hatton v. Gregg*, 4 Cal. App. 537, 88 Pac. 592); *People v. Milner*, 122 Cal. 171, 54 Pac. 833.

against the view of the jury being regarded as evidence said: "In authorizing the court to send the jury to view the premises in litigation, it was not the purpose of the statute to convert the jurors into silent witnesses, acting on their own inspection of the land but only to enable them the more clearly to understand and apply the evidence. If the rule were otherwise, the jury might base its verdict wholly on its own inspection of the premises, regardless of an overwhelming weight of evidence to the contrary, and the losing party would be without a remedy by motion for a new trial. It would be impossible to determine how much weight was due to the inspection by the jury as contrasted with the opposing evidence, or (treating the inspection as in the nature of evidence) whether it was sufficient to raise a substantial conflict in the evidence. The case would be determined not upon evidence given in court, to be discussed by counsel and considered by the court in deciding a motion for a new trial, but upon the opinions of the jurors founded on a personal inspection, the value or the accuracy of which there would be no method of ascertaining. The statement could not have intended to produce such results as these, in authorizing the jury to view the premises." In Illinois the view is regarded in the same way. In a recent case,⁵¹ where the evidence was such that the view was important in furnishing the court information it was impossible to get from the oral testimony and the plats, maps and photographs in evidence, Mr. Justice Shirley said: "While such view was not evidence, it was of peculiar value to see the topography and physical features of the territory and the premises of all the parties, and it would enable the court to much better understand and apply the evidence to the issues involved, and this he doubtless did in making up his findings." How it can be contended that information impossible to get from the oral testimony and maps and plans, and which was obtained on the view and used by the court, is not evidence, we are at

⁵¹ Equitable Powder Mfg. Co. v. Cleveland etc. R. Co., 155 Ill. App. 265.

a loss to understand. Although this opinion has been entertained by very high authority, and is sustained by a great number of decisions, yet it must be conceded that for hundreds of years the courts have allowed jurors to inspect real and personal property, and to base their conclusions, both upon the evidence given in court and the information obtained by their own senses.⁵² Moreover, it may be well questioned whether a direction to a jury that the view is simply for the purpose of enabling them to understand and apply the testimony is of any practical value, since it is hardly probable that a jury, upon any such theoretical distinction, will ignore the facts of which they have gained personal knowledge, or merely apply those facts to the testimony recited in court. At the risk of laboring the proposition, it will be interesting to see the later Californian view which reflects the better law. "The doctrine that information obtained from a view of the premises is not independent evidence that can be taken into consideration in determining the issues of the case having been set aside, it follows, as night follows day, that such information is independent evidence that can be taken into consideration in determining the issue of the case. If, in a case where the question at issue was as to whether or not a certain parcel of land was swamp and overflowed land, and all the witnesses examined on behalf of the plaintiff should so testify, and the court, without the examination of any witness on behalf of defendant, should visit and view the premises, and should there see that the land was rolling hill land, supporting a growth of oaks and other vegetation only grown on upland, it is difficult to reconcile with common sense a rule that would not permit the court to find the facts to be in accordance with what it saw with its own eyes. Both upon reason and authority, we are constrained to hold that the knowledge gained by the court from a view of the premises is independent evidence to be taken into considera-

⁵² See § 393 et seq., *ante*.

tion by the court in determining the issues of the case.”⁵³ From a reliable text-writer,⁵⁴ the following emphatic passage well expresses the logic of the conclusion: “There is no sense in the conclusion that the knowledge which the jurors acquire by the view is not evidence in the case. The conception that what a body of jurors see themselves, relevant to the issue to be decided by them, is not evidence, but something to be considered by them in weighing oral evidence, is nonsense. What they see is evidence in a primary sense, and what is detailed to them concerning the same subject matter by witnesses, is evidence in merely a secondary sense.” The sole question for consideration is how far may a jury who have made a view of premises affected by the action disregard the evidence given in court, and act upon their own observation on such view in making up their verdict? We have shown that the object of a view is to acquaint the jury with the physical situation, condition and surroundings of the thing viewed. What they see they know absolutely. If a witness testify to anything which they know by the evidence of their senses on the view is false, they are not bound to believe, indeed cannot believe, the witness, and they may disregard his testimony, although no other witness has testified on the stand to the fact as the jury know it to be. For example, if a witness testify that a certain farm is hilly and rugged, when the view has disclosed to the jury and to every juror alike that it is level and smooth, or if a witness testify that a given building was burned before the view, and the view discloses that it had not been burned, no contrary testimony of witnesses on the stand is required to authorize the jury to find the fact as it is, in disregard of testimony given in court.⁵⁵ In this

⁵³ *Hatton v. Gregg*, 4 Cal. App. 537, 88 Pac. 592. In *People v. Milner*, 122 Cal. 171, 54 Pac. 833, the court, after reviewing the earlier cases, said it must be concluded that the doctrine of *Wright v. Carpenter*, 49 Cal. 607, had been set aside by the later utterances of the court.

⁵⁴ 1 Thompson, *Trials*, § 893.

⁵⁵ *Washburn v. Milwaukee etc. R. Co.*, 59 Wis. 364, 18 N. W. 328. This useful case goes on to say: “But if the fact of which the jury may thus take cognizance is only one of many elements which must be considered to determine some other fact which

connection the remarks of Shaw, C. J., in a case where the jury were to assess damages for the taking of land, are instructive: "Another exception taken by the complainant was, that the learned judge instructed the jury, that as the evidence of value was matter of opinion, the jury, having taken a view, might exercise their own judgment, though if they knew of any fact, they must disclose it and testify to it in open court. It appears to me, that the direction of the court in this respect was singularly well guarded, and expressed with great accuracy and strictly conformably to law."⁵⁶

§ 409 (412). *Same, continued.*—Although it is true that the facts or information acquired by the jury from a view or inspection cannot be preserved in a bill of exceptions, this is not regarded by the weight of authority as sufficient reason for denying to such facts or inspection efficacy as evidence.⁵⁷ From the necessity of the case jurors will often

can only be satisfactorily determined by a resort to professional or expert testimony, the case is very different."

⁵⁶ The learned chief justice added: "The cases cited tend to show that where a juror knows of a fact material to the issue, he must disclose and testify to it in court; but in the case before us, the jurors were referred to their own experience and knowledge of like subjects, especially that acquired by the view, to test the accuracy of the witnesses in matter of opinion. Were this a common-law action, therefore, I feel strongly inclined to the opinion that this instruction was strictly and legally correct; but what we think puts it beyond any exception here is, that this was not an action, but an estimate of damages, in laying out a highway": *Parks v. Boston*, 15 Pick. (Mass.) 198.

⁵⁷ *Tully v. Fitchburg R. Co.*, 134

Mass. 499 (citing other Massachusetts cases); *Remy v. Municipality No. 2*, 12 La. Ann. 500; *Toledo etc. Ry. Co. v. Dunlap*, 47 Mich. 456, 11 N. W. 271; *Jeffersonville etc. R. Co. v. Bowen*, 40 Ind. 545; *Munkwitz v. Chicago Ry. Co.*, 64 Wis. 403, 25 N. W. 438; *East & W. I. R. Co. v. Miller*, 201 Ill. 413, 66 N. E. 275; *Shepherd v. Camden*, 82 Me. 535, 20 Atl. 91; *Chicago, R. I. & P. R. Co. v. Farwell*, 59 Neb. 544, 81 N. W. 443, 60 Neb. 322, 83 N. W. 71; *State v. Henry*, 51 W. Va. 283, 41 S. E. 439. The same rule holds where the judge viewed the premises: *Preston v. Culbertson*, 58 Cal. 198; *Fitzgerald v. La Porte*, 67 Ark. 263, 54 S. W. 394; *Chicago etc. R. Co. v. Parsons*, 51 Kan. 408, 32 Pac. 1083; *Wellington Waterworks Co. v. Brown*, 6 Kan. App. 725, 50 Pac. 966; *Norcross Bros. Co. v. Vose*, 199 Mass. 81, 85 N. E. 468; *Groundwater v. Washington*, 92 Wis. 56, 65 N. W. 871. The

receive impressions or draw conclusions from the inspection of objects during the trial or from other circumstances coming within their observation. It would be a vain attempt, even if it were desirable, to require the jury to repudiate the evidence of their own senses, or to seek to limit the jury to conclusions derived from those forms of evidence which can be included within bills of exceptions.⁵⁸ The following statement by the learned author referred to in the preceeding section is supported by reason and authority: "The true solution of this difficulty is that cases where there has been a view stand, on appeal or error, on a *special footing*; that, although what the jurors have learned through the view is evidence to be considered by them,—yet, on grounds of public policy, having reference to the known imperfections which attend the conclusions of jurors and even judges in the haste of *nisi prius* work, a reviewing court should set aside a verdict based partly on a view, unless it is supported by substantial testimony, delivered by sworn witnesses."⁵⁹ But although a jury may properly act upon an inspection or view as evidence in the case, they are not justified in acting *solely upon such* evidence and in *disregarding the other evidence*; and if their verdict is not supported by the other evidence, it cannot stand. Thus, in assessing the compensation to be made to the owner of land taken by a railroad corporation, whatever the jury learned of the land in question by viewing it was available to enable them to determine the weight of conflicting testimony respecting value and damage, but no further. Such value and damages could only be assessed upon the evidence given by the witnesses and an assessment outside of the

fact that the jurors on a view in an action of ejectment took measurements and had with them photographs has been held harmless error, which should have been guarded against by appropriate admonition: *Keller v. Harrison*, 151 Iowa, 320, Ann. Cas. 1913A, 300, 128 N. W. 851, 131 N. W. 53.

⁵⁸ *Disotell v. Henry Luther Co.*, 90 Wis. 635, 64 N. W. 425; *Hermann v. State*, 73 Wis. 248, 9 Am. St. Rep. 789, 41 N. W. 171. See § 398 et seq., *ante*.

⁵⁹ *Thomp. Trials*, § 902; *Hartman v. Reading Ry. Co. (Pa.)*, 13 Atl. 774, and other cases above cited.

evidence could not be upheld. For instance, if no witness had estimated the compensation to which a plaintiff was entitled at less than five hundred dollars or more than one thousand dollars, a verdict for less than five hundred dollars or more than one thousand dollars should be set aside because unsupported by the evidence.⁶⁰ It has been well put in a Kansas case,⁶¹ that the evidence which the jury may acquire from making the view is not to be elevated to the character of exclusive or predominating evidence. Such a proceeding would be as erroneous as instructing the jury that they were not to regard real evidence introduced—not to take into consideration the physical fact of the condition of a thing introduced into evidence, but to arrive at their verdict from the testimonial evidence and not from their observations.⁶² In a comparatively recent Washington condemnation case,⁶³ the court, speaking of the jury, said: “We hold that it was their duty to consider all the evidence, including the oral testimony, as well as that afforded them by the view. . . . Taking into consideration all the evidence, including the view of the premises which afforded the jury an opportunity for understanding the exact situation and estimating any probable damages which might result from the improvement, we cannot say that their verdict of no damages to the property not taken should be set aside for the want of sufficient evidence to support it.” The rule has been declared that in an *equity case*, where a jury is called to determine a question of fact, a view should

⁶⁰ Washburn v. Milwaukee Ry. Co., 59 Wis. 364, 18 N. W. 328; Munkwitz v. Chicago Ry. Co., 64 Wis. 403, 25 N. W. 438; Flower v. Baltimore etc. R. Co., 132 Pa. 524, 19 Atl. 274; Hoffman v. Bloomsburg etc. R. Co., 143 Pa. 503, 22 Atl. 823. Knowledge gained by a view of the premises might, with propriety, be used to determine which of two methods of sale should be adopted, where both are supported by proofs. But such knowledge cannot alone be

made the basis of a partition decree: McCamman v. Davis, 162 Mich. 435, 127 N. W. 329.

⁶¹ Chicago etc. R. Co. v. Parsons, 51 Kan. 408, 32 Pac. 1083. See, also, City of Topeka v. Martineau, 42 Kan. 387, 5 L. R. A. 775, 22 Pac. 419.

⁶² Groundwater v. Washington, 92 Wis. 56, 65 N. W. 871.

⁶³ City of Tacoma v. Hansen, 59 Wash. 594, 110 Pac. 426.

not be allowed, unless the judge participate therein. This is upon the theory that in such cases the verdict of the jury is merely *advisory*; and it is competent for the court to find the fact against the findings of the jury; but that in order to review the verdict intelligently, it is necessary for the court to have all the evidence which the jury had.⁶⁴ This would not apply to an action at law.

§ 410 (413). Experiments out of court.—Experiments out of court mean in this section such tests and illustrations as have been made by experts out of the presence of the court for the purpose of giving the results to the jury as an aid to the better understanding of the evidence relating to the subject matter of the action. They do not come within the meaning of those exhibitions of either lands or premises or articles which are made to the jury under orders of inspection. We have already shown⁶⁵ that the statutes, as a rule, do not extend to experiments made out of the courtroom even in the presence of the jury, except, of course, by consent. But a slight digression may be made to treat of them. In an Iowa case,⁶⁶ over the objection of the plaintiff, the jury, judge, parties, and their counsel, and others, left the courthouse,—the place appointed for the trial of cases,—and the defendant was permitted to conduct its defense and present its evidence to the jury where there was no opportunity for cross-examination, and no means by which the plaintiff could have a review of the case in the event that the case had proceeded to verdict and judgment against him. “We know of no authority,” said the court, “by which the trial of a case may be removed from the courthouse, and proceed in the streets of a city, or on the line of a railroad by the running of trains, and observations of the jury taken while sitting in a wagon. There surely

⁶⁴ *Fraedrich v. Flieth*, 64 Wis. 184, 25 N. W. 28; *Jeffersonville, etc. R. Co. v. Bowen*, 40 Ind. 545. On the general subject of view, see *Thomp. Trials*, §§ 875-916.

⁶⁵ § 407, *ante*.

⁶⁶ *Moore v. Chicago etc. R. Co.*, 93 Iowa, 484, 61 N. W. 992.

was no occasion for any such a proceeding in this case." But by consent such experiments may be made. The reason, it may be assumed, why they do not form part of an ordinary order to view being the extreme difficulty of reproducing the actual and physical conditions which existed at the time of the occurrence which forms the subject matter of the inquiry.⁶⁷ Thus where, on the trial of an action for damages for the death of the plaintiff's intestate through negligence, the defendant was permitted, at its request, with the consent of the plaintiff, and in pursuance of an order of court procured by it, to make experiments in the presence of the jury, by the running of a train over the crossing where the plaintiff's intestate was killed, and under conditions practically the same as those which existed when the accident occurred, for the information of the jury as to the nature and cause of the accident, the information so obtained was competent evidence for the consideration of the jury, and an instruction to that effect was not erroneous. If the testimony of witnesses relating to such experiments, and the information obtained from them, furnish competent evidence which the jury may consider in making up their verdict, it is difficult to assign any satisfactory reason why such experiments, when made in the presence of the jury for their information, and by which the results are made obvious to their senses, should not afford evidence of equal, or even greater, force and certainty. Witnesses observing the experiments, when called upon to testify, may imperfectly describe them, or fail to make themselves fully understood, while these imperfections are removed when the jury is placed in the position of the observing witnesses,

⁶⁷ See as to similarity of conditions, *Scott v. The Homesteaders*, 149 Iowa, 541, 129 N. W. 310 (powder marks on a wound illustrated by discharge of revolver against bacon skin supported by a cabbage head); *Taylor v. State*, 135 Ga. 622, 70 S. E. 237 (the possibility or impossibility of identifying a particular per-

son under the same circumstances and conditions wherein a witness testified that he identified the accused may be shown by an experiment made by the same witness); *Dow v. Bullfinch*, 192 Mass. 281, 78 N. E. 416 (experiments made after a lapse of eight years properly excluded in the discretion of the court).

with all the opportunities of observation.⁶⁸ Returning to the subject of the section, there are numerous precedents for allowing experiments made out of court and not in the presence of the jury to be proved for the purpose of illustrating the testimony given in court; for example, experts have been allowed to state their experiments made out of court.⁶⁹ Testimony has been received as to the results of shooting with the weapon in question,⁷⁰ and also as to experiments made out of court in railway damage cases,⁷¹ where it is shown that the *conditions are the same*,⁷² and

⁶⁸ Schweinfurth v. Cleveland etc. R. Co., 60 Ohio St. 215, 54 N. E. 89. The opinion in this case upon which the text is founded, after citing 2 Jones, Ev., § 395, embodied in § 393, *ante*, continues: "True, the experiments in this case were not made in court. It was impractical to do so. Nor, without the consent of the parties, could they have been ordered to be made elsewhere. But they were made out of court, at the request of the defendant, in pursuance of an order procured by it, and under conditions which, to its satisfaction, constituted a sufficiently accurate representation of the occurrence that resulted in the death of the plaintiff's intestate; and they were necessarily of the same probative character as if made in open court. They were intended to furnish information which the jury might use in determining the issues in the case, and which, indeed, might conclusively settle them in the minds of the jury. It would be a vain thing to attempt to require the jury to disregard the evidence so made manifest to their own senses."

⁶⁹ Lincoln v. Taunton Copper Mfg. Co., 9 Allen (Mass.), 181; Williams v. Taunton, 125 Mass. 34; Sullivan v. Commonwealth, 93 Pa. 284; Burg v. Chicago R. I. & P. Ry. Co., 90 Iowa, 106, 48 Am. St. Rep. 419, 57 N. W.

680; Stockwell v. Chicago etc. R. Co., 43 Iowa, 470; Boyd v. State, 14 Lea (Tenn.), 161; State v. Jones, 41 Kan. 309, 21 Pac. 265; Chicago etc. R. Co. v. Champion, 9 Ind. App. 510, 53 Am. St. Rep. 357, 36 N. E. 221, 37 N. E. 21; National Cash Register Co. v. Blumenthal, 85 Mich. 464, 48 N. W. 622; Leonard v. Southern Pac. Co., 21 Or. 555, 15 L. R. A. 221, 28 Pac. 887; Carr v. American Locomotive Co., 26 R. I. 180, 58 Atl. 678; Rowe v. Northport Smelting etc. Co., 35 Wash. 101, 76 Pac. 529; Chicago Tel. Supply Co. v. Marne etc. Tel. Co., 134 Iowa, 252, 111 N. W. 935. As to experiments in court, see §§ 403, 407, *ante*.

⁷⁰ Sullivan v. Commonwealth, 93 Pa. 284.

⁷¹ Byers v. Nashville, C. & St. Ry. Co., 94 Tenn. 345, 29 S. W. 128; Burg v. Chicago R. I. & P. Ry. Co., 90 Iowa, 106, 48 Am. St. Rep. 419, 57 N. W. 680.

⁷² Central R. etc. Co. v. Dottenheim, 92 Ga. 425, 17 S. E. 662; Libby v. Scherman, 146 Ill. 540, 37 Am. St. Rep. 191, 34 N. E. 801; Chicago & A. R. Co. v. Logue, 47 Ill. App. 292; Hagee v. Grossman, 31 Ind. 223; Chicago St. L. & P. Ry. Co. v. Champion, 9 Ind. App. 510, 53 Am. St. Rep. 357, 36 N. E. 221, 37 N. E. 21; Chicago Tel. Supply Co. v. Marne

where they do not relate to some collateral matter.⁷³ Other illustrations might be given, but it is obvious that testimony ought not to be received as to experiments of this character, unless the testimony shows that they were made under such conditions as to fairly illustrate the point in issue; and from the nature of the case the decision of this question must rest largely in the discretion of the trial judge.⁷⁴ So long as the conditions are similar, the identity of the article itself is not imperative. Indeed, in many cases, for instance, where one vehicle is destroyed by collision with another, an experiment with the identical article would be impracticable.⁷⁵ The proposition that the jury have no right to listen to *evidence out of court*, such as to statements of witnesses or other persons concerning the facts in issue or the merits of the cause, is too elementary to require discussion.⁷⁶ They have no right to gain knowledge concerning the cause by such methods as making experiments out of court or by taking views, except *under the supervision of the court*.⁷⁷ But if the knowledge gained in this way could not have affected the verdict rendered, it is not such error as to warrant setting aside the verdict.⁷⁸ Nor can they inspect books or documents in the jury-room which

etc. Tel. Co., 134 Iowa, 252, 111 N. W. 935; National Cash Register Co. v. Blumenthal, 85 Mich. 464, 48 N. W. 622; Leonard v. Southern Pac. Co., 21 Or. 555, 15 L. R. A. 221, 23 Pac. 887; Rowe v. Northport Smelting etc. Co., 35 Wash. 101, 76 Pac. 529.

⁷³ Libby v. Scherman, 50 Ill. App. 123, 146 Ill. 540, 37 Am. St. Rep. 191, 34 N. E. 801.

⁷⁴ Ulrich v. People, 39 Mich. 245; State v. Smith, 49 Conn. 376; Polin v. State, 14 Neb. 540, 16 N. W. 898; Sonoma County v. Stofen, 125 Cal. 32, 57 Pac. 681.

⁷⁵ See Taylor v. McGrath, 9 Ind. App. 30, 36 N. E. 163 (bicycle); Owens v. Missouri etc. R. Co., 38 Fed. 571 (railway engine).

⁷⁶ Ritchie v. Holbrooke, 7 Serg. & R. (Pa.) 458; Hager v. Hager, 38 Barb. (N. Y.) 92, 102; Dower v. Church, 21 W. Va. 23; March v. State, 44 Tex. 64.

⁷⁷ State v. Sanders, 68 Mo. 202, 30 Am. Rep. 782; Yates v. People, 38 Ill. 527; Forehand v. State, 51 Ark. 553, 11 S. W. 766; Jim v. State, 4 Humph. (Tenn.) 289; Winslow v. Morrill, 68 Me. 362; Garside v. Ladd Watchcase Co., 17 R. I. 691, 24 Atl. 470; Woodbury v. Anoka, 52 Minn. 329, 54 N. W. 187; Harrington v. Worcester, L. & S. Ry. Co., 157 Mass. 579, 32 N. E. 955. See note to People v. Thorn, 42 L. R. A. 394 et seq.

⁷⁸ People v. Boggs, 20 Cal. 432; Indianapolis v. Scott, 72 Ind. 196.

have not been received in evidence, except upon consent of the parties.⁷⁹ Any misconduct of the jury of this character furnishes ground for a new trial.⁸⁰ But it has been held that, if the parties are present and no objection is made by either, the alleged misconduct cannot properly be made ground therefor.⁸¹

§ 411 (414). Models — Diagrams — Photographs.—As a corollary to the introduction of the thing itself in evidence—real evidence, as it is styled throughout this work—the introduction of fac-similes⁸² or representations reduced in size but accurate to scale has long been sanctioned. It is the constant practice in the courts to receive in evidence models, maps and diagrams,⁸³ for the purpose of giving a

⁷⁹ *State v. Hartmann*, 46 Wis. 248, 50 N. W. 193; *Munde v. Lambie*, 125 Mass. 367; *State v. Lantz*, 23 Kan. 728, 33 Am. Rep. 215; *McLeod v. Humeston & S. Ry. Co.*, 71 Iowa, 138, 32 N. W. 246; *Toohy v. Sarvis*, 78 Ind. 474.

⁸⁰ This is illustrated by most of the cases cited in the last three notes above.

⁸¹ *State v. Ballew*, 83 S. C. 82, 18 Ann. Cas. 569, 63 S. E. 688, 64 S. E. 1019; and note thereto on right of jury on view to make evidence for themselves by experiment in 18 Ann. Cas. 571. See, also, *Kimie v. San Jose etc. R. Co.*, 156 Cal. 379, 104 Pac. 986; *Indianapolis v. Scott*, 72 Ind. 196; *Emporia v. Juengling*, 78 Kan. 595, 19 L. R. A., N. S., 223, 96 Pac. 850; *Louisville etc. R. Co. v. Whipps*, 27 Ky. Law Rep. 977, 87 S. W. 298; *Jones v. State*, 51 Ohio St. 331, 38 N. E. 79; *Hardin v. State*, 40 Tex. Cr. 208, 49 S. W. 607; *State v. Mortensen*, 26 Utah, 312, 73 Pac. 562, 633.

⁸² *American Express Co. v. Spellman*, 90 Ill. 455; *Gilbourne v. Oregon Short Line R. Co.*, 39 Utah, 80, 114

Pac. 532 (where a hand lantern was permitted to be introduced in evidence as similar to one that was at the rear of a railway engine at the time of a collision and which original lantern could not be found); *Ahearn v. United States*, 158 Fed. 606, 85 C. C. A. 428 (where on an indictment for receiving stolen pigs of tin, it was proper to permit similar pigs to be introduced in evidence that the jury might see that the pile from which pigs were missing contained pigs in all respects like those which were found on the thieves and subsequently traced to the defendant's premises).

⁸³ *Vance v. Fore*, 24 Cal. 435; *Polhill v. Brown*, 84 Ga. 338, 10 S. E. 921; *Angusta etc. R. Co. v. Dorsey*, 68 Ga. 224; *Pennsylvania Coal Co. v. Kelly*, 156 Ill. 9, 40 N. E. 938; *McMahon v. Dubuque*, 107 Iowa, 62, 70 Am. St. Rep. 143, 77 N. W. 517; *Lush v. Parkersburg*, 127 Iowa, 701, 104 N. W. 336; *Weld v. Brooks*, 152 Mass. 297, 25 N. E. 719; *Plummer v. Gould*, 92 Mich. 1, 31 Am. St. Rep. 567, 52 N. W. 146; *Coles v. Yorks*, 36 Minn. 388, 31 N. W. 353; *White-*

more accurate representation of objects or places which cannot conveniently be shown or described to the jury. A plan or picture, whether made by the hand of man or by photography, is admissible in evidence if verified by proof that it is a true representation of the subject to assist the jury in understanding the case. Whether it is sufficiently verified is a preliminary question of fact to be decided by the judge presiding at the trial, and not open to exception.⁸⁴ It has been held no abuse of discretion to allow the jury to see a model of a door, the cause of personal injury, where the party producing it offered to correct it if found faulty by the opponent.⁸⁵ And where the model of a bridge was a substantial reproduction of it with the exception of the number of uprights, it was not held error of the court to admit it or to refuse to strike it out on application.⁸⁶ In a homicide case in California a correct model of the porch where the shooting occurred conceded as not representing hindrance to view by growing vines about the trellis-work or otherwise, but faithfully representing the porch itself, was properly received for the purpose of illustrating the testimony of witnesses as to the place of the shooting, where the conditions surrounding and obstructing the view were fully explained by witnesses.⁸⁷ Casts are admissible the

head v. Ragan, 106 Mo. 231, 17 S. W. 307; Curtis v. Aaronson, 49 N. J. L. 68, 60 Am. Rep. 584, 7 Atl. 886; State v. Fox, 25 N. J. L. 566 (where the model of a wound was introduced in a criminal case); Donohue v. Whitney, 133 N. Y. 178, 30 N. E. 848; Davidson v. Arledge, 97 N. C. 172, 2 S. E. 378; Wolfe v. Scarborough, 2 Ohio St. 361; Burroughs v. Curtiss Lumber Co., 58 Or. 270, 114 Pac. 103; McVey v. Durkin, 136 Pa. 418, 20 Atl. 541; Ewing v. State, 81 Tex. 172, 16 S. W. 872; Moran Bros. v. Snoqualmie Falls Power Co., 29 Wash. 292, 69 Pac. 759; Western Gas etc. Co. v. Danner, 97 Fed. 882, 38 C.

C. A. 528; McIvers v. Walker, 9 Cranch (U. S.), 173, 3 L. Ed. 694. The model need not be of the same material as the original: Texas Machinery etc. Co. v. Ayers Ice Cream Co. (Tex. Civ. App.), 150 S. W. 750.

⁸⁴ Gray, C. J., in Blair v. Inhabitants of Pelham, 118 Mass. 420.

⁸⁵ See valuable opinion in Everson v. Casualty Co. of America, 208 Mass. 214, 94 N. E. 459.

⁸⁶ Coolidge v. City of New York, 99 App. Div. 175, 90 N. Y. 1078.

⁸⁷ People v. Maughs, 149 Cal. 253, 86 Pac. 187, 8 Cal. App. 107, 96 Pac. 407.

same as models.⁸⁸ It is not error for the court to allow the drapery of the clothing of a dead girl upon a dressmaker's frame, as a convenient mode for displaying it, it not being claimed that the frame represented the height, size, or figure of the girl, and the frame itself not being in evidence.⁸⁹ It is common practice to illustrate upon the wall or upon a door in a courtroom, before the eyes of the jury, the location of a bullet mark; but such matters are largely within the discretion of the trial court, and, in the absence of an abuse of discretion, the appellate court will not interfere.⁹⁰ It has been held that a physician may use a skeleton for the purpose of illustrating an injury to the plaintiff and explaining to the jury the location of the various bones and ligaments of the ankle.⁹¹ In a Washington case⁹² the practice of illustration was, however, stretched to its extreme limit. The defendant was charged with biting off the prosecutor's nose in a fight, and error was assigned based on the action of the court compelling the accused to give a spectacular illustration and reproduction of the fight before the jury, using the deputy prosecuting attorney, who was the cross-examining counsel, to represent his antagonist. The appellate court, in view of a retrial, simply said, "Such practice is not commendable." We are strongly of opinion that fault could not be found if the learned justice who delivered the opinion had said that it was error and, in addition, an exhibition degrading alike to the dignity of a court of justice and to those permitting it. It is on a par with indecent exhibitions already referred to.⁹³ It has become the common practice to receive in evidence photographs,

⁸⁸ *People v. Smith*, 121 Cal. 355, 53 Pac. 802; *People v. Searcey*, 121 Cal. 1, 41 L. R. A. 157, 53 Pac. 359; *Mann v. State*, 22 Fla. 600; *Earl v. Lefler*, 46 Hun (N. Y.), 9; *Johnson v. State*, 59 N. J. L. 535, 38 L. R. A. 373, 37 Atl. 949, 39 Atl. 646. See, also, *Whetston v. State*, 31 Fla. 240, 12 South. 661.

⁸⁹ *People v. Durrant*, 116 Cal. 179, 48 Pac. 75.

⁹⁰ *People v. Chin Hane*, 108 Cal. 597, 41 Pac. 697. See, also, *Louisville etc. R. Co. v. Ray*, 101 Tenn. 1, 46 S. W. 554, as to use of court furniture.

⁹¹ *Chicago etc. R. Co. v. Walker*, 217 Ill. 605, 75 N. E. 520.

⁹² *State v. Catsampas*, 62 Wash. 70, 112 Pac. 1116.

⁹³ § 398, *ante*.

including sciagraphs and other X-ray reproductions, for the purpose of illustrating to the jury, more satisfactorily than can be done by description, the appearance of objects, persons or places, where such appearance becomes relevant.⁹⁴ It is clearly necessary, in order to render diagrams, models, photographs and the like, admissible in evidence, that preliminary evidence should be given of the correctness of the representation; and when such evidence is introduced, this is a preliminary question for the determination of the trial judge; and in some states his decision upon this question will not be reviewed by the appellate court.⁹⁵ If, however, the accuracy of the representation is questioned, this is a question for the determination of the jury like other questions of fact. It is common knowledge that as to such matters, either through want of skill on the part of the artist, or inadequate instruments or materials, or through intentional and skillful manipulation, a photograph may be not only inaccurate, but dangerously misleading.⁹⁶ In all cases, therefore, until the actual admission of the photograph by the judge is accomplished, its production should

⁹⁴ For a full discussion and illustration of this subject, see § 581, *post*, and cases and notes there cited.

⁹⁵ *Kansas City Southern R. Co. v. Morris*, 80 Ark. 528, 10 Ann. Cas. 618, 98 S. W. 363; *Cunningham v. Fair Haven etc. R. Co.*, 72 Conn. 244, 43 Atl. 1047; *Ortiz v. State*, 30 Fla. 256, 11 South. 611; *City of Chicago v. Vesey*, 105 Ill. App. 191; *Wicks v. Loan etc. Co.*, 150 Iowa, 112, 129 N. W. 744; *Locke v. Railway Co.*, 46 Iowa, 109; *Western Maryland R. Co. v. Martin*, 110 Md. 554, 73 Atl. 267; *Leidlein v. Meyer*, 95 Mich. 586, 55 N. W. 367; *Stewart v. St. Paul City R. Co.*, 78 Minn. 110, 80 N. W. 855; *Brett v. State*, 94 Miss. 669, 47 South. 781; *Riggs v. Metropolitan St. R. Co.*, 216 Mo. 304, 115 S. W. 969; *Baustian v. Young*, 152 Mo. 317, 75 Am. St. Rep. 462, 53 S. W. 921;

Goldsboro v. Central R. Co. of New Jersey, 60 N. J. L. 49, 37 Atl. 433; *Kemper v. Whiteside*, 67 Misc. Rep. 170, 122 N. Y. Supp. 265; *Pickett v. Atlantic Coast Line R. Co.*, 153 N. C. 148, 69 S. E. 8; *Smith v. Territory*, 11 Okl. 669, 69 Pac. 805; *State v. Miller*, 43 Or. 325, 74 Pac. 658; *Beardslee v. Columbia Tp.*, 188 Pa. 496, 68 Am. St. Rep. 883, 41 Atl. 617; *Hassam v. J. E. Safford Lumber Co.*, 82 Vt. 444, 74 Atl. 197; *Hupfer v. National Distilling Co.*, 127 Wis. 306, 106 N. W. 831. In Connecticut the nonreview of the determination of the trial judge on the question is challenged by *Hamersley, J.*, in *Cunningham v. Fair Haven etc. R. Co.*, 72 Conn. 244, 43 Atl. 1047.

⁹⁶ *Marcy v. Barnes*, 16 Gray (Mass.), 161, 77 Am. Dec. 405; *Cunningham v. Fair Haven etc. R. Co.*,

be properly regarded as for the purpose only of the preliminary proof for its reception, and not be misconstrued as a judicial indication to the jury that it is at that stage to be accepted by them as proved.

72 Conn. 244, 43 Atl. 1047; Geer v. Missouri Lumber & Min. Co., 134 Mo. 85, 56 Am. St. Rep. 489, 34 S. W. 1099; Hynes v. McDermott, 82 N. Y. 41, 37 Am. Rep. 538; Taylor's Will Case, 10 Abb. Pr., N. S. (N. Y.) 300, 318; Eborn v. Zimpelman, 47 Tex. 503, 26 Am. Rep. 315.

CHAPTER 14.

STATUTE OF FRAUDS.

- § 412. Grounds on Which Evidence is Excluded by Statute of Frauds.
- § 413. As to the Creation and Conveyance of Interests in Land.
- § 413a. As to Contracts for the Sale of Lands or Interest Therein.
- § 413b. As to Contracts not to be Performed Within a Year from the Making Thereof.
- § 413c. Agreements in Consideration of Marriage.
- § 414. The Statute as Affecting Leases.
- § 415. Proof of Surrender or Assignment of Interests in Land.
- § 416. Surrender by Operation of Law.
- § 417. Cancellation or Redelivery of Instruments Creating Interests in Land.
- § 418. Trusts—How Proved—Need not be Created by Writing.
- § 419. The Trust to be Proved by Writing.
- § 420. Exception as to Resulting Trusts.
- § 421. Same, Continued.
- § 422. Same—Mode of Proving the Trust—Amount of Evidence.
- § 423. Statutes Limiting Resulting Trusts.
- § 424. Same—Object of the Statute—What Law Governs.
- § 425. Proof of Trusts Between Those Holding Fiduciary Relations.
- § 426. Wills—Procuring Devise by Fraud.
- § 427. Proof of Guaranty—Novation—Executors and Administrators.
- § 428. Sale of Goods.
- § 429. What the Memorandum is to Contain.
- § 430. Same, Continued.
- § 431. Subsequent Modification by Parol—Fraud—Mistake.
- § 432. Reformation—Part Performance—How Proved.
- § 433. Same—Original Agreement must be Proved.

§ 412 (415). Grounds on which evidence is excluded by statute of frauds.—A large part of this work relates to those exclusionary rules of evidence which have had their origin and growth in the courts as a part of the common law. Although, as a rule, statutes have tended to extend rather than limit the admissibility of evidence, there are important statutes which have been enacted for the purpose of preventing the reception of testimony which would otherwise be competent. By far the most important of these statutes is the celebrated *statute of frauds*.¹ This statute has long been the subject of the most unqualified

¹ The Statute of Frauds and Perjuries, 29 Car. II, c. 3.

commendation on the one hand, and of the severest criticism on the other; and the discussion as to its merits is by no means at an end.² "There is reason to surmise that a leading motive in the enactment of that comprehensive, but strange and very un-English piece of legislation, the statute of frauds, was found in the uncertainty that hung over everything at a period when the law of proof was so unsettled. It will be remembered that it was then a very critical time; that the attain as an operative thing had vanished, while the law of new trials was in its infancy, and the rules of our present law of evidence but little developed."³ A note in Kent's Commentaries says that the statute "carries its influence through the whole body of our civil jurisprudence, and is in many respects the most comprehensive, salutary and important legislative regulation on record, affecting the security of private rights. It seems to have been intended to embrace within its provisions the subject matter of all contracts."⁴ The fact, however, that

² See many quotations illustrating this in Reed. Stat. Frauds, §§ 10, 11.

³ Thayer, Prel. Treat. on Ev. 180. The same learned author speaks of it, at page 430, as "a very extraordinary enactment to have been passed by an English-speaking community in any age, so comprehensive is it and so far-reaching."

⁴ The following sketch of the statute will be found useful for reference:

Section 1. All leases, estates, interests of freehold or terms of years, or any uncertain interest of, in, or out of the messuages, manors, lands, tenements, or hereditaments, made or created by livery of seisin only or by parol, and not put in writing and signed by the parties so making or creating the same, or their agents thereunto lawfully authorized by writing, shall have the force and effect of leases or estates at will only, and shall not, either in law or equity,

be deemed or taken to have any other or greater force or effect; any consideration for making any such parol leases or estates, or any former law or usage, to the contrary notwithstanding.

Section 2. Except, nevertheless, all leases not exceeding the term of three years from the making thereof, whereupon the rent reserved to the landlord during such term shall amount to two-third parts at the least of the full improved value of the thing demised.

Section 3. And, moreover, that no leases, estates, or interests, either of freehold or terms of years, or any uncertain interest, not being copyhold or customary interest, of, in, to, or out of any messuages, manors, lands, tenements, or hereditaments, shall be assigned, granted, or surrendered, unless it be by deed or note in writing signed by the party so assigning, granting, or surrendering

for years this statute has held its place in England, and that, with slight changes, it has been adopted and perserved in most of the states of this Union is significant of its great importance, if not of its transcendent value. The statute is based upon the theory that certain contracts be

the same, or their agents thereunto lawfully authorized by writing, or by act and operation of law.

Section 4. No action shall be brought whereby to charge any executor or administrator upon any special promise, to answer damages out of his own estate; 2, or whereby to charge the defendant upon any special promise to answer for the debt, default, or miscarriages of another person; 3, or to charge any person upon any agreement made upon consideration of marriage; 4, or upon any contract or sale of lands, tenements, or hereditaments, or any interest in or concerning them; 5, or upon any agreement that is not to be performed within the space of one year from the making thereof; 6, unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith, or by some person thereunto by him lawfully authorized.

The 5th and 6th apply to devises of land.

Section 7. All declarations or creations of trusts or confidences, of any lands, tenements, or hereditaments, shall be manifested and proved by some writing signed by the party who is by law enabled to declare such trust, or by his last will in writing, or else they shall be utterly void and of none effect.

Section 8. Provided always, that where any conveyance shall be made of any lands or tenements, by which

a trust or confidence shall or may arise or result by the implication or construction of law, or be transferred or extinguished by an act or operation of law; then, and in every such case, such trust or confidence shall be of the like force and effect as the same would have been if this statute had not been made; anything hereinbefore contained to the contrary notwithstanding.

Section 9. All grants or assignments of any trust or confidence shall likewise be in writing, signed by the party granting or assigning the same, or by such last will or devise, or else shall likewise be utterly void and of none effect.

Section 10 gives a remedy against the lands of *cestui que trust*.

Section 11 relieves heirs from liabilities out of their own estates.

Section 12 regulates estates *pur auter vie*.

Sections 13, 14, 15, and 16 apply to judgments and executions.

Section 17. No contract for the sale of any goods, wares, and merchandises for the price of ten pound sterling, or upwards, shall be allowed to be good, except the buyer shall accept part of the goods so sold, and actually receive the same, or give something in earnest to bind the bargain, or in part payment, or that some note or memorandum in writing of the said bargain be made and signed by the parties to be charged by such contract, or their agents thereunto lawfully authorized.

reduced to writing, and thus removed from the uncertainties which affect business transactions resting wholly in parol; that in communities where the ability to write is the rule, rather than the exception, the hardship or inconvenience of requiring important contracts to be reduced to writing is less to be considered than the frauds and perjuries which are apt to follow when such contracts rest only in memory. It is not within the scope of this work to enter in detail upon the discussion of those substantive rules of law which depend upon this celebrated statute; nor of the rules of pleading applicable thereto, which will be found in authoritative works upon contracts, pleading and upon the statute itself. It is desirable, however, to briefly call attention to some of the provisions of the statute, and to the general rules of evidence applicable thereto, and to those principles of equity which guide the courts of that jurisdiction to defeat fraud, which is conceived and attempted to be reared notwithstanding the statute. In the words of Lord Chancellor Parker in a celebrated case,⁵ "In cases of fraud, equity should relieve, even against the words of the statute; as if one agreement in writing should be proposed and drawn, and another fraudulently and secretly brought in and executed in lieu of the former; in this or such like cases of fraud, equity would relieve; but where there is no fraud, only relying upon the honor, word or promise of the defendant, the statute making those promises void, equity will not interfere."

§ 413 (416). As to the creation and conveyance of interests in land.—By the terms of the first and second sections of the statute all conveyances of interests in land, in order to be effectual, excepting only those which create leases or estates at will, must be put in writing and signed by the parties making or creating the same or by their agents,

⁵ Lord Chancellor Parker, after-
ward Earl of Macclesfield, in *Mon-*
tacute v. Maxwell, 1 P. Wms. 518,
24 Eng. Reprint, 541.

lawfully authorized by writing, except that the rule does not apply to leases not exceeding the term of three years from the making thereof.⁶ It will be observed that the statute affects *not* the *credibility or weight* of testimony, but absolutely *excludes* parol proof of a very large class of contracts. It is immaterial whether a large number of witnesses may have knowledge of the terms of a contract within this class, or whether there are no witnesses to controvert their statements, for the reason that these statements are denied all efficacy as evidence.⁷ The courts have been rigid in upholding the statute, and regard any attempt to encroach upon it by recognizing an oral grant of realty as "a radical departure from the existing methods of land transfer in this country from its earliest settle-

⁶ For illustrations of contracts covered by the statute under this head see Wood, Stat. Frauds, § 192 et seq.; Browne, Stat. Frauds, 5th ed., § 228 et seq. Also Tuttle v. Bristol, 142 Mich. 148, 105 N. W. 145; Schmidt v. Beiseker, 14 N. D. 587, 116 Am. St. Rep. 706, 5 L. R. A., N. S., 123, 105 N. W. 1102; Foster Lumber Co. v. Harlan County Bank, 71 Kan. 158, 114 Am. St. Rep. 470, 6 Ann. Cas. 44, 80 Pac. 49; Johnson v. Hayward, 74 Neb. 157, 12 Ann. Cas. 800, 5 L. R. A., N. S., 112, 103 N. W. 1058, 107 N. W. 384; Tucker v. Oltenheimer Estate, 46 Or. 585, 81 Pac. 360; Mack v. Mack, 39 Wash. 190, 81 Pac. 707; Shea v. Nilima, 133 Fed. 209, 66 C. C. A. 263; Grout v. Stewart, 96 Minn. 230, 104 N. W. 966. See, also, the late cases: Houser v. Hobart, 22 Idaho, 735, 127 Pac. 997; Mallow v. Eastes (Ind.), 100 N. E. 836; Dow v. Bradley (Me.), 85 Atl. 896; Sprague v. Kimball (Mass.), 100 N. E. 622; Clark v. Mitchell (Nev.), 130 Pac. 760; W. L. Hurley v. Ray (N. C.), 76 S. E. 234; Geiger v. McMahon (S. D.), 139 N. W. 958;

American etc. Irr. Co. v. Mercedes Plantn. Co. (Tex. Civ. App.), 155 S. W. 286; Herrick v. Miller, 69 Wash. 456, 125 Pac. 974. As to cut timber and crops, see the late cases of Frank Hitch Lumber Co. v. Brown (N. C.), 75 S. E. 714; Kreisle v. Wilson (Tex. Civ. App.), 148 S. W. 1132.

⁷ Coleman v. Stewart, 170 Ala. 255, 53 South. 1020; Bostwick v. Mahoney, 73 Cal. 238, 14 Pac. 832; Shreve v. Town of Cicero, 129 Ill. 226, 21 N. E. 815; Douglass v. Geiler, 32 Kan. 499, 4 Pac. 1039; Tabernacle Baptist Church v. Green, 124 La. 171, 50 South. 1; Jennison v. Haire, 29 Mich. 207; Moe v. Chesrown, 54 Minn. 118, 55 N. W. 832; Hall v. Small, 178 Mo. 629, 77 S. W. 733; Carter v. Pitcher, 87 Hun, 580, 34 N. Y. Supp. 549; Cox v. Ward, 107 N. C. 507, 12 S. E. 379; Arnold v. Cessna, 25 Pa. 34; Thompson v. Dutton, 96 Tex. 205, 71 S. W. 544; Dobbins v. Dexter Horton & Co., 62 Wash. 423, 113 Pac. 1088; Garrett v. South Penn Oil Co., 66 W. Va. 587, 66 S. E. 741; Stoddart v. Stoddart, 39 U. C. Q. B. 203.

ment.”⁸ Even in such a strong case as where it was established that a grantee of land, not having paid the whole of the purchase money, verbally agreed to reconvey the lands to his grantor, the statute was held to apply and the agreement to be void and unenforceable.⁹ But unless the transaction can be held to involve real estate, the benefit of the statute cannot be claimed. In an action by the receiver of an insolvent bank against one of its former customers, upon an overdraft and certain promissory notes, as a partial defense it was alleged, and the evidence tended to prove, that the defendant was the owner of a certain farm, which farm was sold to one A and later to the bank, whereupon it was agreed between said A and the defendant and the bank that A would execute to the bank a promissory note in the sum of two thousand dollars, for the purpose of securing the overdraft, and that the balance of said sum, after paying such overdraft, was to be credited to the account of said defendant with the bank. This contract, as between the bank and the defendant, did not constitute a “transaction involving real estate,” within the purview of the statute of frauds.¹⁰ It is settled by the weight of authority that a deed is not to be rejected as evidence by the terms of this statute, although the signature of the grantor is not actually made by himself, provided it be made in his presence and by his direction.^{10a} When the

⁸ Mr. Justice Brown in *Maxwell Land Grant Co. v. Dawson*, 151 U. S. 586, 38 L. Ed. 279, 14 Sup. Ct. Rep. 458. See, also, *McKinnon v. Mixon*, 128 Ala. 612, 29 South. 690; *Melton v. Lambard*, 51 Cal. 258, 14 Morr. Min. Rep. 695; *McGinness v. Stanfield*, 6 Idaho, 372, 55 Pac. 1020, 7 Idaho, 23, 59 Pac. 936; *Fletcher v. Underwood*, 240 Ill. 554, 88 N. E. 1030; *Price v. Lien*, 84 Iowa, 590, 51 N. W. 52; *Cox v. Honshell* (Ky.), 127 S. W. 159; *Castanedo v. Toll*, 6 Mart. O. S. (La.), 557; *Pitman v. Poor*, 38 Me. 237; *Shelton v. Cook-*

sey, 138 Mo. App. 389, 122 S. W. 331; *Hetfield v. Central R. Co.*, 29 N. J. L. 571; *Huff v. McCauley*, 53 Pa. 206, 91 Am. Dec. 203, 9 Morr. Min. Rep. 268; *Wilkerson v. Charo* (Tex. Civ. App.), 133 S. W. 481; *Maxfield v. West*, 6 Utah, 379, 24 Pac. 98; *Graves v. Graves*, 48 Wash. 664, 94 Pac. 481.

⁹ *Shelton v. Cooksey*, *supra*.

¹⁰ *Burns v. Vaught*, 27 Okl. 711, 113 Pac. 906.

^{10a} *Jackson v. Murray*, 5 T. B. Mon. (Ky.) 184, 17 Am. Dec. 53, and note; *Browne*, Stat. Frauds, 5th ed., § 12b.

deed or conveyance is executed by an attorney in fact, it should be in the name of the principal, and not in the name of the agent. There are a few cases which are not included in the statute, such as where special provision is made by other statutes for the taking of lands by eminent domain or otherwise.¹¹ Dedication of lands is sometimes supposed to form an exception, but inasmuch as dedication has respect to the possession rather than to the permanent estate, and its effect is not to deprive a party of his land, but to estop him, while the dedication continues in force, from asserting his right to exclusive possession and enjoyment, it cannot be properly regarded as being a qualification of the statute.¹² It is also claimed as an exception that in some states a sheriff's sale of land passes the title thereto without a deed when a subsequent memorandum thereof is signed by the sheriff. This cannot be called an exception in any sense of the term, for the sale is one by operation of law, and the memorandum is necessary to prove the sale. In the words of Chief Justice Taney,¹³ the party "cannot recover without it, because the sale being within the statute of frauds, it must be proved by written evidence." The mere abstract passing of the title by the sale without the further act of the sheriff in

¹¹ *Cottrill v. Myrick*, 12 Me. 222; *Tamm v. Kellogg*, 49 Mo. 118; *Hetfield v. Central R. Co.*, 29 N. J. L. 571; *Embury v. Conner*, 3 N. Y. 511, 53 Am. Dec. 325; *Spawn v. South Dakota etc. R. Co.*, 26 S. D. 1, Ann. Cas. 1912D, 979, 127 N. W. 648.

¹² *Ludlow v. Rector etc. of St. John's Church*, 68 Misc. Rep. 400, 124 N. Y. Supp. 75; *Hunter v. Trustees of Sandy Hill*, 6 Hill (N. Y.), 407. In the last-named case Judge Beardsley said: "What right, if any, may hereafter arise in favor of those who can make title from the original owners, it is not necessary now to inquire. The land is still a public graveyard, inclosed, known and rec-

ognized as such. When these graves shall have worn away; when they who now weep over them shall have found kindred resting places for themselves; when nothing shall remain to distinguish this spot from the common earth around, and it shall be wholly unknown as a graveyard,—it may be that someone who can establish a good 'paper title' will have a right to its possession; for it will then have lost its identity as a burial ground, and with that, all right founded on the dedication must necessarily become extinct."

¹³ *Remington v. Lithicum*, 14 Pet. (U. S.) 84, 10 L. Ed. 364.

signing the memorandum is not sufficient, though even if it were, no exception would be created, the sale being, as we have said, by operation of law. Similar expressions of opinion are to be found with reference to an administrator's sale under order of the court.¹⁴ Of other estates and interests which arise by operation of law and which need not be evidenced by writing are vendors' liens, and dower rights.¹⁵ It follows from what we have said that where a deed not having been acknowledged according to law or inherently imperfect and wanting validity has been confirmed or adopted and ratified by a subsequent agreement, that agreement must be in the form required by law. In such a case it is obvious that the binding force of the contract is in the subsequent agreement and not in the deed, and the agreement must therefore be in writing. If a deed could be adopted or set up by a mere parol declaration, it might let in all the evils which the statute was designed to guard against.¹⁶ Easements cannot be created or conveyed by parol, but while they are within the statute, that act did not create the disability, which owes its origin to the common law. Their existence and transfer, therefore, must be evidenced by writing.¹⁷ Revocable licenses,

¹⁴ *Green v. Freeman*, 126 Ga. 274, 7 Ann. Cas. 1069, 55 S. E. 45; and see, also, next section.

¹⁵ *Davis v. Tingle*, 8 B. Mon. (Ky.) 539; *Heald v. Ross* (N. J.), 47 Atl. 575; *Halvorsen v. Halvorsen*, 120 Wis. 52, 97 N. W. 494.

¹⁶ *Price v. Hart*, 29 Mo. 171. See, also, as to ratification of a sheriff's deed, *Pepper v. Commonwealth*, 6 T. B. Mon. (Ky.) 27.

¹⁷ *Tillis v. Treadwell*, 117 Ala. 445, 22 South. 983; *Plunkett v. Meredith*, 72 Ark. 3, 77 S. W. 600; *Oliver v. Burnett*, 10 Cal. App. 403, 102 Pac. 223; *Stewart v. Stevens*, 10 Colo. 440, 15 Pac. 786; *Collins Co. v. Marcy*, 25 Conn. 239; *Hutchins v. Munn* (D. C.), 22 App. Cas. 88;

Wilmington Water Power Co. v. Evans, 116 Ill. 548, 46 N. E. 1083; *Indianapolis etc. R. Co. v. Wycoff* (Ind. App.), 95 N. E. 442; *Jones v. Stover*, 131 Iowa, 119, 6 L. R. A., N. S., 154, 108 N. W. 112; *Phoenix Ins. Co. v. Haskett*, 64 Kan. 93, 67 Pac. 446; *Dillion v. Crook*, 11 Bush (Ky.), 321; *Guier v. Guier*, 7 La. Ann. 103; *Weare v. Chase*, 93 Me. 264, 44 Atl. 900; *Morse v. Copeland*, 2 Gray (Mass.), 302; *Hamilton v. Jones*, 3 Gill & J. (Md.) 127; *Munsch v. Stetler*, 109 Minn. 403, 134 Am. St. Rep. 785, 25 L. R. A., N. S., 727, 124 N. W. 14; *Bonelli v. Blakemore*, 66 Miss. 136, 14 Am. St. Rep. 550, 5 South. 228; *Schultz v. Huffman*, 127 Mich. 276, 86 N. W. 823; *Peer v.*

on the other hand, convey no interest in land. As a rule, it may be said that a revocable license is regarded simply as a permission to perform certain acts on the land of another, and hence the statute contains no special reference and has no general application to them.¹⁸ If, however, the permission exceeds the doing of some act and includes the right to hold the land for a specified purpose, the provisions of the statute are called into operation; and where the license is perpetual or irrevocable, as where coupled with an interest, the statute calls for a writing to evidence its terms.¹⁹ The law may be well taken as expressed by Parker, C. J.:²⁰ "A license is technically an authority given to do some one act, or a series of acts, on the land of another, without passing any estate in the land; such as a license to hunt in another's land, or to cut down a certain number of trees. These are held to be revocable when executory, unless a definite term is fixed, but irrevocable when executed. . . . It is also holden

Wadsworth, 67 N. J. Eq. 191, 58 Atl. 379; Taylor v. Millard, 118 N. Y. 244, 6 L. R. A. 667, 23 N. E. 376; Huff v. McCauley, 53 Pa. 206, 91 Am. Dec. 203, 9 Morr. Min. Rep. 268; Bridges v. Purcell, 18 N. C. 492; Foster v. Browning, 4 R. I. 47, 67 Am. Dec. 505; Long v. Mayberry, 96 Tenn. 378, 36 S. W. 1040; Pifer v. Brown, 43 W. Va. 412, 49 L. R. A. 497, 27 S. E. 399. See, also, the late case of City of Berwyn v. Berglund, 255 Ill. 498, 99 N. E. 705.

¹⁸ Alabama Great Southern R. Co. v. South & N. A. R. Co., 84 Ala. 570, 5 Am. St. Rep. 401, 3 South. 286; Collins Mfg. Co. v. Marcy, 25 Conn. 242; Parker v. Wilson, 66 Ill. App. 91; Baker v. Kenney, 145 Iowa, 638, 139 Am. St. Rep. 456, 124 N. W. 901; Durrett v. Simpson, 3 T. B. Mon. (Ky.) 517, 16 Am. Dec. 115; Hamilton v. Windolf, 36 Md. 301, 11 Am. Rep. 491; De Montague v. Bacha-

rach, 181 Mass. 256, 63 N. E. 435; Sovereign v. Ortmann, 47 Mich. 181, 10 N. W. 191; New Orleans etc. R. Co. v. Moye, 39 Miss. 374; Ameriscoggin Bridge v. Bragg, 11 N. H. 102; People v. Goodwin, 5 N. Y. 568; McKellip v. McIlhenny, 4 Watts (Pa.), 317, 28 Am. Dec. 711; Wood v. Lake (Eng.), Say. 3, 96 Eng. Reprint, 783.

¹⁹ Childers v. Coleman Co., 122 Tenn. 109, 118 S. W. 1018; Adams v. Weir & Flagg (Tex. Civ. App.), 99 S. W. 726.

²⁰ Cook v. Stearns, 11 Mass. 533. See the late cases: City of Berwyn v. Berglund, 255 Ill. 498, 99 N. E. 705; Grandstaff v. Bland, 166 Mo. App. 41, 148 S. W. 139. See, also, Viner's Abridgment, title, "*Licence*," A, D, E, G, and the authorities therein cited, which will be found to sustain the position laid down in Chief Justice Parker's opinion.

that such licenses to do a particular act, but passing no estate, may be pleaded without deed. But licenses which in their nature amount to the granting of an estate for ever so short a time are not good without deed, and are considered as leases, and must always be pleaded as such. The distinction is obvious. Licenses to do a particular act do not in any degree trench upon the policy of the law which requires that bargains respecting the title or interest in real estate shall be by deed or in writing. They amount to nothing more than an excuse for the act, which would otherwise be a trespass. But a permanent right to hold another's land for a particular purpose, and to enter upon it at all times without his consent, is an important interest, which ought not to pass without writing, and is the very object provided for by our statute."²¹

§ 413a (416). As to contracts for the sale of lands or interest therein.—The fourth section of the statute of frauds which has been incorporated into the statutes of practically all of the United States provides, among other things, that no action shall be brought to charge any person upon any contract or sale of lands or any interest in or concerning them unless the agreement upon which such action shall be brought or some memorandum or note thereof shall be in writing, and signed by the party to be charged therewith or some other person thereunto by him lawfully authorized. The consideration of the statute generally lies more in the domain of works on construction and interpretation of statutes and generally of contracts than in a treatise on evidence, but there are some phases of it to which, as we have already said, attention to the rules of evidence bearing on the particular provisions of the statute must be directed. For instance, the validity of such contracts depends upon their being reduced to writ-

²¹ Browne, Stat. Frauds, § 26 points out in a note to this case that the learned chief justice said that certain licenses were not good

without "deed," and that there are many estates which may be granted under the statute by a writing not necessarily a deed.

ing.²² When an agent sells real estate for another, in order to bind the principal, it is not only necessary that the authority of the agent should be in writing, but also that the contract made by the agent, or some memorandum thereof, should be in writing and signed by the agent.²³ In the preceding section reference has been made to conveyances by operation of law as distinguished from those

²² *Allen v. Bromberg*, 163 Ala. 620, 50 South. 884; *Allen v. Caylor*, 120 Ala. 251, 74 Am. St. Rep. 31, 24 South. 512; *Hall v. Wallace*, 88 Cal. 434, 26 Pac. 360; *Malkan v. Hemming*, 82 Conn. 293, 73 Atl. 752; *Tainter v. Brockway*, 1 Root (Conn.), 59; *Hill v. Jones*, 7 Ga. App. 394, 66 S. E. 1099; *Lumpkin v. Johnson*, 27 Ga. 485; *Allen v. Kitchen*, 16 Idaho, 133, 18 Ann. Cas. 914, 100 Pac. 1052; *McGinness v. Stanfield*, 6 Idaho, 372, 55 Pac. 1020; *Preston v. Casner*, 104 Ill. 262; *Holliday v. Perry*, 38 Ind. App. 588, 78 N. E. 877; *Parker v. Heaton*, 55 Ind. 1; *Mathes v. Bell*, 121 Iowa, 722, 96 N. W. 1093; *Robertson v. Talley*, 84 Kan. 817, 115 Pac. 640; *Richardson v. Isaacs* (Ky.), 118 S. W. 1003; *Harrow v. Johnson*, 3 Met. (Ky.) 578; *Brackett v. Brewer*, 71 Me. 478; *Nagengast v. Alz*, 93 Md. 522, 49 Atl. 333; *Clifford v. Heald*, 141 Mass. 322, 6 N. E. 227; *Mitchell v. Bilderback*, 159 Mich. 483, 124 N. W. 557; *Rodgers v. Lamb's Estate*, 137 Mich. 241, 100 N. W. 400; *Watson v. Chicago etc. R. Co.*, 46 Minn. 321, 48 N. W. 1129; *Cole v. Cole*, 99 Miss. 335, 54 South. 953; *Steen v. Kirkpatrick*, 84 Miss. 63, 36 South. 140; *Montpelier Sav. Bank etc. Co. v. Follett*, 68 Neb. 416, 94 N. W. 635; *Ham v. Goodrich*, 37 N. H. 185; *Smith v. Smith*, 28 N. J. L. 208, 78 Am. Dec. 49; *Ford v. Stroud*, 150 N. C. 362, 64 S. E. 1; *Dickerson v. Simmons*, 141 N. C. 325, 8 Ann. Cas. 361, 53 S. E. 850; *For-*

tesque v. Crawford, 105 N. C. 29, 10 S. E. 910; *Fox v. Easter*, 10 Okl. 527, 62 Pac. 283; *Jackson v. Stearns*, 50 Or. 57, Ann. Cas. 1913A, 284, 113 Pac. 30; *Fidelity Title & Trust Co. v. West Side Belt R. Co.*, 230 Pa. 160, 79 Atl. 235; *Bowen v. Sayles*, 23 R. I. 34, 49 Atl. 103; *Shillinglaw v. Sims*, 86 S. C. 76, 67 S. E. 906; *Lichty v. Daggett*, 23 S. D. 380, 121 N. W. 862; *Cress v. Holloway* (Tex. Civ. App.), 135 S. W. 209; *Chadwick v. Arnold*, 34 Utah, 48, 95 Pac. 527; *Merrill v. Pease*, 51 Vt. 556; *Dodge v. Hopkins*, 14 Wis. 630. In Louisiana parol evidence is inadmissible under any circumstances between others than the parties themselves, and between them only where there has been actual delivery: *Mason v. Towne*, 12 La. Ann. 194; *Levy v. Ward*, 33 La. Ann. 1033; *Haughery v. Lee*, 17 La. Ann. 1; *Rev. Civ. Code*, art. 2275. See the late cases: *Barrett v. Durbin* (Ark.), 153 S. W. 265; *Nelson v. Wilson* (Iowa), 137 N. W. 1048 (oral contract to build fence); *Muehling v. Magee*, 168 Mo. App. 675, 153 S. W. 787; *Patterson v. Meyerhofer*, 204 N. Y. 96, 97 N. E. 472; *Farrin v. Matthews* (Or.), 124 Pac. 675; *Lace v. Smith*, 34 R. I. 1, 82 Atl. 268; *Granger Real Est. Exch. v. Anderson* (Tex. Civ. App.), 145 S. W. 262; *Dohr v. Wolfgang*, 151 Wis. 95, 138 N. W. 75.

²³ *Fletcher v. Underwood*, 240 Ill. 554, 88 N. E. 1030.

made voluntarily by an owner. In some states statutory provision has been made obviating the necessity for any written memorandum evidencing a contract, where the sale is under an order of the court. For example, in Georgia it has been held that an administrator's sale of lands belonging to the estate of his intestate cannot be properly termed a contract for the sale of lands, or any interest in or concerning them. "The exposure of the property for sale is a mere ministerial act in compliance with an order or judgment of a court of competent jurisdiction, and when, in obedience to such judgment, the land is 'put up' for sale and 'knocked off' to one bidding therefor, the purchaser is liable for the amount of the purchase money as soon as the hammer falls. . . . No memorandum in writing is necessary to charge the purchaser under the provisions of this section. The offer, the bid, its acceptance, indicated by 'knocking off' the property to the person bidding, makes a contract binding upon the purchaser."²⁴ The matter of what the memorandum should contain is dealt with later on in this chapter.²⁵

§ 413b. As to contracts not to be performed within a year from the making thereof.—This part of the fourth section of the statute may be briefly dealt with. It will be apparent from its terms that the subject practically belongs to the realm of contracts, and that there are no special rules of evidence to be applied to it which call for comment. But in so far as the large number of cases decided under the statute invariably involve the discussion of those rules, the leading constructions placed upon the statutory provisions are convenient for cross-reference. The terms of that part of the fourth section of the statute relate only to the time within which the agreement is to be per-

²⁴ *Green v. Freeman*, 126 Ga. 274, 7 Ann. Cas. 1069, 55 S. E. 45. But in Georgia, § 5466 of the Civil Code (1895) expressly made the provision interpreted as above. See, also, the

late cases of *Rice v. Ahlman*, 70 Wash. 12, 126 Pac. 66; *Beeson v. Pierce* (Ind. App.), 98 N. E. 380.

²⁵ § 429, *post*.

formed, irrespective of the subject matter. The better opinion is that this applies to agreements of every kind, but there is a divergence of opinion among the states as to whether the statute does or does not apply to oral agreements concerning lands, more particularly to agreements for leases for a year which are to begin at a future date.²⁶ It must be noted, however, that in adopting the English statute various changes of the language appear, and it is necessary to make careful comparison. For instance, in New York, the words "from the making thereof,"²⁷ and in Indiana leases are expressly excepted,²⁸ and in Wisconsin the section is placed in the chapter relating to personalty.²⁹ The section has been interpreted, as to the words *to be performed*, that the statute does not apply where the agreement is upon a contingency which *may* happen in a year; or upon a promise to do something when a certain event happens; or to keep on doing something without any time limitation; or to refrain from doing something alto-

²⁶ In the following states it is held that the statute applies, and the agreement must therefore be in writing: *Bain v. McDonald*, 111 Ala. 269, 20 South. 77; *Wickson v. Monarch Cycle Mfg. Co.*, 128 Cal. 156, 79 Am. St. Rep. 36, 60 Pac. 764; *Simons v. New Britain Trust Co.*, 80 Conn. 263, 11 Ann. Cas. 477, 67 Atl. 883; *Wheeler v. Frankenthal*, 78 Ill. 124; *Wolf v. Dozer*, 22 Kan. 436; *Garnes v. Frazier* (Ky.), 118 S. W. 998; *Delano v. Montague*, 4 Cush. (Mass.) 42; *Brosius v. Evans*, 90 Minn. 521, 97 N. W. 373; *Ray v. Blackman*, 120 Mo. App. 497, 97 S. W. 212; *Thostesen v. Dorse*, 77 Neb. 536, 110 N. W. 319; *White v. Holland*, 17 Or. 3, 3 Pac. 573; *Wheeler v. Conrad*, 6 Phila. (Pa.) 209; *O'Connor v. Enos*, 56 Wash. 448, 105 Pac. 1039. On the other side, namely, that the statute does not apply to such agreements, are to be found the following: *Higgins v. Gager*, 65 Ark. 604, 47 S. W.

848; *Sears v. Smith*, 3 Colo. 287; *Ridgeway v. Bryant*, 8 Ga. App. 564, 70 S. E. 28; *St. Joseph Hydraulic Co. v. Globe Tissue Paper Co.*, 156 Ind. 665, 59 N. E. 995; *Stem v. Nysonger*, 69 Iowa, 512, 29 N. W. 433; *Rooks v. Booth*, 160 Mich. 62, 125 N. W. 69; *McCroy v. Toney*, 66 Miss. 233, 2 L. R. A. 847, 5 South. 392; *Ward v. Hasbrouck*, 169 N. Y. 407, 62 N. E. 434; *Turner v. Trail*, 24 Okl. 135, 103 Pac. 575; *Hillhouse v. Jennings*, 60 S. C. 392, 38 S. E. 596; *Hayes v. Arrington*, 108 Tenn. 494, 68 S. W. 44; *Bateman v. Maddox*, 86 Tex. 546, 26 S. W. 51; *Baumgarten v. Cohn*, 141 Wis. 315, 18 Ann. Cas. 1076, 124 N. W. 288.

²⁷ *Young v. Dake*, 5 N. Y. 463, 55 Am. Dec. 356. For terms of statute, see synopsis, § 412, n. 4.

²⁸ *Huffman v. Starks*, 31 Ind. 474.

²⁹ See Stats. 1898, § 2307, and *Baumgarten v. Cohn*, 141 Wis. 315, 18 Ann. Cas. 1076, 124 N. W. 288.

gether;³⁰ or to do something when more than a year is allowed but the agreement can be substantially performed within a year; or where no time is specified but the agreement can be substantially performed within that time according to the understanding of the parties.³¹ But the statute does apply if the contract by its terms takes more than a year; that is, if the contract is not capable of entire and complete execution within a year from the making of it. There is a sharp conflict in the authorities as to whether or not a contract that is to be wholly performed on one side within the year is within the inhibition of the statute.³²

§ 413c. Agreements in consideration of marriage.—No action can be brought to charge any person upon an agreement made in consideration of marriage unless such agreement or a note thereof is in writing. Such is, practically, the provision of the statute of frauds as adopted in the United States. It is most used in connection with marriage settlements, and not, as is popularly supposed, with mutual promises to marry. But while an oral agreement to marry is valid, an oral agreement to execute an antenuptial contract is within the statute of frauds; and if an oral agreement to marry is dependent upon such an agreement, and

³⁰ There is a distinction made when the term of abstention is fixed: See Browne, Stat. Fr., § 282b. See the following late cases involving the various points referred to: Friedman v. Schleuter (Ark.), 151 S. W. 696; Diamond v. Jacquith (Ariz.), 125 Pac. 712; Grant v. New Departure Mfg. Co., 85 Conn. 421, 83 Atl. 212; Brooks v. State (Ga. App.), 76 S. E. 765; O'Donnell v. Daily News, 119 Minn. 378, 138 N. W. 677; Robinson v. Western Union Tel. Co., 169 Mich. 503, 135 N. W. 292; Passino v. Brady Brass Co. (N. J. Sup.), 84 Atl. 615; Fairchild v. City etc. Contract Co., 153 App. Div. 277, 138 N. Y. Supp.

133; International Ferry Co. v. American Fidelity Co. (N. Y.), 101 N. E. 160; Roe v. Fleming, 32 Okl. 259, 122 Pac. 496; Huggins v. Carey (Tex. Civ. App.), 149 S. W. 390; H. T. McGrath Co. v. Marchant, 117 Md. 472, 83 Atl. 912; Zwolanek v. Baker Mfg. Co., 150 Wis. 517, 137 N. W. 769.

³¹ Farwell v. Tillson, 76 Me. 227

³² This part of the fourth section of the statute is exhaustively dealt with in Browne on the Statute of Frauds, §§ 272-291b, and in the note to Okin v. Selidor, 138 Am. St. Rep. 590, to Doyle v. Dixon, 93 Am. Dec. 85, and to Sutcliffe v. Atlantic Mills, 43 Am. Rep. 42.

is a part of it, no action can be maintained upon it.³³ Where marriage, either with the other party or one outside the agreement, forms the consideration of any agreement, that agreement must be in writing.³⁴ It is to be noted that the statute applies to agreements *in consideration* of marriage, and that agreements merely in contemplation of marriage are not within its provisions.³⁵ A marriage in pursuance of an oral agreement is not such a part performance of the contract as will entitle the parties to any legal remedy.³⁶ The form of the agreement or memorandum of it is dealt with later in this chapter,³⁷ but it is appropriate to mention here that an offer in a letter from the promisor has been held accepted by the fact of the marriage. "No acceptance," said an eminent English judge, "could be more solemn than the fact of marrying the lady."³⁸ Evidence must, however, be given that the marriage took place in pursuance of such offer.³⁹ One of the most important aspects of agreements consummated in consideration of marriage is that of the rights of creditors

³³ Chase v. Fitz, 132 Mass. 359; Caylor v. Roe, 9 Ind. 1.

³⁴ Carter v. Worthington, 82 Ala. 334, 60 Am. Rep. 738, 2 South. 516; Galbreath v. Cook, 30 Ark. 417; Bradley v. Saddler, 54 Ga. 681; Richardson v. Richardson, 148 Ill. 563, 26 L. R. A. 305, 36 N. E. 608; Brenner v. Brenner, 48 Ind. 262; Mallory v. Mallory, 92 Ky. 316, 17 S. W. 737; Morgan v. Yarborough, 5 La. Ann. 316; Crane v. Gough, 4 Md. 316; White v. Bigelow, 154 Mass. 593, 28 N. E. 904; Wood v. Savage, 2 Doug. (Mich.) 316; Mowser v. Mowser, 87 Mo. 437; Manning v. Riley, 52 N. J. Eq. 39, 28 Atl. 810; McCartney v. Titsworth, 142 App. Div. 292, 126 N. Y. Supp. 905; Montgomery v. Henderson, 56 N. C. 113; Finch v. Finch, 10 Ohio St. 501; Stanley v. Madison, 11 Okl. 288, 66 Pac. 280; Adams v. Adams, 17 Or. 247, 20 Pac. 633; Hackney v. Hackney, 8 Humph.

(Tenn.) 452; Rowell v. Barber, 142 Wis. 304, 27 L. R. A., N. S., 1140, 125 N. W. 937; North Platte Milling etc. Co. v. Price, 4 Wyo. 293, 33 Pac. 664; Lloyd v. Fulton, 91 U. S. 479, 23 L. Ed. 363; Harrison v. Cage, 1 Ld. Raym. 386, 91 Eng. Reprint, 1156.

³⁵ Browne, Stat. of Frauds, 215b. See, also, Rainbolt v. East, 56 Ind. 538, 26 Am. Rep. 40; Houghton v. Houghton, 14 Ind. 505, 77 Am. Dec. 69; Larsen v. Johnson, 78 Wis. 300, 23 Am. St. Rep. 404, 47 N. W. 615.

³⁶ McAnnulty v. McAnnulty, 120 Ill. 26, 60 Am. Rep. 552, 11 N. E. 397; Lloyd v. Fulton, 91 U. S. 479, 23 L. Ed. 363.

³⁷ § 29, *post*.

³⁸ Lord Chancellor Sugden in Greene v. Cramer, 2 Con. & L. 54.

³⁹ Ayliffe v. Tracy, 2 P. Wms. 65, 24 Eng. Reprint, 642.

against property the subject of post-nuptial settlement made in pursuance of oral antenuptial agreement. While such settlements may be valid between the parties and their privies, it is strongly held in this country that they are invalid with regard to creditors whose rights have accrued prior to the date of the post-nuptial settlement. An oral antenuptial agreement that the husband shall not interfere with the business carried on by the wife, and shall not receive any of the profits accruing from it, unless reduced to writing, is void under the statute of frauds, so far as it was made in consideration of the intended marriage, and will not support a post-nuptial settlement founded on it. Lands purchased and paid for by the wife, with the profits and earnings derived from business carried on by her in her own name, which have become a part of her statutory estate, cannot be subjected by the husband's creditors, though the conveyance was executed after the accrual of their debts; and where the consideration of the conveyance is an account of goods sold after the accrual of the complainants' debt, which were the accretions of her business, constituting a part of her estate, it cannot be considered as her subsequent earnings, and cannot be subjected to the payment of the debt.⁴⁰

§ 414 (417). The statute as affecting leases.—Questions of evidence frequently arise under the statute in contro-

⁴⁰ *Carter v. Worthington*, 82 Ala. 334, 60 Am. Rep. 738, 2 South. 516. See, also, *Galbreath v. Cook*, 30 Ark. 417; *Jones v. Henry*, 3 Litt. (Ky.) 427; *Albert v. Winn*, 5 Md. 66; *Deshon v. Wood*, 148 Mass. 132, 1 L. R. A. 518, 19 N. E. 1; *Wood v. Savage*, Doug. (Mich.) 316; *Manning v. Riley*, 52 N. J. Eq. 39, 27 Atl. 810; *Ennis v. Ennis*, 48 Hun (N. Y.), 11; *Saunders v. Ferrill*, 23 N. C. 97; *Davidson v. Graves*, Riley Eq. (S. C.) 219; *Smith v. Greer*, 3 Humph. (Tenn.) 118. In *Rowell v. Barber*, 142 Wis. 304, 27 L. R. A., N. S., 1140, 125 N.

W. 937, it is held (following *Brandeis v. Neustadt*, 13 Wis. 142) that such a settlement was invalid, but as pointed out by *Kerivin, J.*, the English statute and that of most of the states in the Union, except Wisconsin and New York, do not make the contract void, but merely provide that no action shall be brought upon it. The authorities are reviewed by Chancellor Kent in *Reade v. Livingston*, 3 Johns. Ch. (N. Y.) 481, and by *Collier, C. J.*, in *Andrews v. Jones*, 10 Ala. 400.

versies respecting leases, not executed according to the statute, and the surrender of such leases; and attention will be called to the rules governing those subjects. The provisions of the statute of frauds respecting leases have been quite generally adopted in the United States with the qualification that the excepted term is limited in many states to one year, instead of three.⁴¹ The original statute applied only to those leases where the rent reserved should amount to *two-thirds of the improved value*. But this provision has generally been omitted in this country. It is to be observed that these statutes do not generally declare leases of the class enumerated to be *void*, but, like the English statute, declare such leases to have the effect of *estates at will*.⁴² In some states, however, the lease is declared void; and in others, the statute provides that no action shall be maintained upon such leases. It is the well-settled rule that tenancies within the statute are to be treated as *estates at will*, which may be converted into *tenancies from year to year* by acts on the part of the landlord and tenant showing such intention. Thus, where the tenant enters and pays rent for the year or some aliquot part of a year, such intention may be inferred.⁴³ Even

⁴¹ Elliott v. Bankston, 159 Ala. 462, 49 South. 76; Creighton v. Sanders, 89 Ill. 543; Poole v. Johnson, 31 Ky. Law Rep. 168, 101 S. W. 955; Miles v. Janvrin, 200 Mass. 514, 86 N. E. 785; Barrett v. Cox, 112 Mich. 220, 70 N. W. 446; Phipps v. Ingraham, 41 Miss. 256; Kofoid v. Lincoln Implement etc. Co., 80 Neb. 634, 114 N. W. 937; Nassoit v. Huber, 130 N. Y. Supp. 143; Teal v. Templeton, 149 N. C. 32, 62 S. E. 737; Gladwell v. Holcomb, 60 Ohio St. 427, 71 Am. St. Rep. 724, 54 N. E. 473; Wallace v. Scoggins, 17 Or. 476, 18 Or. 502, 17 Am. St. Rep. 749, and note, 21 Pac. 558; Sausser v. Steinmetz, 88 Pa. 324; Dobbs v. Atlas Elevator Co., 22 S. D. 226, 117 N. W. 128; Childers v. Coleman Co., 122 Tenn. 109, 118

S. W. 1018; Watkins v. Balch, 41 Wash. 310, 3 L. R. A., N. S., 852, 83 Pac. 321. See the late cases: Brodner v. Swirsky (Conn.), 84 Atl. 104; Donovan v. Maloney (Del. Super.), 84 Atl. 1032; Matthes v. Wier (Del. Ch.), 84 Atl. 878; Boggs v. Toney (Ind. App.), 98 N. E. 306; Boone v. Coe, 153 Ky. 233, 154 S. W. 900; Winter v. Spradling, 163 Mo. App. 77, 145 S. W. 834; Girton v. Daniels (Nev.), 129 Pac. 555; Ellis v. Bingham (Tex. Civ. App.), 150 S. W. 602; Vaughn v. Pearce (Tex. Civ. App.), 153 S. W. 171; Anderson v. Frye, 69 Wash. 89, 124 Pac. 499.

⁴² See the statutes of the jurisdiction.

⁴³ Camden v. Bratterbury, 5 Com. B., N. S., 817, 5 Jur., N. S., 627;

under statutes declaring leases of this character void, it has been held that while a parol lease for more than the prescribed period creates in the first instance only an estate at will, yet such estate, when once created, may, like any other estate at will, be converted into a tenancy from year to year by payment of rent or by other circumstances which indicate an intention to create such yearly tenancy.⁴⁴ A distinction has been drawn between an oral lease for longer than the statutory period and a written lease made by the lessor's agent without written authority but subsequently ratified by the lessor. In a recent case,⁴⁵ the husband leased in writing the wife's property for five years, he having verbal but no written authority therefor. She knew what he had done although she did not know the contents of the lease, and she received the rents collected by him. A year after the making of the lease she and her husband conveyed the property to a third party, who also regularly received the rent. Six months later the grantee reconveyed the premises to his grantors and the wife continued to receive the rent as before the conveyance for a short time, when she began proceedings to dispossess the tenant, whom she sought to have regarded as either a tenant at will or from month to month. The lease itself complied with the requirements of the law in form and substance, and, as the court said, it simply lacked the written authority of the husband to make it. That fact, however, did not deprive the wife of the power to ratify and confirm the agreement or of subsequent grantees to accept it and make the tenant attorn to them for the payment of the rent. When so ratified, the lease became valid and effectual for every purpose.⁴⁶ There was ample evidence of

Braythwayte v. Hitchcock, 10 Mees. & W. 497, 2 D. (N. S.) 444, 12 L. J. Ex. 38, 6 Jur. 976; Anderson v. Prindle, 23 Wend. (N. Y.) 616; Barlow v. Wainwright, 22 Vt. 88, 52 Am. Dec. 79; Wood, Stat. Frauds, §§ 19-22.

⁴⁴ Evans v. Winona Lumber Co.,

30 Minn. 515, 16 N. W. 404; Koplitz v. Gustavus, 48 Wis. 48, 3 N. W. 754.

⁴⁵ In re Di Marti, 129 N. Y. Supp. 81.

⁴⁶ United Realty etc. Co. v. Stoothoff, 133 App. Div. 245, 117 N. Y. Supp. 483.

ratification, and on the receipt of the rent she was put on inquiry as to what her husband had done, and the responsibility was on her twofold—first, as owner, and, second, as grantee from the third party. Although a contract beyond the time prescribed is declared void by statute, yet if the tenant enters under such void contract and occupies the premises, he may be compelled to pay for the use and occupation.⁴⁷ When the tenancy from year to year has been established by proof of this character, evidence may be given of *the terms of the original parol contract*, so far as they are consistent with the new agreement which the law has created;⁴⁸ for example, covenants as to the time of paying rent and the amount of rent,⁴⁹ and those as to making repairs,⁵⁰ may be proved. When the parties have apparently acted upon the terms of the invalid lease, it may be fairly presumed, in the absence of other testimony, that they expect such agreements to continue in the new contract implied by law.⁵¹ So in an action for *use and occupation*, where the tenancy begins under an agreement declared void by statute, such original agreement may be proved merely for the purpose of showing the rental value as recognized by the parties.⁵² When a valid parol lease is shown, it is inadmissible to prove by parol a *collateral agreement to extend* such lease beyond the period limited by the statute, since this would be allowing the very object of the statute to be thwarted by indirection.⁵³ The question, too, has arisen as to the effect of a covenant

⁴⁷ Thomas v. Nelson, 69 N. Y. 118, and cases cited.

⁴⁸ Evans v. Winona Lumber Co., 30 Minn. 515, 16 N. W. 404; Crawford v. Jones, 54 Ala. 459; Reed, Stat. Frauds, § 807, and cases cited.

⁴⁹ Doe v. Bell, 5 Term Rep. 471, 101 Eng. Reprint, 265; Maverick v. Donaldson, 1 Ala. 535; Morehead v. Watkyns, 5 B. Mon. (Ky.) 228; Barlow v. Wainwright, 22 Vt. 88, 52 Am. Dec. 79; De Medina v. Polson, Holt, N. P. 47; Norris v. Morrill, 40

N. H. 395; Cunningham v. Roush, 157 Mo. 336, 57 S. W. 769.

⁵⁰ Beale v. Sanders, 3 Bing. N. C. 850, 132 Eng. Reprint, 638; Richardson v. Gifford, 1 Ad. & E. 52, 110 Eng. Reprint, 1127.

⁵¹ Dorrell v. Stephens, 4 McCord (S. C.), 59.

⁵² De Medina v. Polson, Holt N. P. 47; Morehead v. Watkyns, 5 B. Mon. (Ky.) 228.

⁵³ Hand v. Osgood, 107 Mich. 55, 61 Am. St. Rep. 312, 39 L. B. A.

for renewal in a written lease, where the lessee has given notice of his intention to renew but no deed of renewal has been executed, though the lessee has continued in possession and paying rent. When a written lease provided that if it were not renewed, the lessor should pay the lessee a sum in part payment for improvements, and at the expiration of the term the lessee continued in possession and paid rent for a number of years, he was held estopped from denying that the lease had been renewed.⁵⁴ When a written lease contained a provision that the lessee should have the option of extending the term for seven years and the lessee verbally notified the lessor of his intention to exercise the option, and the lessor assented and accepted rent thereafter, the tenant was held to be entitled to the extension, and could not be regarded as a tenant holding over.⁵⁵

§ 415 (418). Proof of surrender or assignment of interests in land.—By the third section of the statute of frauds it was provided that no leases, estates or interests either of freeholders or terms of years, or any uncertain interest in lands, tenements or hereditaments should be assigned, granted or surrendered, unless it be by deed or note signed by the party so assigning, granting or surrendering the same, by their agents thereunto lawfully authorized by writing or by act and operation of law.⁵⁶ It will be observed that the leases mentioned in this statute are not limited to three year leases. In England the courts have followed the exact language of the statute, and have held that no leases can be surrendered except in the manner provided by the statute; and the statute has been held to *exclude* alike *parol assignments* and *parol surrenders* of mere leases *from year to year*, though such leases have been

379, 64 N. W. 867; *Rosen v. Rose*,
13 Misc. Rep. 565, 34 N. Y. Supp.
467.

⁵⁴ *Wallace v. Dorris*, 218 Pa. 534,
67 Atl. 858.

⁵⁵ *Remm v. Landon*, 43 Ind. App.
91, 86 N. E. 973.

⁵⁶ See § 412, *ante*, synopsis of statute.

created by verbal agreement.⁵⁷ In this country, however, although there is some conflict of opinion upon this subject, the view has generally prevailed that the first three sections should be construed together, and that the language of the third section should be liberally construed, and in view of the language contained in the other sections. And it has been urged with much force that the act could not have been intended to require that contracts should be dissolved by writing which might be created by parol.⁵⁸ The statute prescribes *no particular form of words* as necessary to constitute a surrender; hence any writing signed by the tenant, which is accepted or not objected to by the other party, and which clearly evinces the intention to terminate the lease, is sufficient.⁵⁹ The assignment or surrender of other interests in land are governed by the same section. Thus easements cannot be assigned except by writing,⁶⁰ nor in general be surrendered by verbal agreement. They may, however, be extinguished, renounced or modified by a parol license granted by the owner of the dominant tenement and executed by the owner of the servient tenement.⁶¹ An oral agreement by one who negotiates a sale of real estate to pay back at the purchaser's option the money advanced and assume the contract is void under the statute.⁶² As to the assignment

⁵⁷ Botting v. Martin, 1 Camp. 319; Mollett v. Brayne, 2 Camp. 103, 11 R. R. 676; Thompson v. Wilson, 2 Stark. 378, 20 R. R. 696; Doe v. Wells, 10 Ad. & E. 435, 113 Eng. Reprint, 162.

⁵⁸ Strong v. Crosby, 21 Conn. 398; McKinney v. Reader, 7 Watts (Pa.), 123; Greider's Appeal, 5 Pa. 422; Swanzy v. Moore, 22 Ill. 63, 74 Am. Dec. 134; Webster v. Nichols, 104 Ill. 160; Ross v. Schneider, 30 Ind. 423.

⁵⁹ Greider's Appeal, 5 Pa. 422; Strong v. Crosby, 21 Conn. 398; Shepard v. Spaulding, 4 Met. (Mass.) 416; Reed, Stat. Frauds, § 780. As to oral

assignments of leases, see Tyler Commercial College v. Stapleton, 33 Okl. 305, 42 L. R. A., N. S., 162, 125 Pac. 443.

⁶⁰ Thompson v. Gregory, 4 Johns. (N. Y.) 81, 4 Am. Dec. 255; Dyer v. Sanford, 9 Met. (Mass.) 395, 43 Am. Dec. 399.

⁶¹ Dyer v. Sanford, *supra*. See note to Hills v. Miller, 24 Am. Dec. 222. See, also, Morse v. Copeland, 2 Gray (Mass.), 302; Curtis v. Noonan, 10 Allen (Mass.), 406.

⁶² Esslinger v. Pascoe, 129 Iowa, 86, 3 L. R. A., N. S., 147, 105 N. W. 362, to which is appended a useful note on the subject.

of vendor's and vendee's interests under a contract for sale of land there appears to be a conflict.⁶³ The rule is equally pronounced that there can be no exchange of real estate except it is evidenced by writing.⁶⁴ Where coterminous land owners, knowing that a portion of the land of each was separated from the main body of the tract to which it belonged by a county road, orally agreed to exchange the parcels so separated, and built fences and went into possession of the pieces as if the exchanges had been effected by proper conveyances, such agreement had no effect as an agreement for the location of a disputed boundary line, and did not operate to effect the exchange.⁶⁵ As to the doctrine of equitable mortgages created by a deposit of deeds, there is a straight conflict in the various jurisdictions—some following the English rule endowing them with validity and others rejecting it.⁶⁶

§ 416 (419). Surrender by operation of law.—Under the statute there may be a surrender of a lease “by act or operation of law.” This language in the act has given rise to much discussion. It has been said to apply “to cases where the owner of a particular estate has been a party to some act, the validity of which he is by law afterward estopped from disputing, and which would not be

⁶³ Further as to these, however, and as to the rights of mortgagor and mortgagee, of dower claimants, and the assignment of equitable claims, the scope of this work precludes treatment.

⁶⁴ *Clark v. Graham*, 6 Wheat. (U. S.) 577, 5 L. Ed. 334. A contract for an exchange is as much within the statute as a contract for sale: *Purcell v. Coleman (Miner)*, 4 Wall. (U. S.) 513, 18 L. Ed. 435.

⁶⁵ *Mann v. Mann*, 152 Cal. 23, 91 Pac. 994. The rule is otherwise, however, if the agreement is for the purpose of settling some uncertainty or dispute as to the real boundary,

and where such proprietors have acquiesced in a new line for a period equal to the statute of limitations: *Lewis v. Ogram*, 149 Cal. 505, 117 Am. St. Rep. 151, 10 L. R. A., N. S., 610, 87 Pac. 60; *Amburgy v. Burt & Brabb Lumber Co.*, 121 Ky. 580, 89 S. W. 680. See, also, *Garrick v. Garrick*, 43 Ind. App. 585, 87 N. E. 696, 88 N. E. 104; *Porter v. Hill*, 9 Mass. 34, 6 Am. Dec. 22, as to partition and exchange; *Gordon v. Simmons*, 136 Ky. 273, Ann. Cas. 1912A, 305, 124 S. W. 306, as to boundaries.

⁶⁶ See *Browne*, Stat. of Frauds, §§ 62-64.

valid, if his particular estate had continued to exist. There the law treats the doing of such act as amounting to a surrender. Thus, if a lessee for years accept a new lease from his lessor, he is estopped from saying that his lessor had not power to make the new lease; and, as the lessor could not do this until the prior lease had been surrendered, the law says that the acceptance of such new lease is of itself a surrender of the former."⁶⁷ On the same principle a surrender takes place after such acts on the part of the lessee as clearly give rise to the inference that he intends to terminate the former estate.⁶⁸ The most common illustration of such acts is where the *lessee accepts a new lease* during the continuance of the old one, and thereby shows his own intention, and at the same time recognizes the power of the lessor to make a valid lease.⁶⁹ A surrender will not be implied against the intent of the parties as manifested by their acts; and when such intention cannot be presumed without doing violence to common sense, the presumption will not be supported.⁷⁰ So it is proof of the surrender, if the lessee accepts a new lease from the assignee of the lessor.⁷¹ To constitute proof of surrender, the new lease accepted in the place of the old one must be a *valid lease*.⁷² As stated in a New York case, "the farthest that our courts have gone is to hold that, to effect a surrender of an existing lease, by

⁶⁷ *Lyon v. Reed*, 13 Mees. & W. 306, quoted in *Tayl. Ev.*, 10th ed., § 1005.

⁶⁸ For an instructive discussion on this subject, see *Larsh v. Boyle*, 36 Colo. 18, 86 Pac. 1000.

⁶⁹ *Hoag v. Carpenter*, 18 Ill. App. 555; *Van Rensselaer v. Penniman*, 6 Wend. (N. Y.) 569; *Wilson v. Sewell*, 4 Burr. 1975, 98 Eng. Reprint, 29; *Donnellan v. Reed*, 3 Barn. & Ad. 899, 110 Eng. Reprint, 330; *Davison v. Stanley*, 4 Burr. 2210, 98 Eng. Reprint, 152. The rule is the same where the landlord takes possession

himself with assent of the tenant: *Talbot v. Whipple*, 14 Allen (Mass.), 177; *Shahan v. Herzberg*, 73 Ala. 59; *Porter v. Noyes*, 47 Mich. 55, 10 N. W. 77.

⁷⁰ *Coe v. Hobby*, 72 N. Y. 141, 28 Am. Rep. 120.

⁷¹ *Donkersley v. Levy*, 38 Mich. 54.

⁷² *Doe v. Bridges*, 1 Barn. & Ad. 847, 109 Eng. Reprint, 1001; *Schieffelin v. Carpenter*, 15 Wend. (N. Y.) 400; *Smith v. Niver*, 2 Barb. (N. Y.) 180; *Watt v. Maydewell*, Hut. 104, 123 Eng. Reprint, 1132.

operation of law, there must be a new lease, valid in law to pass an interest according to the contract and intention of the parties."⁷³ It is not necessary, however, that the interest acquired by the new arrangement be of *equal value* with the lease surrendered. Thus, if the tenant accepts from the landlord a valid lease for a shorter term, it operates as a surrender.⁷⁴ Where by agreement between all the partners a new member is admitted to the firm, he acquires an interest in the partnership property by operation of law; and such transfer is not within the statute of frauds. In such case a lessor to the firm cannot object to renew the lease on the ground that the parties are not the original lessees.⁷⁵

§ 417 (420). Cancellation or redelivery of instruments creating interests in land.—It is a rule, too well settled to require discussion, that the cancellation, destruction or redelivery of the instrument which created an estate in land does not operate to divest the grantee of his estate or to surrender it.⁷⁶ Even though the parties fully consent to the transaction, this does not change the rules of law which provide the modes in which estates in land may be conveyed and surrendered. Although the cancellation, redelivery or alteration of the instrument of conveyance is not a surrender within the meaning of the statute, its practical operation may be such as to deprive the grantee of the means of proving his title, since he cannot be heard to prove by parol testimony the facts necessary to maintain

⁷³ *Coe v. Hobby*, 72 N. Y. 141, 28 Am. Rep. 120.

⁷⁴ *Van Rensselaer v. Penniman*, 6 Wend. 569; *Flagg v. Dow*, 99 Mass. 18.

⁷⁵ *Gordon v. Pankonin*, 83 Neb. 204, 131 Am. St. Rep. 629, 119 N. W. 449.

⁷⁶ *Mallory v. Stodder*, 6 Ala. 801; *Gilbert v. Bulkely*, 5 Conn. 262, 13 Am. Dec. 57; *Smith v. Phelps*, 32

Iowa, 537; *Nason v. Grant*, 21 Me. 160; *Sherburne v. Fuller*, 5 Mass. 133; *Warren v. Tobey*, 32 Mich. 45; *Wilson v. Hill*, 13 N. J. Eq. 143; *Rowan v. Lytle*, 11 Wend. (N. Y.) 616; *Rifener v. Bowman*, 53 Pa. 313; *Cornwell v. Spence*, Harp. Eq. (S. C.) 258; *Parker v. Kane*, 4 Wis. 1, 65 Am. Dec. 283; *Browne*, Stat. Frauds, 5th ed., § 58; *Reed*, Stat. Frauds, § 782; § 557, *post*.

his title.⁷⁷ The instruments may become invalid, so that no action can be maintained upon the covenants contained in them, and yet the titles which have been acquired under them may remain unaffected. When a person has become the legal owner of real estate, he cannot transfer it or part with his title, except in some of the forms prescribed by law. The grantee may destroy his deed, but not his estate. He may deprive himself of his remedies upon the covenants, but not of his right to hold the property.⁷⁸ The rule seems to prevail in some states that when the grantee of a deed, not recorded, voluntarily surrenders or cancels it, and the grantor executes a new deed to a purchaser in good faith, the latter obtains the legal title.⁷⁹ These cases rest on the principle that, since the grantee has put it beyond his power to produce his deed, the law will not allow him to introduce secondary evidence in violation of his undertaking and to defeat the fair intention of the parties, just as when a deed has been canceled with the intention of revesting the title in the grantor, it might have that effect by way of estoppel. "Delivering the deed back into the hands of the grantor, with the intention of revesting the title, will have the same effect on the same principle. This puts it in the power of the grantor to cancel or destroy the deed, or what is in effect the same thing—to detain it from the grantee. In neither case can the grantee produce the deed, and the law will estop him in both cases to give secondary evidence to defeat the intended operation of his act in returning or annulling the deed."⁸⁰ One cannot lose his vested title to land by mere

⁷⁷ Chesley v. Frost, 1 N. H. 145; Barrett v. Thorndike, 1 Greenl. (Me.) 73; Jackson v. Gould, 7 Wend. (N. Y.) 364.

⁷⁸ Chessman v. Whittemore, 23 Pick. (Mass.) 231.

⁷⁹ Holbrook v. Tirrell, 9 Pick. (Mass.) 105; Nason v. Grant, 21 Me. 160; Mussey v. Holt, 24 N. H. 248, 55 Am. Dec. 234; Mallory v.

Stodder, 6 Ala. 801; Cravener v. Bowser, 4 Pa. 259; Gilbert v. Bulkley, 5 Conn. 262, 13 Am. Dec. 57; Holmes v. Trout, 7 Pet. (U. S.) 171, 8 L. Ed. 647; Raynor v. Wilson, 6 Hill (N. Y.), 469; Corliss v. Corliss, 8 Vt. 373; Chase v. Hinckley, 74 Me. 181.

⁸⁰ Mussey v. Holt, 24 N. H. 248, 55 Am. Dec. 234. An agreement to

oral admission that it belongs to another. It has long been settled that oral disclaimer of a vested freehold in land can only be by deed or in a court of record.⁸¹

§ 418 (421). Trusts—How proved—Need not be created by writing.—In discussing those provisions of the statute relating to trusts, it must be noted that they have not been adopted by all the states, and in some of those that have adopted them there are variations from the original; so that it behooves the practitioner in dealing with trust matters to examine the local provisions, if any, of the state in which lies the subject matter of his inquiry. By the seventh and eighth sections of the statute of frauds, it is provided that declarations or creations of trusts or confidences in lands shall be manifested and proved by some writing signed by the party who is by law enabled to declare such trust, or by his last will in writing; otherwise they shall be void. The exception is made, however, as to trusts or confidences resulting by the implication or construction of law. In considering the class of express trusts referred to in this statute, it is to be observed that the trust need not be *created* by writing. It is a compliance with the terms of the statute if the trust be *manifested and proved* by writing, and, if so proved, it may be created by parol; and it is sufficient to show the existence of the trust by written evidence.⁸² The statute of frauds,

cancel, or an agreement to return, is not sufficient; it is no better than an agreement to convey, and leaves the deed in the hands of the grantee, so that the principle of estoppel cannot be applied: See, also, *Faulks v. Burns*, 2 N. J. Eq. 250; *Dycus v. Hart*, 2 Tex. Civ. App. 354, 21 S. W. 299.

⁸¹ *Crawford v. Workman*, 64 W. Va. 19, 61 S. E. 322. See, also, *Craig v. Craig*, 90 Ind. 215 (rescission of marriage settlement by parol); *Max-*

well v. Wallace, 45 N. C. 251 (oral rescission of deed of conveyance).

⁸² *Tillman v. Kifer*, 166 Ala. 403, 52 South. 309; *Salysers v. Smith*, 67 Ark. 526, 55 S. W. 936; *Smith v. Mason*, 122 Cal. 426, 55 Pac. 143; *Von Trotha v. Bamberger*, 15 Colo. 1, 24 Pac. 883; *Smith v. Williams*, 89 Ga. 9, 32 Am. St. Rep. 67, 15 S. E. 130; *Miller v. Cotten*, 5 Ga. 341; *Horne v. Ingraham*, 125 Ill. 198, 16 N. E. 868; *Orth v. Orth*, 145 Ind. 184, 57 Am. St. Rep. 185, 32 L. R.

requiring express trusts to be manifested or proven by writing, was enacted for the benefit of those claiming title under deeds or other instruments absolute on their face, and not for the benefit of those seeking to defeat the operation of such deeds by showing that they were made upon trusts not appearing upon their face. In all cases, where a deed or instrument of conveyance is absolute on its face, and the grantor or his assignee seeks to defeat its operation by showing that the deed, though absolute in form, was, in fact, executed upon certain express trusts, the grantee may invoke the protection of the statute by requiring proof of these alleged trusts to be made in writing.⁸³ The writing need not be in the form of an agreement between parties; and *any writing subscribed by the party* will be sufficient, if it contain the requisite evidence.⁸⁴

A. 298, 42 N. E. 277, 44 N. E. 17; Hall v. Hall, 132 Iowa, 664, 110 N. W. 148; Ingham v. Burnell, 31 Kan. 333, 2 Pac. 804; Wolf v. Corby, 30 Md. 356; Evans v. Chism, 18 Me. 220; Slack v. Black, 109 Mass. 496; Urann v. Coates, 109 Mass. 581; Sheldon v. Carr, 139 Mich. 654, 103 N. W. 181; Ryan v. Williams, 92 Minn. 506, 100 N. W. 380; Gibson v. Foote, 40 Miss. 788; Patterson v. Patterson, 200 Mo. 335, 98 S. W. 613; Chowen v. Phelps, 26 Mont. 524, 69 Pac. 54; Pollard v. McKenney, 69 Neb. 742, 96 N. W. 679, 101 N. W. 9; Eaton v. Eaton, 35 N. J. L. 290; McClellan v. Grant, 83 App. Div. 599, 82 N. Y. Supp. 208; Cardiff v. Marquis, 17 N. D. 110, 114 N. W. 1088; McCloskey v. McCloskey, 205 Pa. 491, 55 Atl. 180; Skeen v. Marriott, 22 Utah, 73, 61 Pac. 296; Fairchild v. Rasdall, 9 Wis. 379; Jones v. Van Doren, 18 Fed. 619; Leman v. Whitely, 6 L. J. Ch., O. S., 152, 4 Russ. 423, 4 Eng. Ch. 423, 38 Eng. Re-

print, 864. See James v. Smith (1891), 1 Ch. 387; Rochefoucauld v. Boustead (1897), 1 Ch. 196. See, also, the Canadian cases: Page v. Chambers, 1 R. & G. 232; Hull v. Allan, 10 W. R. 151, 782; Wilde v. Wilde, 20 Grant Ch. (U. C.) 521.

⁸³ Allen v. Woodruff, 96 Ill. 11.

⁸⁴ The statute does not require that the writing should be *inter partes*; but within the letter and spirit of the law, any writing subscribed by the party will be sufficient if it contain the requisite evidence: Cook v. Barr, 44 N. Y. 156. In Hutchinson v. Tindall, 3 N. J. Eq. 357, the court said: "A declaration of trust requires no formality, so that it be in writing and have sufficient certainty to be ascertained and executed. It may be in a letter, or upon a memorandum, and it is not material whether the writing be made *as* evidence of the trust or *not*."

Thus, letters,⁸⁵ promissory notes,⁸⁶ recitals in deeds or other agreements,⁸⁷ statements addressed to third persons,⁸⁸ memoranda in books of the trustee,⁸⁹ receipts,⁹⁰ the answer or other pleading of the alleged trustee in the suit to enforce the trust or in an action with another party,⁹¹ and other informal writings have been held sufficient to satisfy the statute. It is not necessary that the writing should have been prepared *for the purpose* of declaring a trust, or intended for the use of the *cestui que trust*. The trustee may be held to the legal effect of the writings, if the trust is therein disclosed.⁹²

§ 419 (422). **The trust to be proved by writing.**—Although the authorities fully justify the rule that the proof of the trust may consist of informal writings, and that no particular form of expression is necessary for that purpose, yet the writing or writings must clearly “manifest and prove” that a trust relation exists, as well as the terms of the trust.⁹³ It is the general rule that the trust, and the whole trust, must be proved by the writing. In the

⁸⁵ Day v. Roth, 18 N. Y. 448; Steere v. Steere, 5 Johns. Ch. (N. Y.) 1, 9 Am. Dec. 256; Maccubbin v. Cromwell, 7 Gill & J. (Md.) 157; Forster v. Hale, 5 Ves. 308, 31 Eng. Reprint, 603; Crook v. Brooking, 2 Vern. 50, 23 Eng. Reprint, 643.

⁸⁶ Murray v. Glasse, 23 L. J. (Ch.) 126, 21 Eq. R. 541, 17 Jur. 816.

⁸⁷ Wolfe v. Frost, 4 Sand. Ch. (N. Y.) 72; Hutchinson v. Tindall, *supra*; Wright v. Douglass, 7 N. Y. 564.

⁸⁸ Morton v. Tewart, 2 Younge & C. 67, 63 Eng. Reprint, 29.

⁸⁹ Keller v. Kunkel, 46 Md. 565; Lewin, Trusts, 11th ed., c. 5, § 2, p. 56. In Homer v. Homer, 107 Mass. 82, the memorandum in the books of the alleged trustee could not be said to indicate any trust, but was evidence rather of a contract to pay the plaintiff his account for services rendered.

⁹⁰ Miller v. Antle, 2 Bush (Ky.), 407, 92 Am. Dec. 495.

⁹¹ Cook v. Barr, 44 N. Y. 156; Maccubbin v. Cromwell, 7 Gill & J. (Md.) 157. See, also, Jones v. Slubey, 5 Har. & J. (Md.) 372.

⁹² Forster v. Hale, 5 Ves. 308, 31 Eng. Reprint, 603; Roberts, Frauds, 102.

⁹³ Kingsbury v. Burnside, 58 Ill. 310, 11 Am. Rep. 67; McClellan v. McClellan, 65 Me. 500; Olliffe v. Wells, 130 Mass. 221; Cornelius v. Smith, 55 Mo. 528; Throckmorton v. O'Reilly (N. J. Ch.), 55 Atl. 56; Eagle Min. etc. Co. v. Hamilton, 14 N. M. 271, 91 Pac. 718; Steere v. Steere, 5 Johns. Ch. 1, 9 Am. Dec. 256; Miller v. Stokely, 5 Ohio St. 194; Ranney v. Byers, 219 Pa. 332, 123 Am. St. Rep. 660, 68 Atl. 971; Brown v. Brown, 1 Strob. Eq. (S. C.) 363; Mathews v. Massey, 4 Baxt.

construction of any instrument the purpose and intention of the parties making the contract must control. That purpose and intent is to be arrived at from the terms used in the instrument, if it is plain and unambiguous.⁹⁴ This rule is modified to the extent that, if the existence of a trust is proved by writing, *parol evidence* may be received to explain and complete the trust, if it is *imperfectly expressed* in the writing.⁹⁵ But such testimony has been refused to furnish evidence of a trust where it is not manifested and proved in the written evidence. Thus in a New York case, although the parol evidence which had been admitted, as well as the acts of the parties, clearly showed the alleged trust, it was held that they could not be resorted to to help out the proof furnished by the writings. But in that case the writings contained no reference to a trust.⁹⁶ In another well-known case⁹⁷ the plaintiff had conveyed to his father, by deeds of lease and release, a certain estate for the expressed consideration of four hundred pounds paid. The bill alleged that the estate was thus conveyed by the advice of an attorney, so that the

(Tenn.) 450; *Pinney v. Fellows*, 15 Vt. 525; *Randall v. Morgan*, 12 Ves. Jr. 74, 8 Rev. Rep. 289, 33 Eng. Reprint, 26; *Forster v. Hale*, 5 Ves. 308, 31 Eng. Reprint, 603.

⁹⁴ *McNew v. Vert*, 43 Ind. App. 83, 86 N. E. 969.

⁹⁵ *Houston v. Bryan*, 78 Ga. 181, 6 Am. St. Rep. 252, 1 S. E. 252; *Kingsbury v. Burnside*, 58 Ill. 310, 11 Am. Rep. 67; *Cagney v. O'Brien*, 83 Ill. 72; *McNew v. Vert*, 43 Ind. App. 83, 86 N. E. 969; *Collins v. Phillips*, 91 Iowa, 210, 59 N. W. 40; *Hinckley v. Hinckley*, 79 Me. 320, 9 Atl. 897; *Eaton v. Cook*, 25 N. J. Eq. 55; *Bliss v. Fosdick*, 24 N. Y. Supp. 939; *McCandless v. Warner*, 26 W. Va. 754; *Cripps v. Jee*, 4 Brown Ch. 472, 29 Eng. Reprint, 994; *Pring v. Pring*, 2 Vern. 99, 23 Eng. Reprint, 673 (where the will making the declara-

tion of trust did not mention for whom, but the confession of the executors and other proof was used to show what was meant).

⁹⁶ *Cook v. Barr*, 44 N. Y. 156. The court said: "I, therefore, entertain no doubt that the alleged trust in this case could be proved by the answer of the defendant, which was given in evidence, if it was sufficiently manifested in the answer. But there is the difficulty. . . . It does not mention or admit any trust whatever. . . . All the allegations in the answer are perfectly consistent with his absolute ownership of the land, and no trust in the land is properly or necessarily inferable from them."

⁹⁷ *Leman v. Whitely*, 4 Russ. 423, 38 Eng. Reprint, 864.

father could raise money by a mortgage of it for the use of the son; that no part of the consideration named in the deed was paid; that the father died without having raised the money or made any conveyance, and that he devised all his real estate by general deeds. The prayer of the bill was that the devisees of the father might be decreed to be trustees of the plaintiff. The facts alleged in the bill were admitted or established by parol testimony, and yet the master of the rolls held that the trust could not be established, and that "to give effect to the trust would be in truth to repeal the statute of frauds." There appears to be some hesitation about the acceptance of the general rule for the explanation of the instrument containing an imperfectly expressed trust. To a certain extent this is attributable to strong expressions of some of the leading text-writers.⁹⁸ The better opinion is that, where there is any written evidence showing that the person apparently entitled is not really so, parol evidence may be admitted

⁹⁸ In 1 Hilliard on Real Property, 4th ed., 425, it is said: "A trust cannot be established by parol evidence, even though this goes to confirm other written evidence." In 1 Greenleaf's Cruise on Real Property, 356, in note, it is said that "the evidence must all be in writing without resorting to parol evidence, even to connect different writings together." Greenleaf, in his Work on Evidence (vol. 1, § 268), says that verbal testimony is not "admissible to supply any defects or omissions in the written evidence; for the policy of the law is to prevent fraud and perjury by taking all the enumerated transactions entirely out of the reach of any verbal testimony whatever." But in 3 Greenl. Ev., § 365, p. 370, referring to *Podmore v. Gunning*, 5 Sim. 485, 58 Eng. Reprint, 420, 7 Sim. 644, 58 Eng. Reprint, 985, we find: "And, in some cases of

trusts imperfectly expressed, parol evidence has been held admissible in explanation of the intent. Thus, when a testator devised his estate to his wife, 'having a perfect confidence that she will act up to those views which I have communicated to her in the ultimate disposal of my property after her decease,' the wife afterward died intestate, and a bill was filed by his two natural children for relief against his heir and next of kin, and her heir and administrator, alleging that the testator, at the time of making his will, desired his wife to give the whole of his estate, after her death, to the plaintiffs, and that she promised to do so, parol evidence was admitted in proof of this allegation." See, also, *Campbell v. Taul*, 3 Yerg. (Tenn.) 548; *Miller v. Cotton*, 5 Ga. 341; *Robson v. Harwell*, 6 Ga. 589.

to show the trust under which he actually holds the estate.⁹⁹ The language of the Illinois court in a well-known case¹⁰⁰ may be taken as representing the law. "From the best investigation we have been able to give to the question, and the authorities which bear upon it, we have arrived at the conclusion that, inasmuch as the written evidence clearly establishes the existence of a trust, parol evidence of the words referred to in the letter is admissible for the purpose of describing or defining what was meant by the latter, and as showing the truth of the transaction. To search for artificial rules by which to exclude such evidence, beyond the just demands of the statute of frauds, would be an attempted reversal of some of the most favorite maxims of courts of equity; would be the exercise of astuteness in the ways of defeating the plain intention of the parties, and aiding in the consummation of a fraud; for when a trust is once established by legal evidence, equity regards every attempt by the trustee to appropriate the trust property to himself, to the exclusion of the rights of the *cestui que trust*, as a fraud contemplated upon the latter." It is conceded in those cases where parol evidence is admitted to explain or help out the writing that it should be received with great caution.¹ The question has sometimes been raised *whether parol evidence is admissible to contradict* the inference drawn from the writings relied on to prove the trust. In an action of this character Chancellor Kent expressed the following view: "If the written proof was clear and positive, it could not be rebutted by parol proof; but considering the loose and ambiguous nature of it, I am inclined to think the parol evidence is competent in support of the sheriff's deed, and to explain the obscurity of the case, by showing what was the understanding of all the parties concerned."²

⁹⁹ Browne, Stat. Frauds, § 111; Hill on Trustees, 62.

¹⁰⁰ Kingsbury v. Burnside, 58 Ill. 310, 11 Am. Rep. 67.

¹ Sayre v. Fredericks, 16 N. J. Eq.

205; Jackson v. Cary, 16 Johns. (N. Y.) 302. See, also, Mead v. Randolph, 8 Tex. 191.

² Steere v. Steere, 5 Johns. Ch. (N. Y.) 1, 9 Am. Dec. 263.

The proof of the trust is not necessarily confined to any single writing but *may consist of several papers*. Nor is it necessary, in such case, that all of the writings be signed, provided they are so linked together in meaning as to be understood without the aid of parol evidence.³ It is not necessary that the writing relied upon to prove the trust should be contemporaneous with the creation of the trust. On the contrary, the *declaration of trust* may be long *subsequent to such creation*.⁴ The statute under consideration does not purport to relate to personal property; and its operation is *confined to real estate*.⁵

§ 420 (423). **Exception as to resulting trusts.**—It will be noticed that a large class of trusts, those which arise from implication of law and are commonly called resulting trusts, are excepted by the terms of the act, and are valid without a writing to support them.⁶ The familiar classification of these trusts is that of Lord Hardwicke, as follows: “*First*, where an estate is purchased in the name

³ Forster v. Hale, 5 Ves. 308, 31 Eng. Reprint, 603.

⁴ Barrel v. Joy, 16 Mass. 221; Forster v. Hale, 5 Ves. 308, 31 Eng. Reprint, 603.

⁵ Kimball v. Morton, 5 N. J. Eq. 26, 53 Am. Dec. 621; Roberts, Frauds, 94.

⁶ Hughes v. Letcher, 168 Ala. 314, 52 South. 914; De Mallagh v. De Mallagh, 77 Cal. 126, 19 Pac. 256; McCartney v. Fletcher, 11 App. Cas. (D. C.) 1; Caruthers v. Williams, 21 Fla. 485; Chastain v. Smith, 30 Ga. 96; Pittock v. Pittock, 15 Idaho, 426, 93 Pac. 719; Brennaman v. Schell, 212 Ill. 356, 72 N. E. 412; Prow v. Prow, 133 Ind. 340, 32 N. E. 1121; Culp v. Price, 107 Iowa, 133, 77 N. W. 848; Lyons v. Berlau, 67 Kan. 426, 73 Pac. 52; Stark v. Cannady, 3 Litt. (Ky.) 399, 14 Am. Dec. 76; Kelley v. Hill, 50 Me. 470; Mutual Fire Ins. Co. v. Deale, 18 Md. 26, 79

Am. Dec. 673; Peabody v. Tarbell, 2 Cush. (Mass.) 226; Robinson v. Leflore, 59 Miss. 148; McMurray v. McMurray, 180 Mo. 526, 79 S. W. 701; Lynch v. Herrig, 32 Mont. 267, 80 Pac. 240; Levy v. Ryland, 32 Nev. 460, 109 Pac. 905; Crowley v. Crowley, 72 N. H. 241, 56 Atl. 190; Baker v. Baker, 75 N. J. Eq. 305, 72 Atl. 1000; Helms v. Goodwill, 64 N. Y. 642; Shelton v. Shelton, 52 N. C. 292; Stafford v. Wheeler, 93 Pa. 462; Hudson v. White, 17 R. I. 519, 23 Atl. 57; Sutton v. Whetstone, 21 S. D. 341, 112 N. W. 850; Brotherton v. Weathersby, 73 Tex. 471, 11 S. W. 505; Chambers v. Emery, 13 Utah, 374, 45 Pac. 192; Walraven v. Lock, 2 Pat. & H. (Va.) 547; Borrow v. Borrow, 34 Wash. 684, 76 Pac. 305; Murray v. Sell, 23 W. Va. 475; Whiting v. Gould, 2 Wis. 552; Hendrichs v. Morgan, 167 Fed. 106, 92 C. C. A. 558.

of one person, but the money or consideration is given by another, and a trust in the estate results to him who gave the money or consideration; *Second*, where a trust is declared only as to part, and nothing said as to the rest, and what remains undisposed of results to the heir-at-law; and *Third*, where transactions have been carried on *mala fide*." Where the purchase money for land is paid by one person and the title thereby purchased is conveyed to another person, the law construes such facts as constituting a resulting trust. Such a resulting trust arises by operation of law. It does not spring from the contract or agreement of the parties, but from their acts. The beneficial estate follows the consideration, and attaches to the party from whom the consideration comes. Such trusts may be established by parol evidence, and the statute of frauds has no application to them.⁸ In order to establish the fact that a trust has been created by implication, on the ground that an estate has been purchased in the name of one person, but the money or consideration given by another, it must be clearly proved that such payment has been made,⁹ and it must be proved to have been made by the person who claims the benefit of the trust,¹⁰ and at or

⁷ Lloyd v. Spillet, 2 Atk. 148, 26 Eng. Reprint, 496; Miller v. Cotton, 5 Ga. 341. In the last-named case the court pointed out that Roberts, in his Treatise on Frauds, p. 97, seems to think that the chancellor must have been incorrectly reported, in his classification of resulting trusts. At any rate, he shows conclusively that the cases of constructive trusts, or such as arise by operation of law, are almost innumerable.

⁸ Brenneman v. Schell, 212 Ill. 356, 72 N. E. 412. In Reed v. Reed, 135 Ill. 482, 25 N. E. 1095, it was held that the trust can only arise from the original transaction at the time it takes place, and at no other time, and that the funds must be advanced and

invested at the time the purchase is made.

⁹ Whiting v. Gould, 2 Wis. 552; Olive v. Dougherty, 3 G. Greene (Iowa), 371. See cases in following note.

¹⁰ Bibb v. Hunter, 79 Ala. 351; Cooksey v. Bryan, 2 App. Cas. (D. C.) 557; Crawford v. Manson, 82 Ga. 118, 8 S. E. 54; Marie M. E. Church v. Trinity M. E. Church, 205 Ill. 601, 69 N. E. 73; Clifford v. Farmer, 79 Ind. 529; Cunningham v. Cunningham, 125 Iowa, 681, 101 N. W. 470; Burden v. Sheridan, 36 Iowa, 125, 14 Am. Rep. 505; Rayl v. Rayl, 58 Kan. 585, 50 Pac. 501; Williams v. McClanahan, 3 Met. (Ky.) 420; Herlihy v. Coney, 99 Me. 469, 59 Atl.

before the time of the purchase.¹¹ If the amount is in part payment, the trust arises to that extent in the property purchased,¹² and the same rule applies in the case of joint

952; *Bailey v. Hemenway*, 147 Mass. 326, 17 N. E. 645; *Wright v. King*, Har. Ch. (Mich.) 12; *Eisenberg v. Goldsmith*, 42 Mont. 563, 113 Pac. 1127; *Withnell v. Withnell*, 69 Neb. 605, 96 N. W. 221; *Mason v. Libby*, 54 How. Pr. (N. Y.) 104; *De Roboam v. Schmidtlin*, 50 Or. 388, 92 Pac. 1082; *Lancaster Trust Co. v. Long*, 220 Pa. 499, 69 Atl. 993; *O'Connor v. Vineyard*, 91 Tex. 488, 44 S. W. 485; *Martin v. New York etc. Min. etc. Co.*, 165 Fed. 398, 91 C. C. A. 348.

¹¹ *Hughes v. Letcher*, 168 Ala. 314, 52 South. 914; *Long v. King*, 117 Ala. 423, 23 South. 534; *Preston v. McMillan*, 58 Ala. 84; *Butterfield v. Butterfield*, 79 Ark. 164, 9 Ann. Cas. 248, 95 S. W. 146; *Red Bud Realty Co. v. South*, 96 Ark. 281, 131 S. W. 340; *Roberts v. Ware*, 40 Cal. 634; *Rice v. Dougherty*, 148 Ill. App. 368; *Wells v. Messenger*, 249 Ill. 72, 94 N. E. 87; *Pickler v. Pickler*, 180 Ill. 168, 54 N. E. 311; *Alexander v. Tams*, 13 Ill. 221; *Boyer v. Libey*, 88 Ind. 235; *Graves v. Dugan*, 6 Dana (Ky.), 331; *Buck v. Swasey*, 35 Me. 41, 56 Am. Dec. 681; *Anderson v. Gile*, 107 Me. 325, 78 Atl. 370; *Hays v. Hollis*, 8 Gill (Md.), 357; *Warner v. Morse*, 149 Mass. 400, 21 N. E. 960; *Bernard v. Bougard*, Har. Ch. (Mich.) 130; *Moore v. Moore*, 74 Miss. 59, 19 South. 953; *Brooks v. Shelton*, 54 Miss. 353; *Lynch v. Herrig*, 32 Mont. 267, 80 Pac. 240; *Levy v. Ryland*, 32 Nev. 460, 109 Pac. 905; *Crowley v. Crowley*, 72 N. H. 241, 56 Atl. 190; *Rogers v. Murray*, 3 Paige (N. Y.), 300; *Botsford v. Burr*, 2 Johns. Ch.

(N. Y.) 405; *Jackson v. Moore*, 6 Cow. (N. Y.) 706; *Levy v. Ryland*, 32 Nev. 460, 109 Pac. 905; *De Roboam v. Schmidtlin*, 49 Or. 388, 92 Pac. 1082; *Cross' Appeal*, 97 Pa. 471; *Brown v. Cave*, 23 S. C. 251; *Gee v. Gee*, 2 Sneed (Tenn.), 395; *Erp v. Meachem* (Tex. Civ. App.), 130 S. W. 230; *Smalley v. Paine* (Tex. Civ. App.), 130 S. W. 739; *Cunio v. Burland*, 1 Posey Unrep. Cas. (Tex.) 469; *Pinnock v. Clough*, 16 Vt. 500, 42 Am. Dec. 521; *Coons v. Coons*, 106 Va. 572, 56 S. E. 576; *Bowen v. Hughes*, 5 Wash. 442, 32 Pac. 98; *Moore v. Mustoe*, 47 W. Va. 549, 81 Am. St. Rep. 812, 35 S. E. 871; *Whiting v. Gould*, 2 Wis. 552; *Olcott v. Bynum*, 17 Wall. 44, 21 L. Ed. 570.

¹² *Faylor v. Faylor*, 136 Cal. 92, 68 Pac. 482; *Crawford v. Manson*, 82 Ga. 118, 8 S. E. 54; *Harris v. McIntyre*, 118 Ill. 275, 8 N. E. 182; *Derry v. Derry*, 98 Ind. 319; *Pierce v. Pierce*, 7 B. Mon. (Ky.) 433; *Johnson v. Johnson*, 96 Md. 144, 53 Atl. 792; *Livermore v. Aldrich*, 5 Cush. (Mass.) 431; *Barton v. Magruder*, 69 Miss. 462, 13 South. 839; *Stevenson v. Smith*, 189 Mo. 447, 88 S. W. 86; *Lynch v. Herrig*, 32 Mont. 267, 80 Pac. 240; *Crowley v. Crowley*, 72 N. H. 241, 56 Atl. 190; *Bergstrasser v. Sayre*, 42 N. J. Eq. 488, 10 Atl. 710; *Bryant v. Allen*, 54 App. Div. 500, 67 N. Y. Supp. 89; *Chadwick v. Felt*, 35 Pa. 305; *Bell v. Edwards*, 78 S. C. 490, 59 S. E. 535; *Miller v. Birdsong*, 7 Baxt. (Tenn.) 531; *Clark v. Clark*, 43 Vt. 685; *Miller v. Miller*, 99 Va. 125, 37 S. E. 792; *Currence v. Ward*, 43 W. Va. 367, 27 S. E. 329.

purchasers where the conveyance is taken in the name of one of them.¹³

§ 421 (424). Same, continued.—The following is a statement by a learned writer of some of the other rules of evidence applicable to this subject: “It is obvious that the purchase money must, at the time of payment, be the property of the party paying it and setting up the trust; and the fact that the purchase was made with borrowed money will not establish a resulting trust in favor of the lender. If, however, the party who takes the deed lends or advances the price to the party who claims the benefit of it, before or at the time of the purchase so that the money or property paid actually belongs to the latter, a trust results. But it is otherwise where the party taking the deed pays his own money for it, with an understanding or agreement that it may afterward be repaid, and the land redeemed by him who sets up the trust. If a trustee or executor purchase estates with the trust money, and take a conveyance to himself without the trust appearing on the deed, the estate will be liable to the trusts, if the application of the trust money to the purchase be clearly proved. And so if one partner makes a purchase of land to himself, paying for it with the partnership funds, a trust results to his copartners, though it is otherwise if the

¹³ *Moultrie v. Wright*, 154 Cal. 520, 98 Pac. 257; *Barrows v. Bohan*, 41 Conn. 278; *Van Buskirk v. Van Buskirk*, 148 Ill. 9, 35 N. E. 383; *Hill v. Pollard*, 132 Ind. 588, 32 N. E. 564; *Sullivan v. McLanans*, 2 Iowa, 437, 65 Am. Dec. 780; *Honore v. Hutchings*, 8 Bush (Ky.), 687; *Lawry v. Spaulding*, 73 Me. 31; *Thomas v. Thomas*, 62 Miss. 531; *In re Ferguson*, 124 Mo. 574, 27 S. W. 513; *Baer v. Koenigstein*, 16 Neb. 65, 20 N. W. 104; *Levy v. Ryland*, 32 Nev. 460, 109 Pac. 905; *Hopkinson v. Dumas*, 42 N. H. 296; *Baker v. Baker*, 75 N. J. Eq. 305,

72 Atl. 1000; *Union College v. Wheeler*, 61 N. Y. 88; *Keaton v. Cobb*, 16 N. C. 439, 18 Am. Dec. 595; *Turpie v. Lowe*, 4 Ohio C. C. 599, 2 Ohio Cir. Dec. 729; *Puckett v. Benjamin*, 21 Or. 370, 28 Pac. 65; *Speer v. Burns*, 173 Pa. 77, 34 Atl. 212; *McCammon v. Pettitt*, 3 Sneed (Tenn.), 242; *Hix v. Armstrong*, 101 Tex. 271, 106 S. W. 317; *Rogers v. Donnellan*, 11 Utah, 108, 39 Pac. 494; *Seiler v. Mohn*, 37 W. Va. 507, 16 S. E. 496; *Wray v. Steele*, 2 Ves. & B. 388, 35 Eng. Reprint, 366.

copartnership be not at the time actually existing, but only resting in executory agreement. The fact of payment or of the ownership of the money may always be shown by *parol evidence*, but such evidence must be clear and strong, particularly after a considerable lapse of time, or when the trust is not claimed until after the death of the alleged trustee. The testimony of the trustee is competent for this purpose; but mere evidence, given during his lifetime, of his declarations to that effect seems to be inadmissible, as not being the best existing evidence. So if it appears upon the face of the conveyance, by recital or otherwise, that the purchase was made with the money of a third person, that is clearly sufficient to create a trust in his favor. Evidence is also admissible of the mean circumstances of the pretended owner of the estate, tending to show it impossible that he should have been the purchaser, although that fact alone would not probably be sufficient to establish the trust."¹⁴ The presumption of a resulting trust may be rebutted by parol evidence. If the plaintiff sets up an equity founded on parol proof, it may be rebutted, put down, or discharged by parol proof. There may be parol waiver of even a written contract.¹⁵ Facts and circumstances which satisfactorily contradict the presumption are received as effectual. And the common case of rebutting the presumption of a trust is, when the purchase may be fairly deemed to be made for another, from motives of love and natural affection. The purchase by a parent in the name of the son would ordinarily be considered as intended for the benefit of the latter, so as to rebut the presumption of a resulting trust for the parent. But this last presumption may be rebutted by evi-

¹⁴ Browne, Stat. Frauds, 5th ed., §§ 90, 91, and cases cited. As to the admissibility of parol evidence to explain defective trusts, see article, 29 Cent. L. Jour. 269. As to the effect of the statute of frauds on an agreement to hold lands purchased

on execution for defendant, see note to Combs v. Little, 40 Am. Dec. 210.

¹⁵ 2 Story's Eq., § 770, a; Price v. Dyer, 17 Ves. 356, 34 Eng. Reprint, 137; Botsford v. Burr, 2 Johns. Ch. (N. Y.) 405.

dence, manifesting a clear intention that the son shall take as a trustee. The cases all show manifestly a determination in courts not to enlarge, by construction or analogy, the doctrine, in allowing the introduction of parol evidence to contradict the language of the deed, and the answer of the alleged trustee in order to raise a resulting trust; but to confine the party presenting such a claim rigidly within the limits which practice has established. And no case has been found where a resulting trust has been held to arise upon payments made in common by the one asserting his claim and the grantee in the deed, wherein the grantor acknowledges the receipt of the consideration from him alone, when the amount belonging to one and the other is uncertain, and unknown even to those who make the payments; and no satisfactory evidence is offered exhibiting the portion which was really the property of each. The trust springs from a presumption of law, because the alleged *cestui que trust has paid the money*. Such presumption must be attended with no uncertainty. The whole foundation is the payment, and this must be clearly established. The principle has its origin in the natural presumption, in the absence of all rebutting circumstances, that he who supplies the money means the purchase to be for his own benefit, rather than that of another; and that the conveyance in the name of the latter is a matter of convenience and arrangement between the parties for other collateral purposes.¹⁶ Where money is advanced as a loan to the party taking the deed, upon the credit of the borrower alone, it cannot be pretended that any presumption of a resulting trust would arise.¹⁷

§ 422 (425). Same — Mode of proving the trust — Amount of evidence.—The real facts as to the payment of

¹⁶ 2 Story's Eq. 1202. See, also, Adams v. Craig, 148 Iowa, 705, 127 N. W. 1021; Clark v. Creswell, 112 Md. 339, 21 Ann. Cas. 338, 76 Atl.

579; Hiester v. Hiester, 228 Pa. 102, 77 Atl. 419.

¹⁷ Boyd v. McLean, 1 Johns. Ch. (N. Y.) 582.

the money by a third person may be proved by parol,¹⁸ even though the deed recites that the consideration was paid by the person named as grantee therein;¹⁹ and it may be shown by parol that the purchase price was wholly or partly paid by another person, and a trust *pro tanto* may thus be created.²⁰ But it is well settled that in such case the testimony must be strong and unequivocal, and of such character as to disclose the exact rights and relations of the parties.²¹ There will be found in modern cases such strong expressions as that the proof must be "clear and convincing";²² "clear, strong and convincing";²³ "clear, full and satisfactory";²⁴ "clear, strong, unequivocal and unmistakable";²⁵ "most satisfactory and convincing."²⁶ Indeed, it may be stated more generally that the proof of trusts by parol is *not regarded with favor* by the courts.²⁷ The proof should be sufficient in amount, and of such a character as to lead to definite conclusions. When the evidence is so ambiguous and indefinite, or when it relates to

¹⁸ *Reece v. Leitch*, 46 Ind. App. 342, 92 N. E. 553; *Johnston v. Sherehouse*, 61 Fla. 647, 54 South. 892; *Stubbings v. Stubbings*, 248 Ill. 406, 94 N. E. 54; *Warden v. O'Brien*, 142 Ky. 633, 136 S. W. 635.

¹⁹ *Blodgett v. Hildreth*, 103 Mass. 484; *Page v. Page*, 8 N. H. 187; *Gardiner Bank v. Wheaton*, 8 Greenl. (Me.) 373. See, also, *Botsford v. Burr*, 2 Johns. Ch. (N. Y.) 405.

²⁰ *Case v. Coddington*, 38 Cal. 191; *Mason v. Showalter*, 85 Ill. 133; *Bragg v. Paulk*, 42 Me. 502; *Nelson v. Worrall*, 20 Iowa, 469.

²¹ *Smith v. Goethe*, 159 Cal. 628, Ann. Cas. 1912C, 1205, 115 Pac. 223; *Leroy v. Norton*, 49 Colo. 490, 113 Pac. 529; *Stevens v. Hicks*, 84 Kan. 351, 113 Pac. 1049; *Ware v. Bennett*, 143 Ky. 743, 137 S. W. 532; *Baker v. Vining*, 30 Me. 121, 50 Am. Dec. 617; *In re Steel*, 68 Misc. Rep. 579, 125 N. Y. Supp. 187; *Harras v. Harras*, 60 Wash. 258, 110 Pac. 1085.

See, also, *Perry v. McHenry*, 13 Ill. 227; *Perry v. Perry*, 65 Me. 399; *Whiting v. Gould*, 2 Wis. 552.

²² *Tatuna v. Bolding*, 96 Ark. 98, 131 S. W. 207; *Ockstadt v. Bowles*, 34 App. D. C. 58; *Braxton v. Johnston*, 34 App. D. C. 386; *Johnston v. Sherehouse*, 61 Fla. 647, 54 South. 892; *McWhirter v. McWhirter*, 155 N. C. 145, 71 S. E. 59; *Harras v. Harras*, 60 Wash. 258, 110 Pac. 1085.

²³ *Hendren v. Hendren*, 153 N. C. 505, 138 Am. St. Rep. 680, 69 S. E. 506.

²⁴ *Eisenberg v. Goldsmith*, 42 Mont. 563, 113 Pac. 1127.

²⁵ *Wells v. Messenger*, 249 Ill. 72, 94 N. E. 87.

²⁶ *Anderson v. Gile*, 107 Me. 325, 78 Atl. 370.

²⁷ *Whitmore v. Learned*, 70 Me. 276; *Getman v. Getman*, 1 Barb. Ch. (N. Y.) 499; *Parmlee v. Sloan*, 37 Ind. 469; *Miller v. Blosc*, 30 Gratt. (Va.) 744.

transactions so remote as to fall short of such a test, it should be held inadequate to establish the trust.²⁸

§ 423 (426). Statutes limiting resulting trusts.—The foregoing remarks apply only where there has been no special statutory limitations on such trusts. In some of the states those resulting trusts which arise where the title to land is taken in the name of one person, and the price is paid by another, have been abolished by statute. Although these statutes vary in form, that of New York may be given as an illustration: "A grant of real property for a valuable consideration, to one person, the consideration being paid by another, is presumed fraudulent as against the creditors, at that time, of the person paying the consideration, and, unless a fraudulent intent is disproved, a trust results in favor of such creditors, to an extent necessary to satisfy their just demands; but the title vests in the grantee, and no use or trust results from the payment of the person paying the consideration, or in his favor, unless the grantee either (1) takes the same as an absolute conveyance, in his own name, without the consent or knowledge of the person paying the consideration, or (2) in violation of some trust, purchase the property so conveyed with money or property belonging to another."²⁹

²⁸ Hughes v. Letcher, 168 Ala. 314, 52 South. 914; Tatum v. Bolding, 96 Ark. 98, 131 S. W. 207; Red Bud Realty Co. v. South, 96 Ark. 281, 131 S. W. 340; Leroy v. Norton, 49 Colo. 490, 113 Pac. 529; Wells v. Messenger, 249 Ill. 72, 94 N. E. 87; Plummer v. Fleisher, 246 Ill. 313, 92 N. E. 863; Polsley v. Flowers, 149 Iowa, 586, 128 N. W. 937; Trout v. Trout, 44 Iowa, 471; Anderson v. Gile, 107 Me. 325, 78 Atl. 370; Brown v. Brown, 163 Mich. 337, 17 Det. Leg. N. 888, 128 N. W. 196; Eisenberg v. Goldsmith, 42 Mont. 563, 113 Pac. 1127; Teter v. Viquesney, 179 Fed. 655, 103 C. C. A. 213; In re Corn-

man's Estate, 197 Pa. 125, 46 Atl. 940; Buckner v. Carter (Tex. Civ. App.), 137 S. W. 442; Smalley v. Paine (Tex. Civ. App.), 130 S. W. 739; Erp v. Meachem (Tex. Civ. App.), 130 S. W. 230; Price v. Price, 68 W. Va. 389, 69 S. E. 892; Barrow v. Greenough, 3 Ves. Jr. 152, 30 Eng. Reprint, 943; Browne, Stat. Frauds, 5th ed., § 91; Reed, Stat. Frauds, § 974.

²⁹ Birdseye, N. Y. R. S., 3d ed., p. 3025, § 74; Leary v. Corvin, 181 N. Y. 222, 106 Am. St. Rep. 542, 2 Ann. Cas. 664, 73 N. E. 984. See 3 Pom. Eq. Jur., 3d ed., 1042. Special provision has also been made by statute in the

The purpose of that statute was to abrogate the common-law doctrine of resultance by legal implication of a trust in favor of the party paying the consideration; and it has no application to a case where the trust is expressly reserved by the instrument making the grant, or declared by another instrument, relieving it from the effect of a secret trust. The resulting trust which was within the denunciation of this statute was dependent upon the payment of the consideration before the execution of the conveyance.³⁰ It is to be observed that, although these statutes have in some states made very important changes, they do not change the rule in those cases where the *grantee takes the conveyance in his own name without the knowledge or consent of the person paying the consideration*, or where the grantee, in violation of some trust, purchases the land with the money of another. As opposed to the legislation of New York and that of states to the same end, it will be found that other states have statutes expressly creating the resulting trust. Of these that of California may be taken as a type. "When a transfer of real property is made to one person, and the consideration therefor is paid by or for another, a trust is presumed to result in favor of the person by or for whom such payment is made."³¹ This and similar statutes are but declaratory of the common law, and it has been held by courts of equity, since the earliest days, that if one person pays the consideration for the purchase of property, and the title is

states mentioned in the following cases: *Marcilliat v. Marcilliat*, 125 Ind. 472, 25 N. E. 597; *Lyons v. Berlau*, 67 Kan. 426, 73 Pac. 52; *Smith v. Smith* (Ky.), 121 S. W. 1002; *Waldron v. Merrill*, 154 Mich. 203, 117 N. W. 631; *Stitt v. Rat Portage Lumber Co.*, 96 Minn. 27, 104 N. W. 561; *Tobin v. Tobin*, 139 Wis. 494, 121 N. W. 144.

³⁰ *Woerz v. Rademacher*, 120 N. Y. 62, 23 N. E. 1113.

³¹ Cal. Civ. Code, § 853; *Heinrich v. Heinrich*, 2 Cal. App. 479, 84 Pac. 326; *Savings etc. Soc. v. Davidson*, 97 Fed. 696, 38 C. C. A. 365. See, also, *Stokes v. Clark*, 131 Ga. 583, 62 S. E. 1028; *Lynch v. Herrig*, 32 Mont. 267, 80 Pac. 240; *Currie v. Look*, 14 N. D. 482, 106 N. W. 131; *Cottonwood County Bank v. Case*, 25 S. D. 77, 125 N. W. 298.

taken in the name of another, such other holds the property in trust for the person who pays the consideration. This resulting trust does not arise from, or depend on, a contract or agreement between the parties. It is independent of any contract, and arises by operation of law from the fact that the consideration for the purpose of the property was paid by one person, and the title to the property purchased taken in the name of another. While the agreements or contracts between parties do not of themselves form the basis of any relief as to the trust, they may be important for consideration in assisting to establish the fact of the ownership of the money, and how it was invested.³²

§ 424 (427). **Same—Object of the statute—What law governs.**—The statutes were enacted to *prevent frauds on creditors*,³³ and not to protect and shield an agent acting in a fiduciary or trust relation in the perpetration of an actual fraud, or in the violation of a trust. The purpose clearly was to prevent a debtor from defrauding his creditors by buying lands and paying for them with his own money, and taking the title in the name of another. By doing so, a debtor takes the risk of losing all claim to the land, and yet creating a resulting trust in favor of his creditors, enforceable by them.³⁴ Hence the statute does not apply in those cases where the person furnishing the money is not aware that the deed is taken in the name of another. The statute implies the assent and co-operation of two persons, one paying the money and so inducing

³² Lynch v. Herrig, *supra*.

³³ Chantland v. Midland Nat. Bank, 66 Kan. 549, 72 Pac. 230; McGraw v. Daly, 82 Mich. 500, 46 N. W. 671; Connelly v. Sheridan, 41 Minn. 18, 42 N. W. 595; Woerz v. Rademacher, 120 N. Y. 62, 23 N. E. 1113; Skinner v. James, 69 Wis. 605, 35 N. W. 37.

³⁴ Kluender v. Fenske, 53 Wis.

118, 10 N. W. 370, in which the leading cases are discussed. On the subject of persons to whom the statute of frauds is available, see note to First Nat. Bank v. Blair State Bank, 127 Am. St. Rep. 756. As to when the statute of frauds may be relied upon as a defense, see note to McCampbell v. McCampbell, 15 Am. Dec. 62.

the grant, and the other receiving it;³⁵ and if it does not appear that the absolute character of the deed was known to or designed by the person paying the consideration, it will be presumed that it was so written by fraud or mistake, and without any intention to violate the statutes.³⁶ As we have shown, if a debtor buys land, paying for it with his own money, and knowingly takes title in the name of another, he gains no title to the land, and runs the risk of incurring a forfeiture of his estate. The grantee gains absolute title, except that the creditors may prove the trust which has resulted in their favor in a court of equity, after exhausting their remedies at law.³⁷ The law of the country where the land is situated governs the title and disposition of real property. That country alone can prescribe the words by which a title to it can pass from one to another, and therefore the laws of such country relating to trust estates must be the guide in construing their validity and operation, and will determine the interest of the parties.³⁸

§ 425 (428). Proof of trusts between those holding fiduciary relations.—It is elementary that the statute of

³⁵ *Reitz v. Reitz*, 80 N. Y. 538 (agent); *Siemon v. Schurck*, 29 N. Y. 598 (parent and child); *Marvin v. Marvin*, 53 N. Y. 607 (partner); *Fairechild v. Fairchild*, 64 N. Y. 471 (partner); *Reid v. Fitch*, 11 Barb. (N. Y.) 399 (insane person).

³⁶ *Siemon v. Schurck*, 29 N. Y. 598.

³⁷ *Garfield v. Hatmaker*, 15 N. Y. 475; *Kluender v. Fenske*, 53 Wis. 118, 10 N. W. 370; *Siemon v. Schurck*, 29 N. Y. 598. See, also, *Trask v. Green*, 9 Mich. 358.

³⁸ *Acker v. Priest*, 92 Iowa, 610, 61 N. W. 235. See, also, *Kerr v. Moon*, 9 Wheat. (U. S.) 565, 6 L. Ed. 161; *McCormick v. Sullivan*, 10 Wheat. (U. S.) 196, 6 L. Ed. 300; *Pensenneau v. Pensenneau*, 22 Mo. 27; *Bentley v. Whittemore*, 18 N. J.

Eq. 366; *Hosford v. Nichols*, 1 Paige Ch. (N. Y.) 220; *Wills v. Cowper*, 2 Ohio, 124; *Williams v. Maus*, 6 Watts (Pa.), 278, 31 Am. Dec. 465. In *Sparks v. Taylor* (Tex. Civ. App.), 87 S. W. 740, 99 Tex. 411, 6 L. R. A., N. S., 381, 90 S. W. 485, where the land, the subject matter of the alleged trust, was in Texas and though the purchase money was raised on property in Ohio, the court said: "We do not find it necessary to decide whether the contract should be interpreted by laws of Ohio or Texas; for, if the transaction is valid by the laws of Texas, it is unnecessary to resort to the laws of our sister state to determine the validity of the agreement."

frauds does not prevent the proof and enforcement of those implied trusts which arise when one sustaining a fiduciary relation obtains the legal title to property by fraud or in any other such manner that he cannot equitably hold the property which justly belongs to another. The general principle is, that if a receiver, executor, factor, or trustee, lay out the money which he holds in his fiduciary character, in the purchase of real property, and take the conveyance to himself, he who is entitled to the money, which has been thus invested, may follow the same and consider the purchase as made for his use, and the purchaser a trustee for him.³⁹ This is illustrated in the cases where *executors* or administrators purchase land with the funds of the estate in their own names.⁴⁰ The same rule applies to *guardians*,⁴¹ *agents* in the management of the

³⁹ *Gale v. Harby*, 20 Fla. 171; *Ward v. Armstrong*, 84 Ill. 151; *Brannon v. May*, 42 Ind. 92; *Cornelison v. Roberts*, 107 Iowa, 220, 77 N. W. 1028; *Michigan Air-line R. Co. v. Mellen*, 44 Mich. 321, 6 N. W. 845; *Patterson v. Booth*, 103 Mo. 402, 15 S. W. 543; *Johnson v. Dougherty*, 18 N. J. Eq. 406; *Buffalo etc. R. Co. v. Lampson*, 47 Barb. (N. Y.) 533; *Green v. Green*, 56 S. C. 193, 46 L. R. A. 525, 34 S. E. 249; *Bozarth v. Watts* (Tenn. Ch. App.), 61 S. W. 108; *Bell County v. Felts* (Tex. Civ. App.), 120 S. W. 1065, 122 S. W. 269; *Thum v. Wolstenholme*, 21 Utah, 446, 61 Pac. 537; *Irvine v. Greever*, 32 Gratt. (Va.) 411; *Barker v. Barker*, 14 Wis. 131; *Phillips v. Crammond*, 19 Fed. Cas. No. 11,092, 2 Wash. C. C. 441.

⁴⁰ *National Bldg. etc. Assn. v. Culbertson*, 126 Ala. 682, 25 South. 173; *Mosely v. Lane*, 27 Ala. 62, 62 Am. Dec. 752; *Osborne v. Graham*, 30 Ark. 66; *Graham v. Graham*, 85 Ill. App. 460; *Seaman v. Cook*, 14 Ill. 501; *Zunkel v. Colson*, 109 Iowa, 695, 81

N. W. 175; *Merket v. Smith*, 33 Kan. 66, 5 Pac. 394; *Locheim v. Eversole*, 29 Ky. Law Rep. 464, 93 S. W. 52; *Alterauge v. Christiansen*, 48 Mich. 60, 11 N. W. 806; *Cooper v. Cooper*, 61 Miss. 676; *Boynton v. Miller*, 144 Mo. 681, 46 S. W. 754; *Johnson v. Quarles*, 46 Mo. 423; *Fithian's Estate*, 15 N. Y. St. 734, 14 N. Y. Civ. Proc. 52; *Gumaer v. Barber*, 182 Pa. 31, 37 Atl. 848; *Watson v. Thompson*, 12 R. I. 466; *Redwood v. Riddick*, 4 Munf. (Va.) 222; *Allan v. Gillet*, 21 Fed. 273.

⁴¹ *Thompson v. Hartline*, 105 Ala. 263, 16 South. 711; *Pillars v. McConnell*, 141 Ind. 670, 40 N. E. 689; *Bitzer v. Bobo*, 39 Minn. 18, 38 N. W. 609; *Patterson v. Booth*, 103 Mo. 402, 15 S. W. 543; *Durling v. Hammar*, 20 N. J. Eq. 220; *Schlaefel v. Corson*, 52 Barb. (N. Y.) 510; *Sweet v. Jacobs*, 6 Paige Ch. (N. Y.) 355; *Ostendorf v. Shale*, 30 Ohio C. C. 378; *Paschall v. Hinderer*, 28 Ohio St. 568; *O'Hara v. Dilworth*, 72 Pa. 397; *Snell v. Elam*, 2 Heisk. (Tenn.) 82; *Hix v. Armstrong* (Tex. Civ. App.), 108

property of their principals,⁴² trustees⁴³ and to an attorney who takes title in his own name to property purchased with his client's money, or in violation of his duty as attorney.⁴⁴ Generally, as we have shown in the preceding sections, where the purchase money of land is paid by one person, and the conveyance is taken in the name of another, the party taking the title is presumed to hold the estate in trust for him who pays the purchase price. But where the conveyance runs to one for whom the purchaser is under a legal or moral obligation to provide, the presumption arises that the conveyance was intended as an advancement to the nominal purchaser. In either of the foregoing cases the presumption arising is one of fact, which may be rebutted by evidence tending to show that the intention of the purchaser was different from that

S. W. 797; *Myers v. Myers*, 47 W. Va. 487, 35 S. E. 868; *Hill v. True*, 104 Wis. 294, 80 N. W. 462.

⁴² *Milner v. Rucker*, 112 Ala. 360, 20 South. 510; *Firestone v. Firestone*, 49 Ala. 128; *O'Connor v. Irvine*, 74 Cal. 435, 16 Pac. 236; *Hardenbergh v. Bacon*, 33 Cal. 356, 1 Morr. Min. Rep. 352; *Warren v. Adams*, 19 Colo. 515, 36 Pac. 604; *Brainard v. Buck*, 16 App. Cas. (D. C.) 595; *Ellsworth v. Miner T. Ames Co.*, 125 Ill. 223, 17 N. E. 467; *Hampson v. Fall*, 64 Ind. 382; *Brown v. Dwelley*, 45 Me. 52; *Pillsbury v. Pillsbury*, 17 Me. 107; *Backus v. Cowley*, 162 Mich. 585, 127 N. W. 775; *Dougan v. Bemis*, 95 Minn. 220, 5 Ann. Cas. 253, 103 N. W. 882; *Flynt v. Hubbard*, 57 Miss. 471; *Wiano Land etc. Co. v. Webster*, 75 Mo. App. 457; *Plaut v. Plaut*, 44 N. J. Eq. 18, 13 Atl. 849; *O'Neill v. Otero*, 15 N. M. 707, 113 Pac. 614; *Safford v. Hynds*, 39 Barb. (N. Y.) 625; *Malin v. Malin*, 1 Wend. (N. Y.) 625; *Gasche v. Young*, 51 Ohio St. 376, 38 N. E. 20; *Urquhart v. Belloni*, 57 Or. 314, 111 Pac. 692; *Robb's*

Appeal, 41 Pa. 45; *Van Dyke v. Grigsby*, 11 S. D. 30, 75 N. W. 274; *Long v. Steiger*, 8 Tex. 460; *Parker v. Logan*, 82 Va. 376, 4 S. E. 613; *Moffatt v. Shepard*, 2 Pinn. (Wis.) 66, 52 Am. Dec. 141; *Irvine v. Marshall*, 20 How. (U. S.) 558, 15 L. Ed. 994. See, also, *Burden v. Sheridan*, 36 Iowa, 125, 14 Am. Rep. 505; *Minot v. Mitchell*, 30 Ind. 228, 95 Am. Dec. 685.

⁴³ *Methodist Episcopal Church v. Wood*, 5 Ohio, 283; *Green v. Green*, 56 S. C. 193, 46 L. R. A. 525, 34 S. E. 249; *Brown v. Brown*, 1 Strob. Eq. (S. C.) 363; *Sandford v. Weeden*, 2 Heisk. (Tenn.) 71.

⁴⁴ *Linsley v. Sinclair*, 24 Mich. 380; *Cameron v. Lewis*, 56 Miss. 76; *Leisenring v. Black*, 5 Watts (Pa.), 303, 30 Am. Dec. 322; *Howell v. Baker*, 4 Johns. Ch. (N. Y.) 118, where property bought at a nominal price by plaintiff's attorney at sheriff's sale; *Stephens v. Dubois*, 31 R. I. 138, 140 Am. St. Rep. 741, 76 Atl. 656; *Cooper v. Lee*, 75 Tex. 114, 12 S. W. 483; *Henyan v. Trevino* (Tex. Civ. App.), 137 S. W. 458.

to be inferred from the bare fact of the conveyance to another person. When such intention is ascertained, the courts will give it effect, if possible. Thus the principle has been applied where the proofs showed that a relation of trust and confidence existed by reason of the *relationship of the parties*,⁴⁵ as well as in transactions where the money of a *wife* has been invested in lands deeded to the *husband*,⁴⁶ and in those cases where a *partner*, by means

⁴⁵ *Bailey v. Dobbins*, 67 Neb. 548, 93 N. W. 687. See, also, *Creed v. Lancaster Bank*, 1 Ohio St. 1; *Hamilton v. Steele*, 22 W. Va. 348; *Cole v. Thompson*, 169 Fed. 729; *Robinson v. Leflore*, 59 Miss. 148; *Corse v. Leggett*, 25 Barb. (N. Y.) 389 (grandfather and his grandchildren); *Wormouth v. Johnson*, 58 Cal. 621 (purchase by son for the benefit of his mother). See §§ 139, 190, *ante*, as to burden of proof where fiduciary relations exist.

⁴⁶ *Kline v. Ragland*, 47 Ark. 111, 14 S. W. 474; *Wright v. Wright*, 242 Ill. 71, 26 L. R. A., N. S., 161, 89 N. E. 789; *Dorman v. Dorman*, 187 Ill. 154, 79 Am. St. Rep. 210, 58 N. E. 235; *Loften v. Witboard*, 92 Ill. 461; *Goldsberry v. Gentry*, 92 Ind. 193; *Howard v. Howard*, 52 Kan. 469, 34 Pac. 1114; *Thomas v. Standiford*, 49 Md. 181; *Keller v. Keller*, 45 Md. 269; *Hayward v. Cain*, 110 Mass. 273; *Moore v. Moore*, 74 Miss. 59, 19 South. 953; *Siling v. Hendrickson*, 193 Mo. 365, 92 S. W. 105; *Condit v. Bigalow*, 64 N. J. Eq. 504, 54 Atl. 160; *Ross v. Hendrix*, 110 N. C. 403, 15 S. E. 4; *Gidney v. Moore*, 86 N. C. 484; *Newton v. Taylor*, 32 Ohio St. 399; *Springer v. Young*, 14 Or. 280, 12 Pac. 400; *Lloyd v. Woods*, 176 Pa. 63, 34 Atl. 926; *Sandford v. Weeden*, 2 Heisk. (Tenn.) 71; *Blum v. Rogers*, 71 Tex. 668, 9 S. W. 595; *Denny v. Schwabacher*, 54 Wash. 689, 132 Am. St. Rep. 1140, 104 Pac. 137;

Standard Mercantile Co. v. Ellis, 48 W. Va. 309, 37 S. E. 593. And if portion only of the money belonged to the wife, then the resulting trust is created *pro tanto*: *Haney v. Legg*, 129 Ala. 619, 87 Am. St. Rep. 81, 30 South. 34; *Holmes v. Clifford*, 95 Ill. App. 245; *Mayer v. Kane*, 69 N. J. Eq. 733, 61 Atl. 374; *Bible v. Marshall*, 103 Tenn. 324, 52 S. W. 1077. But when the conveyance is made to the wife, though the money is paid by the husband, no such resulting trust is created, but in lieu thereof a presumption that the conveyance was intended as a gift or settlement: *Long v. King*, 117 Ala. 423, 23 South. 534; *Poole v. Oliver*, 89 Ark. 578, 117 S. W. 747; *Foster v. Berrier*, 39 Colo. 338, 89 Pac. 787; *McCartney v. Fletcher*, 11 App. Cas. (D. C.) 1; *Vickers v. Vickers*, 133 Ga. 383, 24 L. R. A., N. S., 1043, 65 S. E. 885; *Wright v. Wright*, 242 Ill. 71, 26 L. R. A., N. S., 161, 89 N. E. 789; *Lochenour v. Lochenour*, 61 Ind. 595; *De France v. Reeves*, 148 Iowa, 348, 125 N. W. 655; *Clay v. Clay*, 24 Ky. Law Rep. 2016, 72 S. W. 810; *Staples v. Bowden*, 105 Me. 177, 73 Atl. 999; *Johnson v. Johnson*, 96 Md. 144, 53 Atl. 792; *Cairns v. Colburn*, 104 Mass. 274; *Bulen v. Granger*, 56 Mich. 207, 22 N. W. 306; *Johnson v. Johnson*, 16 Minn. 512; *Wilson v. Beauchamp*, 50 Miss. 24; *Ilgenfritz v. Ilgenfritz*, 116 Mo. 429, 22 S. W. 786; *Gray v. Gray*, 13 Neb.

of fiduciary relations, has gained the legal title to property which in equity and good conscience belongs to the firm.⁴⁷ On the same general principle parol evidence may be given, notwithstanding the statute of frauds, to establish a trust where a person by agreement acts for another or falsely represents that he is *bidding* for another at a *public sale*, and thereby gains an unjust advantage.⁴⁸ There are numerous cases founded on the fraudulent purchase by an agent at an auction sale, where the bidding has been withheld by those who would otherwise have become purchasers, in consequence of representations by the agent intended to arouse the sympathy of the prospective bidders with his principal. These are generally sheriff's or mortgagee's sales, and the action of the agent in subsequently repudiating the principal cannot be supported by the ex-

453, 14 N. W. 390; *Lahey v. Broderick*, 72 N. H. 180, 55 Atl. 354. (The earlier New Hampshire cases, *Tebbetts v. Tilton*, 31 N. H. 273, and *Pembroke v. Allenstown*, 21 N. H. 107, were overruled in *Dickinson v. Davis*, 43 N. H. 647, 80 Am. Dec. 202.) The same rule is applied where the conveyance is made to a child, the money being paid by the parents: *Bogy v. Roberts*, 48 Ark. 17, 3 Am. St. Rep. 211, 2 S. W. 186; *Wright v. Wright*, 242 Ill. 71, 26 L. R. A., N. S., 161, 89 N. E. 789; *Hoon v. Hoon*, 126 Iowa, 391, 102 N. W. 105; *Staples v. Bowden*, 105 Me. 177, 73 Atl. 999; *Page v. Page*, 8 N. H. 187; *Partridge v. Havens*, 10 Paige (N. Y.), 618; *Vanzant v. Davies*, 6 Ohio St. 52; *Elrod v. Cochran*, 59 S. C. 467, 38 S. E. 122; *Miller v. Blose*, 30 Gratt. (Va.) 744; *Knox v. Traver*, 24 Grant Ch. (U. C.) 477. But in the converse case—conveyance to the parent when the purchase money is paid by the child—the resulting trust arises: *Brown v. Arkansas Cent. R. Co.*, 72 Ark.

456, 81 S. W. 613; *Harlan v. Eilke*, 100 Ky. 642, 38 S. W. 1094, 18 Ky. Law Rep. 1096; *Detwiler v. Detwiler*, 30 Neb. 338, 46 N. W. 624; *Johnson v. Dougherty*, 18 N. J. Eq. 406; *Norcum v. Savage*, 140 N. C. 472, 53 S. E. 289; *Johnson v. Anderson*, 7 Baxt. (Tenn.) 251; *Gentry v. Poteet*, 59 W. Va. 408, 53 S. E. 787.

⁴⁷ *Dewey v. Dewey*, 35 Vt. 555; *Anderson v. Lemon*, 8 N. Y. 236; *Nicoll v. Ogden*, 29 Ill. 323, 81 Am. Dec. 311; *Floyd v. Duffy*, 68 W. Va. 339, 33 L. R. A., N. S., 883, 69 S. E. 993; *Eisenberg v. Goldsmith*, 42 Mont. 563, 113 Pac. 1127.

⁴⁸ *Ryan v. Dox*, 34 N. Y. 307, 90 Am. Dec. 696; *McQuat v. Cathcart*, 84 Ind. 567; *McRarey v. Huff*, 32 Ga. 681; *Paine v. Wilcox*, 16 Wis. 202; *Rives v. Lawrence*, 41 Ga. 283; *Green v. Ball*, 4 Bush (Ky.), 586; *Wolford v. Herrington*, 86 Pa. 39; *Bethel v. Sharp*, 25 Ill. 173, 76 Am. Dec. 790; *Lindsey v. Platner*, 23 Miss. 576. This principle is illustrated by many cases cited in *Reed*, Stat. Frauds, § 930.

clusion of parol evidence of the whole of the surrounding circumstances. Where a creditor induced his debtor's agent not to bid at a sale of his debtor's land by promising to give the debtor time to pay the debt and then to reconvey the land, and thus succeeded in buying the land for one-third of its value, after which he repudiated his agreement as void within the statute, the court held that if the agreement proved was void, the creditor must surrender up his advantage under it. "Can it be tolerated, that a creditor shall, at a sale of his debtor's property, lull him to sleep, and keep off other purchasers, by an agreement, under which he buys in the land for a small sum, much below the value, and then that he should declare that the agreement was void under the statute of frauds, and that the other party should be allowed to have no benefit from the agreement, whilst he reaped all its fruits? Surely not. Courts of justice would be blind, indeed, if they could permit such a state of things." If the agreement was void, then, as we have said, the advantages must be yielded and the loss of the adverse party made good by him who broke faith.⁴⁹

⁴⁹ Keith v. Purvis, 4 Desaus. (S. C.) 114. In Sandford v. Norris, 4 Abb. Dec. (N. Y.) 144, Bockes, J., said: "The circumstances attending the defendant's purchase are not obscured, in the least, by any doubts, either as regards the facts or their moral bearing; nor is any excuse or apology offered for his violated faith; and the simple question presented to this court is, whether the fruits of his perfidy are secured to him, by a law having for its object the prevention of frauds. It stands indisputably proved that the defendant obtained his title, on the pretense, that he was purchasing for Mrs. Sandford, as a friendly act to her, and under an agreement with her, that he would take and hold the title for her

benefit. Having thus obtained the title in himself, he claims and insists that he is under no legal obligation to carry out the arrangement, because it is not evidenced by a writing, and that he may violate the trust and confidence reposed in him, with impunity. But the law will not give its aid in support of a wrong and fraud so flagrant. If the question could ever have been considered open for discussion, it must now be deemed settled by the recent decision of this court, in Ryan v. Dox." Other valuable cases on the same subject are cited in Ryan v. Dox, *supra*, which is approved in Congregation K. A. J. M. v. Universal B. & C. Co., 134 App. Div. 368, 119 N. Y. Supp. 72.

§ 426 (429). **Wills — Procuring devise by fraud.**—Under another head there will be found a discussion of those rules of evidence which relate to the explanation and revocation of wills. It is beyond the province of this work to discuss the section of the statute of frauds and the other English and American statutes which relate to the mode of executing and proving wills.⁵⁰ It is a settled principle that if a testator make a devise in terms absolute but upon a private understanding had with his devisee, whether by the latter's express promise or his assent implied from his silence, that he will apply the devised estate to some purpose designated by the testator, a trust arises which a court of equity will enforce, unless unlawful in itself. It has frequently been held that, if a person procures an absolute devise or bequest to himself by orally promising the testator that he will convey the property to, or hold it for, the benefit of third persons, and afterward refuses to perform his promise, a trust arises out of the confidence reposed in him by the testator and his own fraud, which a court of equity, upon clear or satisfactory proof of the facts, will enforce against him at the suit of such third persons.⁵¹ In the leading case in this country it is said: "It is contended that parol evidence of a trust is contrary to our statute of wills which corresponds, as far as regards the point in dispute, with the British statute of frauds. Undoubtedly, every part of a will must be in writing; and a naked parol declaration of a trust in respect of land devised is void. The trust insisted on here, however, owes

⁵⁰ As to parol revocation and explanation of ambiguities in wills, see § 479 et seq., *post*; § 191, *ante*.

⁵¹ *Barrell v. Hanrick*, 42 Ala. 60; *De Laurencel v. De Boom*, 48 Cal. 581; *Suman v. Harvey*, 114 Md. 241, 79 Atl. 197; *Baylies v. Payson*, 5 Allen (Mass.), 473; *Hooker v. Ax-ford*, 33 Mich. 453; *Ragsdale v. Ragsdale*, 68 Miss. 92, 24 Am. St. Rep. 256, 11 L. R. A. 316, 8 South. 315; *Smullin v. Wharton*, 73 Neb. 667, 103

N. W. 288, 106 N. W. 577, 112 N. W. 622, 113 N. W. 267; *Williams v. Vreeland*, 29 N. J. Eq. 417; *Rutherford v. Carpenter*, 134 App. Div. 881, 119 N. Y. Supp. 790; *Socher's Appeal*, 104 Pa. 609; *McLellan v. McLean*, 2 Head (Tenn.), 684; *Brook v. Chappell*, 34 Wis. 405; *Shields v. McAuley*, 37 Fed. 302; *Oldham v. Litchfield*, 2 Vern. 506, 23 Eng. Reprint, 923; *Chamberlain v. Chamberlain*, 1 Freem. 34, 22 Eng. Reprint, 1041.

its validity not to the will or the declaration of the testator, but to the fraud of the devisee. It belongs to a class in which the trust arises *ex maleficio*, and in which equity turns the fraudulent procurer of the legal title into a trustee to get at him; and there is nothing in reason or authority to forbid the raising of such a trust from the surreptitious procurement of a devise."⁵² We have seen that, in a large class of cases, the statute of frauds is no bar to the proof by parol of those facts which create a trust *ex maleficio*; that the courts do not allow the statute to be thus interposed as a shield for fraud. But the cases cited also illustrate the rule that in order to constitute proof of fraud, in such cases, a mere *refusal to perform* the trust is *not enough*. It is necessary that there should be an *agency*, active or passive, on the part of the alleged trustee *in procuring the title*.⁵³ The same principle applies to cases where the testator has been persuaded to refrain from inserting in his will provisions favorable to the person for whom the declaration is sought. Where a devisee in a will is active in preventing the testator from making an intended provision therein for another, for whom provision would have been made but for this intervention, such devisee will be held to be a trustee of any devise to himself to the extent it would have been for such other if it had not been intercepted by him, and will be compelled to respond to the claim of the intended beneficiary. Such interception and diversion of the testator's bounty amount to fraud, from which a trust arises by operation of law.⁵⁴

⁵² Hoge v. Hoge, 1 Watts (Pa.), 163, 26 Am. Dec. 52. A contract between the owner of land and third parties, whereby, in consideration of his care during life, the land at his death was to belong to the latter, is not within the statute after full performance: Soper v. Galloway, 129 Iowa, 145, 105 N. W. 399.

⁵³ Lantry v. Lantry, 5 Ill. 458, 2

Am. Rep. 310. See, also, Hoge v. Hoge, 1 Watts (Pa.), 136, 26 Am. Dec. 52; Brook v. Chappell, 34 Wis. 405.

⁵⁴ Ragsdale v. Ragsdale, *supra*. So where one who will succeed to personal property, if the person to whom it belongs dies intestate, promises the latter to dispose of it in a particular

§ 427 (430). **Proof of guaranty—Novation—Executors and administrators.**—Written evidence signed by the party charged therewith or by his agent is by the same statute required in every case of contract by executors or administrators to answer damages out of their own estate; in case of every promise of one person to answer for the debt, default or miscarriage of another person; every agreement made in consideration of marriage, or which is not to be performed within a year from the time of making it,⁵⁵ and every contract for the sale of lands, tenements or hereditaments, or of any interest in or concerning them. Without entering upon any general discussion of the broad subject of guaranties, it is important to state the principle that the statute does not exclude parol proof to show that the promise in question, although in form a guaranty, is in reality a *promise to pay the debt of the person himself*.⁵⁶ This is illustrated in those cases where the promise relates

manner after his death, a trust will arise *ex maleficio*: *Parker v. Urie*, 21 Pa. 305; *Pringle v. Pringle*, 59 Pa. 281; *Williams v. Fitch*, 18 N. Y. 546. Lord Westbury, in *M'Cormick v. Grogan*, L. R. 4 H. L. 97, Ir. R. 1 Eq. 313, very clearly stated the principle on which equity acts in this instance. He says: "And if an individual, on his death-bed, or at any other time, is persuaded by his heir at law, or his next of kin, to abstain from making a will; or, if the same individual having made a will, communicates a disposition to the person on the face of the will benefited by that disposition, but at the same time says to that individual that he has a purpose to answer, which he has not expressed in the will, but which he depends on the donee to carry into effect, and the donee assents, either expressly or by any mode of action, which the donee knows must give to the testator the impression and belief that he fully assents to the request, then undoubt-

edly the heir at law in the one case, and the donee in the other, will be converted into trustees, simply on the principle that an individual shall not be benefited by his own personal fraud."

⁵⁵ § 413b, *ante*.

⁵⁶ *Hubon v. Park*, 116 Mass. 541; *Randall v. Kelsey*, 46 Vt. 158; *Smart v. Smart*, 97 N. Y. 559; *Darst v. Bates*, 95 Ill. 493; *De Witt v. Root*, 18 Neb. 567; *Eastwood v. Kenyon*, 11 Ad. & E. 438, 113 Eng. Reprint, 482; *Morin v. Martz*, 13 Minn. 191; *Dyer v. Gibson*, 16 Wis. 557; *Sutherland v. Carter*, 52 Mich. 151, 471, 17 N. W. 780, 18 N. W. 223. As to extrinsic aid to construe contracts of guaranty, see note to *Pearsell Mfg. Co. v. Jeffreys*, 105 Am. St. Rep. 502. As to what within the meaning of the statute of frauds is a contract to answer for or pay the debt of another, see notes to *Leonard v. Vredenburg*, 5 Am. Dec. 321; *Muller v. Riviere*, 46 Am. Rep. 296; *Sherman v. Alberts*,

to a debt on which the promisor was already liable with others.⁵⁷ In considering the subject with regard to the evidence which may be called to support or deny a stated position, careful distinction of the nature of the promise is called for. This is not the place to discuss those rules emanating from the great English leading case,⁵⁸ which decided that "where the defendant comes only in aid of another, so that there is a remedy against both, it is a collateral promise, and void by the statute of frauds; otherwise where the whole credit is given to the defendant." But reference to them is necessary to correctly appreciate the nature of the promise, that it may be appropriately dealt with, whether it be original or collateral. To that end the language of the court in that case unfailingly leads. "If two come to a shop, and one buys, and the other, to gain him credit, promises the seller, *if he does not pay you, I will*; this is a collateral undertaking, and void without writing, by the statute of frauds; but if he says, *Let him have the goods, I will be your paymaster, or I will see you paid*, this is an undertaking as for himself, and he shall be intended to be the very buyer, and the other to act but as his servant." In other words, if the person for whose use the goods are furnished is liable primarily, any other person's promise is void, except in writing. An original promise to pay may be proved by parol, although the *goods* or other consideration are *furnished*, not to the promisor, but *to some third person*. In such a case the undertaking is in no sense a collateral undertaking, and is not within the statute.⁵⁹ The question to whom the credit was

126 Am. St. Rep. 487; and as to when they need and need not be in writing, the note to Packer v. Benton, 95 Am. Dec. 251.

⁵⁷ Orrell v. Coppock, 26 L. J. (Ch.) 269, 2 Jur., N. S., 1244, 5 W. R. 185 (trustees); Durham v. Manrow, 2 N. Y. 533; Stephens v. Squire, 5 Mod. 205, 87 Eng. Reprint, 610; Hopkins v. Carr, 31 Ind. 260.

⁵⁸ Birkmyr v. Darnell, 1 Salk. 27, 1 Smith's Lead. Cas. 359, 91 Eng. Reprint, 27.

⁵⁹ West v. O'Hara, 55 Wis. 645, 13 N. W. 894; Birkmyr v. Darnell, *supra*; Chicago etc. Coal Co. v. Liddell, 69 Ill. 639, 3 Morr. Min. Rep. 126; Walker v. Hill, 119 Mass. 249; Brown v. Harrell, 40 Ark. 429; Davis v. Tift, 70 Ga. 52; Newton Grain Co.

given is one of the greatest importance in determining whether a promise to pay the debt of another is or is not within the statute of frauds. Its solution is often a matter of the greatest difficulty, and the only test for settling this question is a resort to the intention of the parties at the time the promise was made as indicated by the language used, the situation of the parties and all the circumstances surrounding the transaction. The rule generally supported by the cases is, that if the credit is given to the promisor alone, the promise is original and not within the statute of frauds;⁶⁰ but if the credit is given to a third person to any extent, so that he is in any degree independently and originally liable, the oral promise of the other party is collateral.⁶¹ If any credit at all is given to the person for whose benefit the promise is made, there should be written proof of the promise made by the one sought to be held as defendant.⁶² There must be a distinct

v. Pierce, 106 Mo. App. 200, 80 S. W. 268. As to whether contracts of indemnity are within the statute of frauds, see note to *Smith v. Delaney*, 42 Am. St. Rep. 186.

⁶⁰ *Gates v. Morton Hardware Co.*, 146 Ala. 692, 40 South. 509; *Smith Bros. & Co. v. Miller*, 152 Ala. 485, 44 South. 399; *Chick v. Frey Coal Co.*, 78 Mo. App. 234; *Gallagher v. McBride*, 66 N. J. L. 360, 49 Atl. 582; *Meldrum v. Kenefick*, 15 S. D. 370, 89 N. W. 863; *Atlas Lumber Co. v. Flint*, 20 S. D. 118, 104 N. W. 1046; *First Nat. Bank v. Greenville Oil & Cotton Co.*, 24 Tex. Civ. App. 645, 60 S. W. 828; *Johnson v. Bank*, 60 W. Va. 320, 9 Ann. Cas. 893, 55 S. E. 394.

⁶¹ *Pake v. Wilson*, 127 Ala. 240, 28 South. 665; *Williams v. Auten*, 62 Neb. 822, 87 N. W. 1061; *Swigart v. Gentert*, 63 Neb. 157, 88 N. W. 159; *Matteson v. Moore*, 25 R. I. 129, 54 Atl. 1058; *Atlas Lumber Co. v. Flint*, 20 S. D. 118, 104 N. W. 1046; *Johnson v. Bank*, 60 W. Va. 320, 9 Ann.

Cas. 893, 55 S. E. 394; *Mankin v. Jones*, 63 W. Va. 373, 15 L. R. A., N. S., 214, 60 S. E. 248.

⁶² *Larson v. Wyman*, 14 Wend. (N. Y.) 246; *Foster v. Napier*, 74 Ala. 393; *Bugbee v. Kendrick*, 130 Mass. 437; *Barber v. Fox*, 1 Stark. 270; *Hall v. Wood*, 4 Chand. (Wis.) 36; *Langdon v. Richardson*, 58 Iowa, 610, 12 N. W. 622; *Wills v. Ross*, 77 Ind. 1, 40 Am. Rep. 279. See, also, the late cases: *Cameron v. Haas Bros. Packing Co.*, 3 Ala. App. 520, 57 South. 388; *Savage v. Craig* (Ark.), 150 S. W. 146; *Johnson v. Cothern* (Ga. App.), 77 S. E. 207; *Coldwell Co. v. Cowart*, 138 Ga. 233, 75 S. E. 425; *Caldwell v. Sliter*, 160 Ill. App. 144; *Frohardt Bros. v. Duff* (Iowa), 135 N. W. 609; *First Nat. Bank v. Johnson*, 130 La. 288, 57 South. 930 (parol proof of agent's authority to indorse note for principal); *Beall v. Board of Trade*, 164 Mo. App. 186, 148 S. W. 386; *Stokes v. Mills* (Mo. App.), 154 S. W. 455; *Mulholland v.*

obligation, capable of enforcement,⁶³ for the discharge of which the collateral promise is made, otherwise the statute does not apply. Unless there is a principal debtor, there can be no suretyship.⁶⁴ Nor does the statute apply where the owner of a note transfers it to his creditor in payment of his own debt, and represents the note to be collectible.⁶⁵ Where a note of a third party is taken by a creditor from his debtor, for or on account of a pre-existing debt, or on a consideration then first accruing, it may be received either in absolute payment, conditional payment, or as collateral security. And in every case it may be shown by evidence what was the actual transaction, and on what terms the note was received.⁶⁶ Where such note is taken in absolute payment of a pre-existing

Jones (N. J.), 83 Atl. 875; Speckmann v. Foote, 138 N. Y. Supp. 380; Dux v. Spielberg, 140 N. Y. Supp. 410; Partin v. Prince, 159 N. C. 553, 75 S. E. 1080; Van Gilder v. Bullen, 159 N. C. 291, 74 S. E. 1059; Olson v. McQueen (N. D.), 139 N. W. 522; Slaver Carriage Co. v. Jones, 32 Okl. 713, 123 Pac. 148; Richardson v. Parker, 33 Okl. 339, 125 Pac. 442; Sharp v. Levan, 236 Pa. 374, 84 Atl. 915; Ripley v. Ocean Accident etc. Corp. (Tex. Civ. App.), 146 S. W. 974; Davies v. Carey (Wash.), 130 Pac. 1137; Handsaker v. Pedersen (Wash.), 128 Pac. 230; Taylor v. Howard, 70 Wash. 217, 126 Pac. 423; Goldie-Klenert etc. Co. v. Bothwell, 67 Wash. 264, 121 Pac. 60; Runnion v. Morrison (W. Va.), 76 S. E. 457 (contract to pay for services rendered to another); Kelsey v. Munson, 198 Fed. 841, 117 C. C. A. 483; Green v. Menominee Indians, 46 Ct. of Cl. 68.

⁶³ Browne, Stat. of Frauds, §§ 156-159. A promise to pay the debt of a minor, being only voidable, is within the statute: Brown v. Farmers' etc. Nat. Bank, 88 Tex. 265, 33 L. R. A. 359, 31 S. W. 285.

⁶⁴ Sanford v. Howard, 29 Ala. 684, 68 Am. Dec. 101; Kilbride v. Moss, 113 Cal. 432, 54 Am. St. Rep. 361, 45 Pac. 812; Buchanan v. Moran, 62 Conn. 83, 25 Atl. 396; Resseter v. Waterman, 151 Ill. 169, 37 N. E. 875; Boos v. Hinkle, 18 Ind. App. 509, 48 N. E. 383; Groeltz v. Armstrong, 125 Iowa, 339, 99 N. W. 128; Griffin v. Derby, 5 Me. 476; Jepherson v. Hunt, 2 Allen (Mass.), 417; Ruppe v. Peterson, 67 Mich. 437, 35 N. W. 82; Stewart v. Patton, 65 Mo. App. 21; Crook v. Scott, 65 App. Div. 139, 72 N. Y. Supp. 516; Mease v. Wagner, 1 McCord (S. C.), 395; James v. Carson, 94 Wis. 632, 69 N. W. 1004.

⁶⁵ Cardell v. McNeil, 21 N. Y. 336; Fears v. Story, 131 Mass. 47; Wyman v. Goodrich, 26 Wis. 21; Shaffer v. Ryan, 84 Ind. 140; Mobile etc. Ry. Co. v. Jones, 57 Ga. 198; Power v. Rankin, 114 Ill. 52, 29 N. E. 185; Bruce v. Burr, 67 N. Y. 237; Wilson v. Hentges, 29 Minn. 102, 12 N. W. 151. See article by Isaac Redfield, 4 Am. Law Reg., N. S., 460.

⁶⁶ Butts v. Dean, 2 Met. (Mass.) 76, 35 Am. Dec. 389; Parham Sewing Machine Co. v. Brock, 113 Mass. 194.

debt, or of a liability for money lent, service rendered, or other consideration accruing at the time of taking it, the effect, of course, is to extinguish the liability of the person who transfers the note, and to substitute therefor the liability of the parties to the note, as the sole subsisting obligation. But where the note is taken as collateral security, or in conditional payment, the right of action against him who makes the transfer is not defeated altogether, but is, at most, only suspended during the time the note has to run, and revives again upon the nonpayment of the note at its maturity. The original indebtedness in such case is not discharged, unless the note is paid.⁶⁷ The statute does not apply in those cases where the promise is to pay a *debt which attaches to the promisor's own property*, though the debt in the first instance is that of a third person.⁶⁸ It is generally held that before the provisions of the statute can apply, it must appear that the *liability* of the third person in whose behalf the promise is made *continues*; and the two obligations must concur.⁶⁹ It is now settled by authority both in this country and in England, "that if, by the arrangement between the parties, the original debtor is discharged, the

⁶⁷ The Kimball, 3 Wall. (U. S.) 37, 18 L. Ed. 50; Byles on Bills, 6th Am. ed., 236, 380, 385; 2 Am. Lead. Cas., 4th ed., 250, 251, and cases cited; Belshaw v. Bush, 11 Com. B. 191, 206, 22 L. J. C. P. 24, 17 Jur. 67; Valpy v. Oakeley, 16 Q. B. 941, 117 Eng. Reprint, 1142; Miles v. Gorton, 2 Cr. & M. 504, 512, 4 Tyr. 295, 3 L. J. Ex. 115. In the latter class of cases, the transaction is as if the debtor said: "I owe you a debt. Take this note, and collect it if you can. If you get the money on it, that will pay you. If you do not, I will myself pay you what I owe." In all such cases the defendant's promise is in effect to pay his own debt, and it is not necessary that such promise

shall be in writing, though incidentally the debt of a third person is guaranteed: Dows v. Swett, 134 Mass. 140, 45 Am. Rep. 310.

⁶⁸ Wills v. Brown, 118 Mass. 137; Weisel v. Spence, 59 Wis. 301, 18 N. W. 165; Walden v. Karr, 88 Ill. 49; Walker v. Taylor, 6 Car. & P. 752; Stewart v. Campbell, 58 Me. 439, 4 Am. Rep. 296; Morgan v. Overman Silver Min. Co., 37 Cal. 534; Mitchell v. Griffin, 58 Ind. 559.

⁶⁹ Booth v. Eighmie, 60 N. Y. 228, 19 Am. Rep. 171; Stone v. Symmes, 18 Pick. (Mass.) 467; Goodman v. Chase, 1 Barn. & Ald. 297, 106 Eng. Reprint, 110; Watson v. Jacobs, 29 Vt. 169; Armstrong v. Flora, 3 T. B. Mon. (Ky.) 43.

defendant's promise is good without writing; it clearly raises, in such case, an original and absolute, and not a collateral and contingent liability.''⁷⁰ Whenever the main purpose and object of the promisor is not to answer for another, but to subserve some pecuniary or business purpose of his own, involving either a benefit to himself or damage to the other contracting party, his promise is not within the statute, although it may be in form a promise to pay the debt of another, and although the performance of it may incidentally have the effect of extinguishing that liability.⁷¹ Cases in which the guaranty or promise is collateral to the principal contract, but is made at the same time, and becomes an essential ground of the credit given to the principal debtor, are, in general, within the statute of frauds. Other cases arise which also fall within the statute, where the collateral agreement is subsequent to the execution of the debt, and was not the inducement to it, on the ground that the subsisting liability was the foundation of the promise on the part of the defendant, without any other direct and separate consideration moving between the parties. In the application of the statute it makes no difference whether the guaranty relates to a *past, present or future debt* of another.⁷² The rule has often been stated that a *new* and sufficient *consideration* moving directly to the guarantor will take the case out of the statute of frauds.⁷³ But the rule is not accepted with-

⁷⁰ Browne, Stat. of Frauds, § 193.

⁷¹ Emerson v. Slater, 22 How. (U. S.) 28, 16 L. Ed. 360. And in Davis v. Patrick, 141 U. S. 479, 35 L. Ed. 826, 12 Sup. Ct. Rep. 58, the court observes that there is a marked difference between a promise which, without any interest in the subject matter of the promise in the promisor, is purely collateral to the obligation of a third party, and that which, though operating upon the debt of a third party, is also and mainly for the benefit of the promisor.

⁷² Emerson v. Slater, 22 How. (U. S.) 28, 16 L. Ed. 360; Doyle v. White, 26 Me. 341, 45 Am. Dec. 110; Walker v. Richards, 39 N. H. 259; Reed, Stat. Frauds, § 31.

⁷³ Westmoreland v. Porter, 75 Ala. 452; Maxwell v. Haynes, 41 Me. 559; Britton v. Angier, 48 N. H. 420; Fears v. Story, 131 Mass. 47; Kelly v. Schupp, 60 Wis. 76, 18 N. W. 725; McCormick v. Johnson, 31 Mont. 266, 78 Pac. 500; Reed, Stat. Frauds, §§ 64, 65.

out objection; and in many states the existence of such new consideration does not avail to take the promise out of the statute, if the original liability continues to exist, and unless a new promise is substituted for the original liability.⁷⁴ Akin to this subject is the doctrine of *novation*, which means the substitution of one debtor by mutual agreement for another or the substitution of a new obligation for an old one, which is thereby extinguished. A familiar illustration is where a debtor with the assent of his creditor agrees to pay to some third person that which he owed to the original creditor. In such case it must be proved that the original creditor released the debtor and that the debtor and the third person agreed to the transfer of the liability, and that all parties agreed to the substitution of the new contract for the old one. Such contracts are not within the statute, and therefore need not be in writing.⁷⁵ The liability of executors and administrators under

⁷⁴ *Dows v. Swett*, 134 Mass. 140, 45 Am. Rep. 310; *Vaughn v. Smith*, 65 Iowa, 579, 22 N. W. 684; *Ackley v. Parmenter*, 98 N. Y. 425, 50 Am. Rep. 693; *Reed*, Stat. Frauds, §§ 66, 67; *Commercial Nat. Bank of Appleton v. Goodrick*, 107 Wis. 574, 83 N. W. 766. See, also, *Fullam v. Adams*, 37 Vt. 391, wherein Chief Justice Poland deals with the subject exhaustively. See, also, *Browne*, Stat. of Frauds, §§ 207-214c. See, also, the late cases: *Chattanooga Brewing Co. v. Smith*, 3 Ala. App. 551, 58 South. 63; *Zimmerman v. Holt* (Ark.), 144 S. W. 222; *Oleson v. Oleson*, 90 Neb. 738, 134 N. W. 648; *Rice v. Hardwick* (N. M.), 124 Pac. 800; *Hawkins v. Western Nat. Bank* (Tex. Civ. App.), 145 S. W. 722; *Davies v. Carey* (Wash.), 130 Pac. 1137.

⁷⁵ *Abercrombie v. Fourth Nat. Bank* (Ala.), 39 South. 606; *Welch v. Kenny*, 49 Cal. 49; *Consociated Presbyterian Soc. of Green's Farms v. Staples*, 23 Conn. 544; *Palmetto*

Mfg. Co. v. Parker, 123 Ga. 798, 51 S. E. 714; *Sherer v. Rubedew*, 11 Idaho, 536, 83 Pac. 512; *Runde v. Runde*, 59 Ill. 98; *Hyatt v. Bonham*, 19 Ind. App. 256, 49 N. E. 361; *Lester v. Bowman*, 39 Iowa, 611; *Grant v. Pendery*, 15 Kan. 236; *Hall v. Alford*, 105 Ky. 664, 49 S. W. 444, 20 Ky. Law Rep. 1482; *Hamlin v. Drummond*, 91 Me. 175, 39 Atl. 551; *Stowell v. Gram*, 184 Mass. 562, 69 N. E. 342; *Hanson v. Nelson*, 82 Minn. 220, 84 N. W. 742; *Olive v. Lewis*, 45 Misc. Rep. 203; *Wilson v. Vass*, 54 Mo. App. 221; *Maule v. Bucknell*, 50 Pa. 39; *Bicknall v. Bicknall*, 27 R. I. 429, 62 Atl. 976; *Antonio v. Clissey*, 3 Rich. (S. C.) 201; *Blankenship etc. Co. v. Tillman* (Tex. App.), 18 S. W. 646; *Buchanan v. Paddleford*, 43 Vt. 64; *Balliet v. Scott*, 32 Wis. 174. See, also, the late cases: *Harris Emery Co. v. Howerton*, 154 Iowa, 472, 134 N. W. 1068; *Parker v. Daniels*, 159 N. C. 518, 75 S. E. 712.

the statute seems to depend upon the existence of assets in the estate at the time of the promise. "If he have not assets, his promise must be fulfilled, if at all, out of his own estate, and the statute would require it to be in writing. If he have assets, he would have a right to charge them with the damages recovered against him upon such promise; and so, though the judgment might be against him personally, the damages would ultimately be answered out of the estate of the decedent, not out of his own, and the spirit of the statute would not require the promise to be in writing."⁷⁶ This, of course, refers to the personal liability of an executor, who has orally promised to pay a debt of the decedent.

§ 428 (431). Sale of goods.—According to the same statute, no contract for the sale of goods for the price of ten pounds or upward shall be good, unless the buyer shall accept part of the goods, and actually receive the same, or give something in earnest to bind the bargain or in part payment, or except some note or memorandum in writing of the bargain be made and signed by the parties to be charged by the contract or by their agents, lawfully authorized thereto.⁷⁷ This provision of the statute has been adopted quite generally in the United States, although such statutes in this country most generally fix the limit of value at the sum of fifty dollars instead of ten pounds. It frequently becomes necessary to *determine whether some part of the goods has been accepted* and actually received within the meaning of the statute and in such a manner as to render the memorandum unnecessary.⁷⁸ Ordinarily,

⁷⁶ Browne, Stat. Frauds, § 186; Pratt v. Humphrey, 22 Conn. 317; Stebbins v. Smith, 4 Pick. (Mass.) 97; Collins v. Row, 10 Leigh (Va.), 114.

⁷⁷ § 412, note 4, *ante*, synopsis of statute.

⁷⁸ Brockman Commission etc. Co. v. Pound, 77 Ark. 364, 91 S. W. 183;

Gurwell v. Morris, 2 Cal. App. 451, 83 Pac. 578; Sloan Saw Mill etc. Co. v. Guttschall, 3 Colo. 8; Calkins v. Lockwood, 17 Conn. 154, 42 Am. Dec. 729; Columbus Crate Co. v. Evans, 130 Ga. 432, 60 S. E. 1065; Hitz v. Warner, 47 Ind. App. 612, 93 N. E. 1005; Leggett etc. Tobacco Co. v. Collier, 89 Iowa, 144, 56 N. W. 417;

this is a matter to be proved by *parol evidence*, which will generally consist of the language and acts of the buyer. Among other acts relevant to this issue are the continued possession of the buyer without objection;⁷⁹ the opportunity for the full examination of the goods, and the failure to make any objection to them,⁸⁰ and the exercise of such control or dominion over the goods as seems inconsistent with ownership in another.⁸¹ In addition there is the case of goods already in the buyer's possession before he became the purchaser. That fact alone does not amount to a delivery and acceptance, and to take the case out of the statute there must be some affirmative act of his founded on the sale and his possession.⁸² To satisfy the

Beedy v. Brayman Wooden Ware Co., 108 Me. 200, Ann. Cas. 1913B, 273, 36 L. R. A., N. S., 76, 79 Atl. 721; Jones v. Mechanics' Bank, 29 Md. 287, 96 Am. Dec. 533; Rodgers v. Jones, 129 Mass. 420; Becker Co. v. E. D. Davis Drug Co., 93 Miss. 803, 47 South. 468; Hudson v. Emmons, 107 Mich. 549, 65 N. W. 542; Rickey v. Tenbroeck, 63 Mo. 563; J. H. Teasdale Commission Co. v. Keeckler, 84 Neb. 116, 120 N. W. 955; Towne v. Davis, 66 N. H. 396, 22 Atl. 450; Matthiessen etc. Refining Co. v. McMahon, 38 N. J. L. 536; Thedford v. Herbert, 195 N. Y. 63, 87 N. E. 798; White v. White, 20 N. C. 536; Dinnie v. Johnson, 8 N. D. 153, 77 N. W. 612; Duzan v. Meserve, 24 Or. 523, 34 Pac. 548; Gabriel v. Kildare Elevator Co., 18 Okl. 318, 11 Ann. Cas. 517, 10 L. R. A., N. S., 638, 99 Pac. 10; Smith v. Evans, 36 S. C. 69, 15 S. E. 344; Wilkinson v. Wilkinson, 61 Vt. 409, 17 Atl. 795; Adams County Mercantile Co. v. Walla Walla Livestock Co., 64 Wash. 285, 116 Pac. 669; Hankwitz v. Barrett, 143 Wis. 639, 128 N. W. 430; Hinchman v. Lincoln, 124 U. S. 38, 31 L. Ed. 337, 8 Sup. Ct. Rep. 369.

⁷⁹ Standard Wall Paper Co. v.

Towns, 72 N. H. 324, 56 Atl. 744; Lawton v. Keil, 61 Barb. (N. Y.) 558; Dyer v. Forest, 2 Abb. Pr. (N. Y.) 282; Spencer v. Hale, 30 Vt. 314, 73 Am. Dec. 309; Bushel v. Wheeler, 15 Q. B. 442, 117 Eng. Reprint, 526; Coleman v. Gibson, 1 Moody & R. 168; Wilcox Silver Plate Co. v. Green, 72 N. Y. 17. But the statute does not apply to a contract substantially for work and labor: Roubicek v. Haddad, 67 N. J. L. 522, 51 Atl. 938; nor to an agreement to resign an office: Colton v. Raymond, 114 Fed. 863, 52 C. C. A. 382.

⁸⁰ See cases last cited.

⁸¹ Currie v. Anderson, 2 El. & El. 592, 121 Eng. Reprint, 223; Morton v. Tibbett, 15 Q. B. 428, 117 Eng. Reprint, 520; Rodgers v. Phillips, 40 N. Y. 519. See, also, the *late case* of Barton v. Weinman, 134 N. Y. Supp. 566.

⁸² Godkin v. Weber, 154 Mich. 207, 114 N. W. 924, 117 N. W. 628. The question as to the receipt and acceptance necessary to satisfy the statute when the goods are in possession of the purchaser at the time of the agreement is discussed in the notes to Silkman Lumber Co. v. Hunholz, 11 L.

language of the statute it is necessary to prove, *not only that the buyer has accepted, but that he has received, part of the goods*. In other words, there must be a delivery with the intent on the part of the seller to transfer the ownership, and on the part of the buyer to accept.⁸³ Acceptance and actual receipt, which implies delivery, are essential to take the case out of the statute.⁸⁴ Title and possession must both pass to satisfy the exception in the statute,⁸⁵ and the delivery, receipt and acceptance must be under the contract, and in pursuance of it.⁸⁶ The *delivery*, however, *may be constructive* or symbolical, or by the agents of the parties.⁸⁷ It has sometimes been stated that

R. A., N. S., 1186, and to *Shindler v. Houston*, 49 Am. Dec. 325, to *King v. Jarman*, 37 Am. Rep. 16, and to *Devine v. Warner*, 96 Am. St. Rep. 215. See, also, the Canadian case of *Munn v. Berger*, 10 S. C. R. 512.

⁸³ *Atherton v. Newhall*, 123 Mass. 141; *Messer v. Woodman*, 22 N. H. 172, 53 Am. Dec. 241; *Jones v. Mechanics' Bank*, 29 Md. 287, 96 Am. Dec. 533; *Taylor v. Mueller*, 30 Minn. 343, 44 Am. Rep. 199, 15 N. W. 413; *Stone v. Browning*, 68 N. Y. 598.

⁸⁴ *Hausman v. Nye*, 62 Ind. 485, 30 Am. Rep. 199; *Young v. Blaisdell*, 60 Me. 272; *Hewes v. Jordan*, 39 Md. 472, 17 Am. Rep. 578; *Knight v. Mann*, 118 Mass. 143; *Taylor v. Mueller*, 30 Minn. 343, 44 Am. Rep. 199, 15 N. W. 413; *Shepherd v. Pressey*, 32 N. H. 49; *Clark v. Tucker*, 2 Sand. (N. Y.) 157; *Sheldon v. Parker*, 5 Thomp. & C. (N. Y.) 617; *Cooke v. Millard*, 65 N. Y. 352, 22 Am. Rep. 619; *Brand v. Focht*, 3 Keyes (N. Y.), 410; *Stone v. Browning*, 51 N. Y. 211; *Caulkins v. Hellman*, 47 N. Y. 449, 7 Am. Rep. 461, and note; *Gibbs v. Benjamin*, 45 Vt. 124. The principle is well stated by *Alvey, J.*, in *Hewes v. Jordan*, *supra*, as follows: "From the plain meaning

of the terms of the statute itself, independent of all authority, the concurrence of two distinct acts on the part of the vendee would seem to be required; he must accept and he must actually receive part of the goods, in order to render the contract binding on him. There may be an actual receipt without any acceptance, and there may be an acceptance without any receipt. But if both these acts concur, with the intention of the parties that the vendee shall take possession of the goods under the contract as owner, then the latter must be taken as having made a final election to accept the goods, or such part of them as he may have actually received as his property, and, at the same time, assent to their being such as will gratify the contract, and acceptance and receipt being thus complete, to bind the contract, the vendee cannot afterwards withdraw his acceptance and reject the goods, except it be on the ground of fraud."

⁸⁵ *Rodgers v. Jones*, 129 Mass. 420.

⁸⁶ *Matthiessen etc. Refining Co. v. McMahon*, 38 N. J. L. 536.

⁸⁷ *Mueller v. Guye*, 12 Mo. App. 589; *Wadhams & Co. v. Balfour*, 32

in order to constitute the acceptance and receipt contemplated by the statute, there must be proof of more than mere words or promises; that the evidence must show acts and conduct as well.⁸⁸ This statement, however, has been criticised by high authority on the ground that the statute does not prescribe any mode of proving the change of possession.⁸⁹ From our own examination of the cases the criticism seems well established, and no sufficient reason is given for discriminating between what is said and what is done by the parties. The cases, too, show that want of harmony which generally distinguishes the decisions under the seventeenth section of the statute. "In many of the cases, even where the doctrine is admitted, it seems to be violated; and, in others, although nothing is said about it, it is practically repudiated."⁹⁰ Where the goods are in the possession of a third person at the time of the sale, there is a sufficient actual receipt of them, as contemplated by the statute, when by the concurrence of all the parties the bailee or agent of the vendor has become the bailee or agent of the buyer;⁹¹ but the holder of the property must expressly or impliedly assent to the arrangement, or, as is said in some of the cases, he must "attorn" to the buyer, for he cannot be made the latter's bailee without his con-

Or. 313, 51 Pac. 642; *Sahlman v. Mills*, 3 Strob. (S. C.) 384, 51 Am. Dec. 630; *Outwater v. Dodge*, 6 Wend. (N. Y.) 397; *Chaplin v. Rogers*, 1 East, 191, 102 Eng. Reprint, 75; *Cross v. O'Donnell*, 44 N. Y. 661, 4 Am. Rep. 721; *Dodsley v. Varley*, 12 Ad. & E. 632, 113 Eng. Reprint, 954; *Snow v. Warner*, 10 Met. (Mass.) 132, 43 Am. Dec. 417; *King v. Jarman*, 35 Ark. 190, 37 Am. Rep. 11, and long note; *Browne*, Stat. Frauds, 5th ed., § 319.

⁸⁸ *Bassett v. Camp*, 54 Vt. 232; *Malone v. Plato*, 22 Cal. 103; *Edwards v. Grand Trunk Ry. Co.*, 54 Me. 105; *Shepherd v. Pressey*, 32 N. H. 49.

⁸⁹ *Browne*, Stat. of Frauds, 5th ed., § 320. See, also, excellent note to *Shindler v. Houston*, 49 Am. Dec. 325. As to when contracts for the sale of goods are within the statute of frauds, see note to *Crookshank v. Burrell*, 9 Am. Dec. 188. As to whether the statute of frauds applies to contracts made beyond the state, see note to *Siegel v. Robinson*, 93 Am. Dec. 776. See, also, the *late case* of *Farmers' Sav. Bank v. Newton*, 154 Iowa, 49, 134 N. W. 436.

⁹⁰ A. C. Freeman, in note to *Shindler v. Houston*, *supra*.

⁹¹ *Hatch v. Bayley*, 12 Cush. (Mass.) 127; *Sahlman v. Mills*, 3 Strob. (S. C.) 384, 51 Am. Dec. 630.

currence.⁹² The question of receipt and acceptance is one for the jury, under proper instructions, and is, in general, a question of intention to be determined from the evidence.⁹³ The final exception to be dealt with is where the buyer gives something in earnest to bind the bargain or in part payment, though this exception does not appear in the statutes of all the states. The part payment required by the statute of frauds as an act in addition to the parol contract need not be made in money. Anything of value, which by mutual agreement is given by the buyer and accepted by the seller, on account or in part satisfaction of the price, will be equivalent to part payment.⁹⁴ Another writer says: "The statute evidently contemplates that the part payment shall be made at the time the contract is entered into, and shall be in money or something of value, which is accepted as its equivalent."⁹⁵ The thing delivered in part payment must be of some value, but if of any value at all, it will be sufficient to bind the bargain. One of the old writers says that, "if all or part of the money is paid in hand, or I give earnest-money, albeit it is only a penny," the contract is valid.⁹⁶ Part payment of the price is earnest-money and binds the bargain.⁹⁷

⁹² *Stevens v. Stewart*, 3 Cal. 140; *Gooch v. Holmes*, 41 Me. 523; *Boardman v. Spooner*, 13 Allen (Mass.), 353, 90 Am. Dec. 196; *Taylor v. Mueller*, 30 Minn. 343, 44 Am. Rep. 199, 15 N. W. 413; *Marsh v. Rouse*, 44 N. Y. 643; *Bassett v. Camp*, 54 Vt. 232; *In re Clifford*, 2 Saw. 430, Fed. Cas. No. 2893; *Bentall v. Burn*, 3 Barn. & C. 423. 107 Eng. Reprint, 791.

⁹³ *Bass v. Walsh*, 39 Mo. 192; *Pinkham v. Mattox*, 53 N. H. 600; *Burrows v. Whitaker*, 71 N. Y. 291, 27 Am. Rep. 42; *Somers v. McLaughlin*, 57 Wis. 358, 15 N. W. 442.

⁹⁴ 1 Benj. Sales, § 194.

⁹⁵ *Wood, Frauds*, § 294. See, also, *Shaw Lumber Co. v. Manville*, 4 Idaho,

369, 39 Pac. 559; *Kuhns v. Gates*, 92 Ind. 66; *Howe v. Jones*, 57 Iowa, 130, 8 N. W. 451, 10 N. W. 299; *Driggs v. Bush*, 152 Mich. 53, 125 Am. St. Rep. 389, 15 Ann. Cas. 30, 15 L. R. A., N. S., 654, 115 N. W. 985; *Groomer v. McMillan*, 143 Mo. App. 612, 128 S. W. 285; *Woodford v. Patterson*, 32 Barb. (N. Y.) 630; *Post v. Wilson*, 5 Ohio Dec. 368; *Dow v. Worthen*, 37 Vt. 108.

⁹⁶ 1 Shep. Touch. 224. See, also, *Langford v. Tyler*, 6 Mod. 162, 87 Eng. Reprint, 919; *Archer v. Zeh*, 5 Hill (N. Y.), 200; *Wood, Frauds*, § 293.

⁹⁷ *Howe v. Hayward*, 108 Mass. 54, 11 Am. Rep. 306; *Bissell v. Balcom*, 39 N. Y. 275; 2 Bl. Comm. 447. If

Money, however, which is merely "staked" as a deposit, forfeitable on the noncompletion of the contract is not earnest-money. Earnest-money must be a part payment of the price.⁹⁸

§ 429 (432). **What the memorandum is to contain.**— Since it was the subject of the statute of frauds to compel parties to prove certain kinds of contracts by written evidence, it follows that the memorandum relied on should contain the terms of the contract with such definiteness that no resort to parol testimony is necessary. Unless the essential terms of the sale can be ascertained from the writing itself, or by reference in it to something else, the writing is not a compliance with the statute; and, if the agreement be thus defective, it cannot be supplied by parol proof, for that would at once introduce all the mischiefs which the statute was intended to prevent. Any note or memorandum in writing which furnishes evidence of a complete and practicable agreement is sufficient under the statute, and parol evidence is admissible to explain latent ambiguities, and to apply the instrument to the subject matter. The proof as to the terms of the contract must be clear, definite and conclusive, and must show a contract, leaving no *jus deliberandi* or *locus poenitentiae*.⁹⁹

it is intended to make a debt due by the seller to the purchaser a part of the entire payment, the evidence must be clear as to the ascertainment of the amount, and the adjustment and the credit given either by receipt or book entry: *Walker v. Malsby Co.*, 134 Ga. 399, 67 S. E. 1039; *Peake v. Conlan*, 43 Iowa, 297; *Logan v. Carroll*, 72 Mo. App. 613 (check); *Brabin v. Hyde*, 32 N. Y. 519; *Norwegian Plow Co. v. Hantorn*, 71 Wis. 529, 37 N. W. 825.

⁹⁸ *Jennings v. Dunham*, 60 Mo. App. 635.

⁹⁹ *Patt v. Gerst*, 149 Ala. 287, 292, 42 South. 1001; *Shannon v. Wisdom*,

171 Ala. 409, 55 South. 102; *St. Louis etc. Ry. Co. v. Beidler*, 45 Ark. 17; *Seymour v. Oelrichs*, 156 Cal. 782, 134 Am. St. Rep. 154, 106 Pac. 88; *Salomon v. McRae*, 9 Colo. App. 23, 47 Pac. 409; *Morris v. Peckham*, 51 Conn. 128; *Ocala Coöperage Co. v. Florida Coöperage Co.*, 59 Fla. 390, 52 South. 13; *Capital City Brick Co. v. Atlanta Ice etc. Co.*, 5 Ga. App. 436, 63 S. E. 562; *J. T. Stewart & Son v. Cook*, 118 Ga. 541, 45 S. E. 398; *Thompson v. Burns*, 15 Idaho, 572, 99 Pac. 111; *Kurdy v. Rogers*, 10 Idaho, 416, 79 Pac. 195; *Gentlemen's Driving Club v. Union Biscuit Co.*, 151 Ill. App.

Hence, if the memorandum is manifestly incomplete or fails to state the essential terms of the contract, it cannot be helped out by parol evidence.¹⁰⁰ Accordingly, the memorandum contract cannot be added to by parol proof of the *names of the parties* to be bound. The statute not only requires that the agreement on which the action is brought, or some memorandum thereof, shall be signed by the party to be charged, but that the *agreement or memorandum shall be in writing*. In an agreement of sale

324; Lee v. Hills, 66 Ind. 474; Jennings v. Shertz, 45 Ind. App. 120, 88 N. E. 729; Guy v. Barnes, 29 Ind. 103; Allan v. Bemis, 120 Iowa, 172, 94 N. W. 560; Vaughn v. Smith, 58 Iowa, 553, 12 N. W. 604; Schneider v. Anderson, 75 Kan. 11, 121 Am. St. Rep. 356, 88 Pac. 525; Fry v. Platt, 32 Kan. 62, 3 Pac. 781; Second Nat. Bank v. Rouse, 142 Ky. 612, 134 S. W. 1121; Kingsley v. Siebrecht, 92 Me. 23, 69 Am. St. Rep. 486, 42 Atl. 249; Thurlow v. Perry, 107 Me. 127, 77 Atl. 641; Williams v. Robinson, 73 Me. 186, 40 Am. Rep. 352; Fisher v. Andrews, 94 Md. 46, 50 Atl. 407; Leatherbee v. Bernier, 182 Mass. 507, 45 N. E. 842; Ebert v. Cullen, 165 Mich. 75, 33 L. R. A., N. S., 84, 130 N. W. 185; Hanson v. Marsh, 40 Minn. 1, 40 N. W. 841; Gulfport Cotton Oil etc. Mfg. Co. v. Reneau, 94 Miss. 904, 136 Am. St. Rep. 607, 48 South. 292; Brookfield v. Drury College, 139 Mo. App. 339, 123 S. W. 86; McWilliams v. Lawless, 15 Neb. 131, 17 N. W. 349; Maisch v. Cobb, 76 N. H. 62, 79 Atl. 489; Brown v. Whipple, 58 N. H. 229; Bernheimer v. Verdon, 63 N. J. Eq. 312, 49 Atl. 732; Wright v. Weeks, 25 N. Y. 153; Ruggerio v. Leuchtenburg, 61 Misc. Rep. 298, 113 N. Y. Supp. 615; Kling v. Bordner, 65 Ohio St. 86, 61 N. E. 148; Catterlin v. Bush, 39 Or. 496, 59 Pac. 706, 65 Pac. 1064; Halsell v.

Renfrow, 14 Okl. 674, 2 Ann. Cas. 286, 78 Pac. 118; Conrade v. O'Brien, 1 Pa. Super. Ct. 104, 37 Wkly. Not. Cas. 493; Wagniere v. Dunnell, 29 R. I. 580, 17 Ann. Cas. 205, 73 Atl. 309; Meadows v. Meadows, 3 McCord (S. C.), 458, 15 Am. Dec. 645; Johnson v. Kellogg, 7 Heisk. (Tenn.) 262; Skov v. Coffin (Tex. Civ. App.), 137 S. W. 450; Abba v. Smyth, 21 Utah, 109, 59 Pac. 756; Crosby v. Bouchard, 82 Vt. 66, 71 Atl. 835; Reed v. Reed, 108 Va. 790, 62 S. E. 792; Crouch v. Forbes, 63 Wash. 564, 116 Pac. 14; Bacon v. Eccles, 43 Wis. 227; Ballantine v. Yung Wing, 146 Fed. 621; Williams v. Morris, 95 U. S. 444, 24 L. Ed. 360; Hales v. Van Berchem, 2 Vern. 617, 23 Eng. Reprint, 1006. As to the general requirements, see notes to McConnell v. Brillhart, 65 Am. Dec. 668, and Neaves v. North State Min. Co., 47 Am. Rep. 532. See, also, the late case of Leesley Bros. v. A. Rebori Fruit Co., 162 Mo. App. 195, 144 S. W. 138. See, also, the interesting Canadian case of Martin v. Haubner, 26 S. C. R. 142, where the writing was a repudiation of the contract.

¹⁰⁰ See cases last cited. On the general subject of what the memorandum is to contain with *certainty*, see elaborate note to Atwood v. Cobb, 26 Am. Dec. 661.

there can be no contract without both a vendor and a vendee. There can be no purchase without a seller. There must be a sufficient description of the thing sold and of the price to be paid for it. It is, therefore, an essential element of a contract in writing, that it shall contain within itself a description of the thing sold, by which it can be known or identified, of the price to be paid for it, of the party who sells it, and the party who buys it.¹ The signature of the party to be charged or his duly authorized agent is indispensable, even though the instrument is all in the party's writing. It may be by initials or mark and may be printed, or stamped by him. The

¹ *Grafton v. Cummings*, 99 U. S. 100, 25 L. Ed. 366, distinguishing *Salmon Falls Mfg. Co. v. Goddard*, 14 How. (U. S.) 446, 14 L. Ed. 493, in which the memorandum signed merely with the initials, no name appearing anywhere in it, was held sufficient. There was a strong dissenting opinion by Justices Curtis, Catron and Daniel, which without doubt expresses the better law. In *Grafton v. Cummings*, *supra*, Mr. Justice Miller generously cites *Browne on the Stat. of Frauds*, §§ 372-375, as showing that the earlier case is one which might be saved from conflict with the general rule, on the ground that a bill of parcels detailing the purchase was made out and sent to the purchaser, and accepted by him as such. See, also, the following cases in support of the text: *Breckinridge v. Crocker*, 78 Cal. 529, 21 Pac. 179; *Nichols v. Johnson*, 10 Conn. 192; *Oglesby Grocery Co. v. Williams Mfg. Co.*, 112 Ga. 359, 37 S. E. 372; *Thompson v. Burns*, 15 Idaho, 572, 99 Pac. 111; *Elwell v. Hicks*, 238 Ill. 170, 87 N. E. 316; *Horton v. McCarty*, 53 Me. 394; *Drury v. Young*, 58 Md. 546, 42 Am. Rep. 343, and long note; *Lewis v. Wood*, 153 Mass. 321, 11 L. R. A. 143, 26 N. E. 862; *Clampet v.*

Bells, 39 Minn. 272, 39 N. W. 495; *Phillips v. Cornelius* (Miss.), 28 South. 871; *Tombs v. Basye*, 65 Mo. App. 30; *Frahm v. Metcalf*, 75 Neb. 241, 13 Ann. Cas. 312, 106 N. W. 227; *Lang v. Henry*, 54 N. H. 57; *Bowers v. Glucksman*, 68 N. J. L. 146, 52 Atl. 218; *Raubitschek v. Blank*, 80 N. Y. 478; *Calkins v. Falk*, 39 Barb. (N. Y.) 620; *Flegel v. Dowling*, 54 Or. 40, 135 Am. St. Rep. 812, 19 Ann. Cas. 1159, 102 Pac. 178; *Morrison v. Hazzard* (Tex. Civ. App.), 88 S. W. 385; *Jordan v. Mahoney*, 109 Va. 133, 63 S. E. 467; *Seymour v. Cushway*, 100 Wis. 580, 69 Am. St. Rep. 957, 76 N. W. 769; *American Iron etc. Mfg. Co. v. Midland Steel Co.*, 101 Fed. 200; *Gratton v. Cummings*, 99 U. S. 100, 25 L. Ed. 366; *O'Donohoe v. Stammers*, 11 Can. S. Ct. 358; *Phelan v. Tedcastle*, 15 L. R. Ir. 169. As to whether such memorandum is to be signed by both parties, see long notes to *Corbitt v. Salmon etc. Co.*, 25 Am. Rep. 543, and *Worrall v. Munn*, 55 Am. Dec. 344. See, also, many examples cited in *Reed, Stat. Frauds*, § 401 et seq. As to memorandum of auction sales sufficient to satisfy the statute of frauds, see note to *Davis v. Rowell*, 13 Am. Dec. 398.

place of signature is unimportant, except the statute calls for *subscription*, when it must appear at the foot of the document. In any case, it should be in such part of the instrument as to indicate it is a final signature, and cannot be taken to give effect to words which follow it. The signature "must always be inserted in such a manner as to authenticate the instrument as the act of the party executing it, or, in other words, to show the intention of the party to admit his liability upon the contract."² But several letters or other writings may be construed together as constituting the memorandum; and if the names of the parties appear from all the writings or words used so that the parties can be identified, it is enough.³ Where the description within the memorandum "points directly to one set of persons, and but one, and their identity can be shown from the writing or from other written evidence or by parol evidence, which can indicate the persons described in the writing without involving inadmissible parol proof of anything in the contract itself, the writing is sufficient."⁴ It is not necessary that the memorandum should state the *time of payment*, as in such cases it will be presumed that cash payment is intended.⁵ If, however, the memorandum shows that credit is intended,

² Browne, Stat. of Frauds, §§ 355-358. As we have shown *supra*, parol evidence is admissible to show agency, so that while it is preferable that the agent should sign, disclosing his principal, it is not absolutely essential.

³ Salmon Falls Co. v. Goddard, 14 How. (U. S.) 454, 14 L. Ed. 493; Barry v. Coombe, 1 Pet. (U. S.) 640, 7 L. Ed. 295; Clark v. Rawson, 2 Denio (N. Y.), 135; Drury v. Young, 58 Md. 546, 42 Am. Rep. 343, and long note; Reed, Stat. Frauds, § 401; Browne, Stat. Frauds, 5th ed., § 374 et seq. As to "Of What Writing the Memorandum to Satisfy the Statute of Frauds must Consist, and Whether It may be in Pencil," see note to Merritt v. Clason, 7 Am. Dec. 288. See,

also, the late case of White River Val. R. Co. v. Appel (S. D.), 137 N. W. 48.

⁴ Reed, Stat. of Frauds, § 407; Newell v. Radford, L. R. 3 C. P. 52 (parol evidence received to identify a party by showing his occupation); Bateman v. Phillips, 15 East, 272, 104 Eng. Reprint, 847 (parol evidence to show agency); Reed, Stat. Frauds, § 377; Darnell v. Lafferty, 113 Mo. App. 282, 88 S. W. 784 (which contains an exhaustive opinion on the subject of this section). As to correction of mere and unprejudicial misnomer, see Fessenden v. Mussey, 11 Cush. (Mass.) 127; Pinckney v. Hagadorn, 1 Duer (N. Y.), 89.

⁵ Atwood v. Cobb, 16 Pick. (Mass.) 227, 26 Am. Dec. 657; O'Donnell v.

and that the terms are so incomplete that the real intent cannot be ascertained without a resort to parol evidence, the omission is fatal.⁶ Those *provisions* which are *merely formal* and are not essential need not be expressed, as they will be implied. It is necessary that the memorandum should set out the subject matter of the contract, so that it may be identified either from the inherent description or by proper reference to something else which can be identified.⁷ In illustration of the rule that the memorandum must contain the full terms of the contract, it may be added that the *price* should be stated.⁸ But if the memorandum contains the recital that the price has been received, it is then unnecessary.⁹ It is also unnecessary if no price has been named in the contract or the property has been sold for what it is reasonably worth.¹⁰ This is obvious when the character of the memorandum is considered. It is to be a memorandum of the contract, and if the contract bore no mention of price, then the memorandum does not call for any reference to it. Price and consideration are not to be confused.¹¹ In further illustration of the same general subject, if the memorandum is relied upon as a contract relating to land, the *land must be so described* as to be capable of identification.¹²

Leeman, 43 Me. 158, 69 Am. Dec. 54; Hawkins v. Chace, 19 Pick. (Mass.) 502 (as to time of delivery of goods).

⁶ Ryan v. Hall, 13 Met. (Mass.) 520; Grace v. Denison, 114 Mass. 16; Schmeling v. Kriesel, 45 Wis. 325.

⁷ Browne, Stat. of Frauds, § 385.

⁸ Morgan v. Milman, 3 De Gex, M. & G. 24, 43 Eng. Reprint, 10; Grace v. Denison, 114 Mass. 16; Browne, Stat. Frauds, 5th ed., § 377. See note to Siemers v. Siemers, 60 Am. St. Rep. 432-441.

⁹ Browne, Stat. Frauds, 5th ed., § 379; Miller v. Kansas City, Ft. S. & M. R. Co., 58 Kan. 189, 48 Pac. 853.

¹⁰ Hoadley v. McLane, 10 Bing.

482, 131 Eng. Reprint, 982; Browne, Stat. Frauds, 5th ed., § 377.

¹¹ Browne, Stat. of Frauds, § 381. See next section.

¹² Miller v. Campbell, 52 Ind. 125; Pulse v. Miller, 81 Ind. 190; McGuire v. Stevens, 42 Miss. 724, 2 Am. Rep. 649; Church v. Farrow, 7 Rich. Eq. (S. C.) 378; Meadows v. Meadows, 3 McCord (S. C.), 458, 15 Am. Dec. 645; Coles v. Browne, 10 Paige Ch. (N. Y.) 526; Stafford v. Lick, 10 Cal. 12. As to whether a sale of growing trees is a sale of interest in land within the statute of frauds, see notes to Kingsley v. Holbrook, 86 Am. Dec. 182, and to Purner v. Piercy, 17 Am. Rep. 595.

While parol evidence is admissible to apply the description to the property intended, and to show the surrounding circumstances, it cannot be allowed to add to the memorandum.¹³ If any such reference is made to the land that it can be definitely ascertained, as where it is designated as the land of a certain estate, or land having known names, it is sufficient.¹⁴ A written memorandum for the sale of land need not specify the interest to be conveyed, the presumption being that it is a fee simple.¹⁵ On the other hand, if the description is not certain either in the memorandum or in the references which it may contain, the statute is not complied with and the contract is not enforceable.¹⁶ Obviously, the same general principle as to the sufficiency of the description applies when the contract within the statute of frauds relates to sales of *personal property*.¹⁷

¹³ See cases last cited. See, also, *Eggleston v. Wagner*, 46 Mich. 610, 10 N. W. 37; *Smith's Appeal*, 69 Pa. 474; *Halsell v. Renfrow*, 14 Okl. 674, 2 Ann. Cas. 286, 78 Pac. 118. Many illustrations will be found in *Reed, Stat. Frauds*, c. 18.

¹⁴ *Smith v. Freeman*, 75 Ala. 285; *Springer v. Kleinsorge*, 83 Mo. 152; *Scanlan v. Geddes*, 112 Mass. 15. As to what amounts to a contract for the sale of land within the meaning of the statute of frauds, see note to *McCoy v. McCoy*, 102 Am. St. Rep. 236.

¹⁵ *Conroy v. Woodcock*, 53 Fla. 582, 43 South. 693.

¹⁶ *Thompson v. New South Coal Co.*, 135 Ala. 630, 93 Am. St. Rep. 49, 62 L. R. A. 551; *Craig v. Zelian*, 137 Cal. 105, 69 Pac. 853; *Douglass v. Bunn*, 110 Ga. 159, 35 S. E. 339; *Miller v. Campbell*, 52 Ind. 125; *Hartsthorn v. Smart*, 67 Kan. 543, 73 Pac. 73; *Jones v. Tye*, 93 Ky. 390, 20 S. W. 388, 14 Ky. Law Rep. 448; *Taney v. Bachtell*, 9 Gill (Md.), 205;

Miller v. Burt, 196 Mass. 395, 82 N. E. 39; *Taylor v. Allen*, 40 Minn. 433, 42 N. W. 292; *Scherck v. Moyse*, 94 Miss. 259, 48 South. 513; *Fox v. Courtney*, 111 Mo. 147; 20 S. W. 20; *Ryan v. Davis*, 5 Mont. 505, 6 Pac. 339; *Lippincott v. Bridgewater*, 55 N. J. Eq. 208, 36 Atl. 672; *Cooley v. Lobdell*, 82 Hun, 98, 31 N. Y. Supp. 202; *Murdock v. Anderson*, 57 N. C. 77; *Harrisburg Bd. of Trade v. Eby*, 1 Daugh. Co. Rep. (Pa.) 99; *Ray v. Card*, 21 R. I. 362, 43 Atl. 846; *Humbert v. Brisbane*, 25 S. C. 506; *Davis v. Ross* (Tenn. Ch. App.), 50 S. W. 650.

¹⁷ See cases illustrating the subject, cited in *Reed, Stat. Frauds*, § 413 et seq. See §§ 441, 444, *post*. As to whether contracts for the purchase of property not then in existence are within the statute of frauds, see note to *Pawelski v. Hargreaves*, 54 Am. Rep. 164. See, also, the late case of *Field v. Kieser*, 135 N. Y. Supp. 1094, 77 Misc. Rep. 105.

§ 430 (433). **Same, continued.**—It has been the subject of infinite discussion and controversy whether, under the statute, the memorandum must show the *consideration*. In some states statutes have been enacted requiring a statement of the consideration. In others, statutes declare that the consideration need not be expressed. The English rule requiring the memorandum to state the consideration has been rejected in this country in the greater number of states, but it remains an open question as to which view is sustained by the greater weight of authority.¹⁸ But even in those jurisdictions where the consideration must be expressed in the memorandum, it *need not be expressly stated*. It suffices if the consideration appears from the writing and the surrounding circumstances to be gathered from it.¹⁹ In the words of a well-known English opinion, “it would undoubtedly be sufficient, in any case, if the memorandum is so framed that any person of ordinary capacity must infer, from the perusal of it, that such, and no other, was the consideration upon which the undertaking was given. Not that a mere conjecture, however plausible, that the consideration stated in the declaration was that intended by the memorandum, would be sufficient to satisfy the statute; but there must be a well-grounded inference to be necessarily collected from the terms of the memorandum, that the con-

¹⁸ See cases cited *pro* and *con* in 8 Am. & Eng. Ency. of Law, 727. See note to *Siemers v. Siemers*, 60 Am. St. Rep. 432-441.

¹⁹ *Shadwell v. Shadwell*, 9 Com. B., N. S., 159, 173, 7 Jur., N. S., 311, 3 L. T. 628; *Church v. Brown*, 21 N. Y. 315; *Otis v. Haseltine*, 27 Cal. 80; *Simons v. Steele*, 36 N. H. 73; *Ordeman v. Lawson*, 49 Md. 135; *Straight v. Wight*, 60 Minn. 515, 63 N. W. 105. The words “value received” are sufficient: *Violett v. Patton*, 5 Cranch (U. S.), 151, 3 L. Ed.

61; *Dahlman v. Hammel*, 43 Wis. 466; *Marshall v. Cobleigh*, 18 N. H. 485; *Booth v. Dexter Steam Fire Engine Co.*, 118 Ala. 369, 24 South. 405; *Emerson v. Aultman*, 69 Md. 125, 14 Atl. 671; *Osborne v. Baker*, 34 Minn. 307, 57 Am. Rep. 55, 25 N. W. 606; *White Sewing Machine Co. v. Fowler*, 28 Nev. 94, 78 Pac. 1034; *Smith v. Northrup*, 80 Hun, 65, 29 N. Y. Supp. 851; *McMorris v. Herndon*, 2 Bail. (S. C.) 56, 21 Am. Dec. 515.

sideration stated in the declaration was intended by the parties to be the ground of the promise.”²⁰ For example, the consideration for sale of land in a “note or memorandum” satisfies the statute, where the total is given, one-fourth whereof is to be paid as provided therein and the “balance to be paid in one, two and three years respectively at six per cent interest.” The presumption is that equality of payment is intended, and it is not necessary to set forth the nature or details of the security.²¹ Where the language of the instrument is such as to warrant the inference that the consideration rests upon mutual promises, the writing satisfies all the requirements of the statute.²² And where the *language* of the memorandum is *ambiguous*, and may refer to different subjects, parol evidence may, under a familiar rule, be received to show the *situation and circumstances of the parties* at the time in order to construe their agreement.²³ It is to be borne in mind that the memorandum required in the various sections of the statute of frauds is *not the contract* itself. The writing is only the evidence of the contract showing the terms and the parties.²⁴ Hence the *memo-*

²⁰ Hawkes v. Armstrong, 1 Bing. N. C. 761, 27 E. C. L. 565, 1 Scott, 661, 131 Eng. Reprint, 1311; cited in Hargroves v. Cooke, 15 Ga. 321.

²¹ Conroy v. Woodcock, 53 Fla. 582, 43 South. 693. This case also rules that a “note or memorandum” for the sale of land is not void on its face because part of the consideration is to be in the form of “a note (negotiable).” The term is frequently used in banking and mercantile circles, and the court can easily obtain evidence as to such usage.

²² Bowers v. Ocean etc. Guarantee Corp., 110 App. Div. 691, 97 N. Y. Supp. 485; Seymour v. Warren, 179 N. Y. 1, 71 N. E. 260.

²³ Harrigan v. Dodge, 200 Mass.

357, 86 N. E. 780; Lee v. Butler, 167 Mass. 426, 57 Am. St. Rep. 466, 46 N. E. 52; Doherty v. Hill, 144 Mass. 465, 11 N. E. 581; Becker v. Calmenson, 102 Minn. 406, 113 N. W. 1014; Ellis v. Bray, 79 Mo. 227; Peycke Bros. v. Ahrens, 98 Mo. App. 456, 72 S. W. 151; Union Nat. Bank v. Leary, 77 App. Div. 332, 70 N. Y. Supp. 217; Walrath v. Thompson, 4 Hill (N. Y.), 200; Flegel v. Dowling, 54 Or. 40, 135 Am. St. Rep. 812, 19 Ann. Cas. 1159, 102 Pac. 178; Bibb v. Allen, 149 U. S. 481, 37 L. Ed. 819, 13 Sup. Ct. Rep. 950; Haigh v. Brooks, 10 Ad. & E. 309, 113 Eng. Reprint, 119.

²⁴ Coles v. Trecothick, 9 Ves. 234, 32 Eng. Reprint, 592; Bradford v. Roulston, 8 Ir. C. L. Rep. 468;

*randum may be subsequent to the making of the contract,*²⁵ but must be made *before the action is brought,*²⁶ and cannot be made before the making of the contract itself.²⁷ If the memorandum is shown to have been lost, its contents may be proved by parol.²⁸ The memorandum *need not* on its face *purport to be an agreement*, nor need it be executed for the purpose of creating or recognizing a liability. If it is delivered and accepted by the other party, it may suffice.²⁹ Indeed, it has frequently been held that such a memorandum may be binding within the statute, *although it disclaims all liability.*³⁰ And letters addressed to third persons stating the terms of the contract may be sufficient evidence to satisfy the statute.³¹ It is now settled that a writing, no matter what may be its particular form, will be a sufficient memorandum or note in writing, as required by the statute, provided it contain the essential terms of the contract, expressed with such certainty that they may be understood from the instrument itself, or from some other writing to which it refers, without recourse to parol proof, and be signed by the party to be charged thereby.³² Hence, the memorandum *need not be*

Grimes v. Hamilton Co., 37 Iowa, 290; Bluck v. Gompertz, 7 Ex. 862, 21 L. J. Ex. 268. As to the effect of the statute of frauds where part of the original agreement is that the contract shall be in writing, see note to Box v. Stanford, 51 Am. Dec. 144.

²⁵ Jenkins v. Harrison, 66 Ala. 345; Thayer v. Luce, 22 Ohio St. 62; Gale v. Nixon, 6 Cow. (N. Y.) 445; Phillips v. Ocmulgee Mills, 55 Ga. 633.

²⁶ Williams v. Bacon, 2 Gray (Mass.), 387; Heideman v. Wolfstein, 12 Mo. App. 366.

²⁷ Reed, Stats. Frauds, § 357.

²⁸ Raubitechek v. Blank, 80 N. Y. 478; Irwin v. Irwin, 34 Pa. 525; Wiley v. Mullins, 22 Ark. 394; Black-

burn v. Blackburn, 8 Ohio, 81; Bent v. Smith, 22 N. J. Eq. 560. See proof of lost instruments, § 212 et seq., *ante*.

²⁹ Shippey v. Derrison, 5 Esp. 190; Thayer v. Luce, 22 Ohio St. 62; Ellis v. Deadman, 4 Bibb (Ky.), 466.

³⁰ Bailey v. Sweeting, 9 Com. B., N. S., 843, 30 L. J. C. P. 150; Shippey v. Derrison, 5 Esp. 190; Buxton v. Rust, L. R. 7 Ex. 279; Townsend v. Hargraves, 118 Mass. 325.

³¹ Moss v. Atkinson, 44 Cal. 3; Wright v. Cobb, 5 Sneed (Tenn.), 143; Wood v. Davis, 82 Ill. 311; More v. Mountcastle, 61 Mo. 424.

³² Adams v. McMillan, 7 Port. (Ala.) 73; Joseph v. Holt, 37 Cal. 250; Capital City Brick Co. v. At-

a *formal instrument*, but may exist in almost any form, provided it contains the signature of the party or parties to be charged, and the terms of the agreement.³³ The entire memorandum *need not be* contained in a *single writing*, but may consist of several, provided they so refer to each other that parol evidence is not necessary to show the relation between them.³⁴ If, however, they are so connected, then parol evidence, admissible, as we have above shown, to show the situation of the parties and the attendant circumstances, may be introduced for the purpose of applying the contract to the subject matter and of showing the connection of the different writings constituting

Ianta Ice etc. Co., 5 Ga. App. 436, 63 S. E. 562; Ullsperger v. Meyer, 217 Ill. 262, 3 Ann. Cas. 1032, 2 L. R. A., N. S., 221, 75 N. E. 482; Nebraska Bridge Supply etc. Co. v. Conway & Sons, 127 Iowa, 237, 103 N. W. 122; Acree v. Rozzell, 32 Ky. Law Rep. 1342, 108 S. W. 846; Wade v. Curtis, 96 Me. 309, 52 Atl. 762; McManus v. Boston, 171 Mass. 152, 50 N. E. 607; Wheless v. Meyer-Schmidt Grocer Co., 140 Mo. App. 572, 120 S. W. 708; Pindyck v. Marwell, 129 N. Y. Supp. 454; Cadwalder v. App, 81 Pa. 194; Blaha v. Borgman, 142 Wis. 43, 124 N. W. 1047; Mine & Smelter Supply Co. v. Bank, 173 Fed. 859, 98 C. C. A. 229.

³³ A receipt containing the terms of the agreement was received in Raubitschek v. Blank, 80 N. Y. 478; a telegram in North v. Mendel, 73 Ga. 400, 54 Am. Rep. 879, Brewer v. Horst-Lachmund Co., 127 Cal. 643, 50 L. R. A. 240, and full note, 60 Pac. 415, and Little v. Dougherty, 11 Colo. 103, 17 Pac. 292; and mere written offer with proof of acceptance in Argus Co. v. Albany, 55 N. Y. 495, 14 Am. Rep. 296; Western Union etc. Co. v. Chicago etc. R. Co., 86 Ill. 246, 29 Am. Rep. 28; letters:

Miller v. Kansas City, Ft. S. & M. R. Co., 58 Kan. 189, 48 Pac. 853; resolution by corporation: Western Timber Co. v. Kalama River Lumber Co., 42 Wash. 620, 114 Am. St. Rep. 137, 7 Ann. Cas. 667, 6 L. R. A., N. S., 397, 85 Pac. 338; Ullsperger v. Meyer, 217 Ill. 262, 3 Ann. Cas. 1032, 2 L. R. A., N. S., 221, 75 N. E. 482. See the late case of O'Donnell v. Daily News, 119 Minn. 378, 138 N. W. 677 (to show date of contract).

³⁴ Raubitschek v. Blank, 80 N. Y. 478; Boydell v. Drummond, 11 East, 142, 103 Eng. Reprint, 958; Hawkinson v. Harmon, 69 Wis. 551, 35 N. W. 28; Peck v. Vandemark, 99 N. Y. 29, 4 N. E. 41; Hollis v. Burgess, 37 Kan. 487, 15 Pac. 536; Tice v. Freeman, 30 Minn. 389, 15 N. W. 674; Peycke Bros. v. Ahrens, 98 Mo. App. 456, 72 S. W. 151; Halsell v. Renfrow, 14 Okl. 674, 2 Ann. Cas. 286, 78 Pac. 118; American Oak Leather Co. v. Porter, 94 Iowa, 117, 62 N. W. 658; Elbert v. Los Angeles Gas Co., 97 Cal. 244, 32 Pac. 9; Cobb v. Glenn Boom & L. Co., 57 W. Va. 49, 110 Am. St. Rep. 734, 49 S. E. 1005; Lerner v. Wannemacher, 9 Allen (Mass.), 412; Peabody v. Speyers, 56 N. Y. 230.

the memorandum with one another.³⁵ Although parol evidence is inadmissible to vary or contradict the terms of a written agreement, it is well settled that such evidence is admissible to show that a particular written paper "was never intended as a contract or as the binding record of a contract between the parties." And this has been held to be true, even though the paper writing in question be in the form of a contract and bear the signatures of those named in it as the contracting parties.³⁶ Parol evidence is admissible to show that there never was any concluded binding contract entitling the party who claimed the benefit of it to enforce its stipulations. The United States supreme court has held,³⁷ that "the rule that excludes parol evidence in contradiction of a written agreement presupposes the existence in fact of such an agreement at the time the suit is brought, but the rule has no application if the writing was not delivered as a present contract." Parol evidence is admissible as well to show that the memorandum does not contain the material or essential terms of the verbal contract, and that it therefore does not comply with the statute.³⁸

³⁵ *Oliver v. Alabama Gold Ins. Co.*, 82 Ala. 417, 2 South. 445; *Jacobson v. Hendricks*, 83 Conn. 120, 75 Atl. 85; *Turner v. Lorillard Co.*, 100 Ga. 645, 62 Am. St. Rep. 345, 28 S. E. 383; *Lee v. Mahoney*, 9 Iowa, 344; *First Parish in Freeport v. Bartol*, 3 Me. 340; *Ordeman v. Lawson*, 49 Md. 135; *Nickerson v. Weld*, 204 Mass. 346, 90 N. E. 589; *Lee v. Butler*, 167 Mass. 426, 57 Am. St. Rep. 466, 46 N. E. 52; *Tice v. Freeman*, 30 Minn. 339, 15 N. W. 674; *Gough v. Williamson*, 62 N. J. Eq. 526, 50 Atl. 323; *Ward v. Hasbrouck*, 169 N. Y. 407, 62 N. E. 434; *Flegel v. Dowling*, 54 Or. 40, 135 Am. St. Rep. 812, 19 Ann. Cas. 1159, 102 Pac. 178; *Blair v. Snodgrass*, 1 Sneed (Tenn.), 1; *Jordan v. Mahoney*, 109 Va. 133, 63

S. E. 467; *Darling v. Cumming's Exr.*, 92 Va. 521, 23 S. E. 880.

³⁶ *Colonial Parks Estates v. Massart*, 112 Md. 648, 77 Atl. 275; *Southern Street Railway Adv. Co. v. Metropole Shoe Mfg. Co.*, 91 Md. 61, 46 Atl. 513.

³⁷ *Burke v. Dulaney*, 153 U. S. 234, 38 L. Ed. 698, 14 Sup. Ct. Rep. 816.

³⁸ *Fisher v. Andrews*, 94 Md. 46, 50 Atl. 407; *Boardman v. Spooner*, 13 Allen (Mass.), 353, 90 Am. Dec. 196; *Smith v. Schell*, 82 Mo. 215, 52 Am. Rep. 365. Although parol evidence to explain writings forms the subject of the next chapter, it is deemed advisable to make the present particular references to the memorandum under the statute.

§ 431 (434). **Subsequent modification by parol—Fraud—Mistake.**—Under another head it will be seen that the statute of frauds does not stand as an imperative bar to the *subsequent parol rescission or change* of agreements within its terms.³⁹ The courts have held, with much less difficulty and reluctance, that the statute of frauds cannot stand in the way of oral *proof of fraud*, when it is charged. It has been said to be “absurd that a statute made to prevent frauds shall be made a handle to support them.”⁴⁰ Courts of equity compel the specific performance of a verbal contract to which the statute would apply, “*where the refusal to execute it would amount to practicing a fraud*. . . . The correct view appears to be that equity will at all times lend its aid to defeat a fraud, *notwithstanding* the statute of frauds”; and it is upon this ground that many decisions in equity will be found substantially to rest.⁴¹ For example, parol evidence may be received to prove that a conveyance or other contract has been obtained by fraud,⁴² or that the wrong boundaries have been pointed out in the sale of land.⁴³ So where there was an oral agreement to make an absolute conveyance, and a further one that the grantee should execute a defeasance, the court compelled the grantee to execute the full agreement, when he, having received the conveyance, relied on the statute and refused to execute the defeasance.⁴⁴ So, also, the court has power to declare a deed, absolute on its face, to be a mortgage, and to that end to receive parol proof that it was meant only as a security. This was fully discussed in a well-known

³⁹ See § 444, *post*.

⁴⁰ Peachey's Case (not reported), Rolls E. T. 1759; Day v. Lown, 51 Iowa, 364, 1 N. W. 786; Sandford v. Rose, 2 Tyler (Vt.), 428; Lamm v. Port Deposit Homestead Assn., 49 Md. 233, 33 Am. Rep. 246; Ochsenkehl v. Jeffers, 32 Mich. 482; 2 Reed, Stat. Frauds, c. 21.

⁴¹ Browne, Stat. of Frauds, §§ 437, 438.

⁴² Thompson v. Mason, 4 Bibb (Ky.), 195; Day v. Lown, 51 Iowa, 364, 1 N. W. 786.

⁴³ Sandford v. Rose, 2 Tyler (Vt.), 428.

⁴⁴ Vin. Abr. 523.

Massachusetts case.⁴⁵ In that case the court said the parol evidence was admitted, not to vary, add to or contradict the writings, but to establish the fact of an inherent fault in the transaction or its consideration, which afforded ground for avoiding the effect of the writings, by restricting their operation, or defeating them altogether. "Upon the whole," continued the court, "we are convinced that the doctrine may be adopted without violation of the statute of frauds, or of any principle of law or evidence; and, if properly guarded in administration, may prove a sound and salutary principle of equity jurisprudence. It is a power to be exercised with the utmost caution, and only when the grounds of interference are fully made out, so as to be clear from doubt."⁴⁶ We have already referred⁴⁷ to cases of purchasers at judicial sales fraudulently attempting to retain property which was allowed to be "bid off" to them by agreement with the owner, and have shown that such purchasers cannot take advantage of the statute of frauds and escape because the contract was not in writing. The rule has been broadly stated in a recent case⁴⁸ that any act performed under a parol contract, which would work a fraud on the party if the contract was not enforced, may be sufficient to take the case out of the operation of the statute of frauds.⁴⁹ A very strong case is reported from New York. A contractor, required to find surety on his bond for work, arranged verbally with his wife to convey to her his property, so that she could justify and afterward reconvey it to him. She agreed, and the transaction was carried out; but she refused to reconvey the property, and relied on the fact that he was estopped from claiming the reconveyance in consequence

⁴⁵ *Campbell v. Dearborn*, 109 Mass. 130, 12 Am. Rep. 671.

⁴⁶ See interesting discussion of this case in *Browne on Stat. of Frauds*, § 441a.

⁴⁷ § 425, *ante*.

⁴⁸ *Dalby v. Maxfield*, 244 Ill. 214,

135 Am. St. Rep. 312, 91 N. E. 420 (specific performance of a contract to will property in consideration of services).

⁴⁹ See, also, *McGuire v. Murray*, 107 Me. 108, 77 Atl. 692.

of having stood by and heard her statement that she was the absolute owner of the property. The court held that as no third persons were affected, the husband was not estopped, and that in view of the confidential relation existing between the parties, the statute of frauds could not be availed of, and that it was one of those cases where equity interposes to prevent the perpetration of a fraud or the abuse of confidence.⁵⁰ Under another heading the rule has been discussed that in equitable proceedings it may be shown by parol that by reason of a mistake, surprise or fraud, a written contract fails to state the actual agreement between the parties.⁵¹ Many of the illustrations there given show that the rule applies as well when the contract is one which by the statute of frauds is required to be in writing.

§ 432 (435). Reformation — Part performance — How proved.—The court may, in a proper proceeding, thus correct and reform such instruments as those just mentioned either by striking out terms or clauses improperly contained in the writing, or by adding others which, according to the real agreement, belong there.⁵² But the *mere refusal to carry out an oral agreement*, otherwise defective under the statute of frauds, is not a ground of action; and oral evidence is not rendered admissible to prove such a contract, merely by reason of its breach. There can be no fraud or legal wrong in the breach of a trust from which the statute withholds the right of judicial recognition. Such conduct may sometimes appear to relate back, and give character to the original transaction, by showing, in that, an express intent to deceive and defraud. But

⁵⁰ *Gallagher v. Gallagher*, 135 App. Div. 457, 120 N. Y. Supp. 18 (Ingraham and Scott, JJ., dissenting).

⁵¹ See § 435 et seq., *post*.

⁵² *Beardsley v. Duntley*, 69 N. Y. 577; *Tilton v. Tilton*, 9 N. H. 385; *Quinn v. Roath*, 37 Conn. 16; *Keis-*

selbrack v. Livingston, 4 Johns. Ch. (N. Y.) 144; *Coles v. Bowne*, 10 Paige (N. Y.), 526. See § 437, *post*. See, also the late case of *Kennedy v. Poole* (Mass.), 100 N. E. 635.

ordinarily it will not be connected with the original transaction otherwise than constructively, or as involved in it as its legitimate consequence and natural fruit.⁵³ It is, however, a well-recognized power of the courts of equity to compel the *specific performance* of a verbal agreement within the statute of frauds, where the refusal to execute would be equivalent to a fraud. Notwithstanding a conflict, "the preponderance of authority remains on the side of maintaining the jurisdiction to reform contracts or conveyances in case of mistake or fraud proved by oral testimony only, notwithstanding the statute of frauds."⁵⁴ When the contract for a conveyance of land must be in writing to be enforceable, and the contract is oral, and the vendor receives the full consideration but causes the deed to be so fraudulently made as to omit part of the tract included in the contract, a court of equity has the power, notwithstanding the statute of frauds, to afford relief by a decree for a conveyance in accordance with the oral contract.⁵⁵ Although the statute of frauds is binding alike

⁵³ Campbell v. Dearborn, 109 Mass. 130, 12 Am. Rep. 671; Montague v. Maxwell, 1 P. Wms. 618; Dunphy v. Ryan, 116 U. S. 491, 29 L. Ed. 703, 6 Sup. Ct. Rep. 486; Scott v. Harris, 113 Ill. 447; Pusey v. Gardner, 21 W. Va. 469; McClain v. McClain, 57 Iowa, 167, 10 N. W. 333; Reed, Stat. Frauds, § 478.

⁵⁴ Browne, Stat. of Frauds, § 441.

⁵⁵ McDonald v. Yungbluth, 46 Fed. 836. The conflict was raised to its utmost importance by the celebrated opinion in Glass v. Hulbert, 102 Mass. 24, 3 Am. Rep. 418, in which the court held contrary to the text. The opinion in McDonald v. Yungbluth, *supra*, contains an excellent collection of cases on the subject. We extract the following passages from it. Chancellor Kent, in Gillespie v. Moon, 2 Johns. Ch. (N. Y.) 596, says that it would be a great defect in

what Lord Eldon terms the "moral jurisdiction" of the court if there were no relief for such a case. Justice Story also was of the opinion that the relief could be granted: See Story, Eq. Jur., § 161, and cases cited. Pomeroy, in his work on Contracts (Specific Performance), at section 264, declares that the preponderance of judicial authority in this country, by courts and jurists of the highest character, is that where, by reason of fraud, the written instrument fails to express the actual agreement, whether the variation consists in limiting the scope of the writing or in enlarging it so as to embrace land omitted through mistake or fraud, relief may be granted by making the writing conform to the agreement, although the agreement was oral, and of the class required by the statute

upon courts of law and equity, and although a mere breach of or refusal to execute a parol agreement, not valid according to the statute of frauds, is not alone a ground for equitable jurisdiction, yet if one party to such an agreement induces the other to *partially perform* it, and to change materially his situation, the refusal to complete the agreement is tantamount to a fraud.⁵⁶ In such cases where the circumstances are such that the injured party cannot be restored to his former condition, courts of equity receive *parol evidence of the contract* and of the facts relied on to constitute a partial performance; and they compel the wrongdoer to perform his agreement, or give compensation in damages.⁵⁷ A familiar illustration of the part performance which will remove an oral contract

of frauds to be in writing. Numerous authorities are cited in a footnote in support of this view. To the same effect see *Murray v. Dake*, 46 Cal. 644, and cases there cited, and *Hitchins v. Pettingill*, 58 N. H. 386, reviewing *Glass v. Hulbert*, and citing a large number of cases to the contrary. See, also, cases cited in note 4 to section 85, *Adams, Eq.*, 8th ed., and *Beardsley v. Duntley*, 69 N. Y. 577, which also comments upon and disapproves *Glass v. Hulbert*. See *Flagler v. Pleiss*, 3 Rawle (Pa.), 345; *Blodgett v. Hobart*, 18 Vt. 414; *Moale v. Buchanan*, 11 Gill & J. (Md.) 314; *Worley v. Tuggle*, 4 Bush (Ky.), 168; *Provost v. Reberman*, 21 Iowa, 419; *Hunter v. Bilyeu*, 30 Ill. 228; *Durant v. Bacot*, 13 N. J. Eq. 201; and *Wyche v. Greene*, 16 Ga. 49. So in Ohio: *Davenport v. Sovil*, 6 Ohio St. 459; *Ormsby v. Longworth*, 11 Ohio St. 653.

⁵⁶ *Attorney General v. Day*, 1 Ves. Sr. 218, 27 Eng. Reprint, 992; *Williams v. Morris*, 95 U. S. 444, 24 L. Ed. 360; *Graham v. Theis*, 47 Ga. 479; *Sands v. Thompson*, 43 Ind. 18;

Glass v. Hulbert, 102 Mass. 24, 3 Am. Rep. 418; *Ham v. Goodrich*, 33 N. H. 32; *Freeman v. Freeman*, 43 N. Y. 34, 3 Am. Rep. 657; *Horn v. Ludington*, 32 Wis. 73; *Ann Berta Lodge*, No. 42, I. O. O. F. v. *Leverton*, 42 Tex. 18; *Reed*, Stat. Frauds, § 550; *Browne*, Stat. Frauds, 5th ed., § 437. As to correcting a mutual mistake, see *Butler v. Threlkeld*, 117 Iowa, 116, 80 N. W. 584. As to what acts constitute part performance so as to take the contract out of the statute of frauds, see extended notes, *Christy v. Barnhart*, 53 Am. Dec. 539; *Norton v. Preston*, 32 Am. Dec. 129, and *Shindler v. Houston*, 49 Am. Dec. 325. As to when the statute of frauds is satisfied by part payment of purchase price under an oral contract for the sale of chattels, see note to *Driggs v. Bush*, 125 Am. St. Rep. 393.

⁵⁷ See cases last cited. See, also, the late cases: *Korrer v. Madden* (Wis.), 140 N. W. 325 (repurchase of stock at buyer's option); *Hollweg v. Schaefer Brokerage Co.*, 197 Fed. 689, 117 C. C. A. 83.

from the operation of the statute of frauds is when the contract relates to land, and possession is taken or valuable improvements are made.⁵⁸ The proof must show that the possession is pursuant to the contract relied on,⁵⁹ and it must be notorious and exclusive.⁶⁰ Although the possession is generally accompanied by other acts, *possession alone is sufficient* part performance;⁶¹ but, although the acts constituting part performance may be proved by parol, such evidence should be clear and convincing.⁶² The party who claims the interference of the court of equity in respect to such parol contracts has the burden of proof thrown upon him. He knows the law requires written evidence of such contracts, and when he seeks the assistance of the court to save him from the consequences of his disregard of the law, he is held rigidly to full, satisfactory and indubitable proof—First: Of the contract, and of its terms. Such proof must be clear, definite and conclusive, and must show a contract, leaving no *jus deliberandi* or *locus poenitentiae*. It cannot be made

⁵⁸ Cummings v. Gill, 6 Ala. 562; Terry v. Rosell, 32 Ark. 478; Alderman v. Chester, 34 Ga. 152; McDowell v. Lucas, 97 Ill. 489; Glass v. Hulbert, 102 Mass. 24, 3 Am. Rep. 418; Miller v. Ball, 64 N. Y. 286; Milliken v. Dravo, 67 Pa. 230; Smith v. Armstrong, 24 Wis. 446; Reed, Stat. Frauds, § 574 et seq. See full note to Roberts v. Templeton, 3 L. R. A., N. S., 790-817.

⁵⁹ Gorham v. Dodge, 122 Ill. 528, 14 N. E. 44; Brown v. Brown, 33 N. J. Eq. 650; Riddell v. Riddell, 70 Neb. 472, 97 N. W. 609.

⁶⁰ Brown v. Lord, 7 Or. 302; Moore v. Small, 19 Pa. 461; Charpiot v. Sigerson, 25 Mo. 63; Baldwin v. Baldwin, 73 Kan. 39, 4 L. R. A., N. S., 957, 84 Pac. 568. See note to Roberts v. Templeton, 3 L. R. A., N. S., 813 et seq.

⁶¹ Reed, Stat. Frauds, § 584, and cases cited.

⁶² Houston v. Townsend, 1 Del. Ch. 416, 12 Am. Dec. 109; Worth v. Worth, 84 Ill. 442; Collins v. Vandever, 1 Iowa, 583; Reese v. Reese, 41 Md. 554; Russell v. Berkstresser, 77 Mo. 417; Force v. Dutcher, 18 N. J. Eq. 401; Niven v. Belknap, 2 Johns. (N. Y.) 573; Ackerman v. Fisher, 57 Pa. 457; Clarke v. Vankirk, 14 Serg. & R. (Pa.) 354; Hand v. Nix, 39 Tex. Civ. App. 403, 87 S. W. 204; Blanchard v. McDougal, 6 Wis. 167, 70 Am. Dec. 458; Purcell v. (Miner) Coleman, 4 Wall. 513, 18 L. Ed. 435; Reed, Stat. Frauds, § 637. See note on "Weight of Testimony Based on Memory of Oral Statements," to Wilbur v. Toothaker, 18 Ann. Cas. 1191.

by mere hearsay, or evidence of the declarations of a party to mere strangers to the transaction, in chance conversation—which the witness had no reason to recollect from interest in the subject matter, which may have been imperfectly heard, or inaccurately remembered, perverted or altogether fabricated; testimony, therefore, impossible to be contradicted. Second: That the consideration has been paid or tendered. But the mere payment of the price, in part or in whole, will not, of itself, be sufficient for the interference of a court of equity, the party having a sufficient remedy at law to recover back the money. Third: Such a part performance of the contract that its rescission would be a fraud on the other party, and could not be fully compensated by recovery of damages in a court of law. Fourth: That delivery of possession has been made in pursuance of the contract, and acquiesced in by the other party. This will not be satisfied by proof of a scrambling and litigious possession.⁶³

§ 433 (436). Same — Original agreement must be proved.—Part performance in no way dispenses with the necessity of proving the original agreement. It is not the province of the courts to make contracts; and, as we have shown in the preceding section, the party who relies on part performance as removing the bar of the statute of frauds must produce definite and convincing proof as to the nature and terms of the oral contract on which he relies.⁶⁴ The consideration and the subject matter,⁶⁵ as well as the other terms of the agreement, must be proved by a clear preponderance of testimony in such a manner that the court may know that the minds of the parties have met, and that a definite and complete contract has been

⁶³ *Purell v. (Miner) Coleman*, 10 Grant Ch. 109; *Smith v. Crandall*, 20 Md. 482.
supra.

⁶⁴ *Kinyon v. Young*, 44 Mich. 339,
⁶ *N. W.* 835; *Nichol v. Tackaberry*,

⁶⁵ *Hart v. Carroll*, 85 Pa. 508;
Cooper v. Carlisle, 17 N. J. Eq. 525.

made.⁶⁶ Although acts of part performance may illustrate and indicate the contract, they need not afford complete proof of its terms. It is sufficient if they are referable to, and consistent with the oral contract.⁶⁷ A final word is called for as to the mode and reason of the necessary proof. When a plaintiff gives proof of part performance which points to the existence of the agreement alleged, then the court permits proof of the parol agreement despite the statute, in order that the statute of frauds shall not be a shield in that case to cover fraud.⁶⁸ It must always be borne in mind that the foundation of the jurisdiction is not the parol agreement, but fraud.⁶⁹ Hence it is that the courts call for evidence, clear and satisfying, of the nature of the acts which go to make up the part performance relied on. In the words of Chancellor Kent, "It is well settled that if a party sets up part performance, to take a parol agreement out of the statute, he must show acts unequivocally referring to, and resulting from, *that* agreement; such as the party would not have done, unless on account of that very agreement, and with a direct view to its performance; and the agreement set up must appear to be the *same* with the one partly performed. There must be no equivocation or uncertainty in the case. The ground of the interference of the court is not simply that there is proof of the existence of a parol agreement, but that there is *fraud* in resisting the completion of an agreement partly performed."⁷⁰ And Earls, J., in the New York case cited,⁷¹ following Chancellor Kent's reasoning, added: "The part performance must be sub-

⁶⁶ Blanchard v. McDougal, 6 Wis. 167, 12 Am. Dec. 109; Purcell v. (Miner) Coleman, 4 Wall. (U. S.) 513, 13 L. Ed. 435; Aday v. Echols, 18 Ala. 353, 52 Am. Dec. 225; Brewer v. Wilson, 17 N. J. Eq. 180.

⁶⁷ Sitton v. Shipp, 65 Mo. 297; Church v. Sterling, 16 Conn. 388; Bard v. Elston, 31 Kan. 274, 1 Pac. 565.

⁶⁸ Robbins v. Robbins, 89 N. Y. 251; McKinley v. Hessen, 135 App. Div. 832, 120 N. Y. Supp. 257.

⁶⁹ Wheeler v. Reynolds, 66 N. Y. 227.

⁷⁰ Phillips v. Thompson, 1 Johns. Ch. (N. Y.) 131.

⁷¹ Wheeler v. Reynolds, *supra*.

stantial, and nothing will be considered as part performance which does not put the party into a situation which is a fraud upon him unless the agreement be fully performed; and the acts of part performance should clearly appear to be done solely with a view to the agreement being performed. Generally, if they are acts which might have been done with other views, they will not take the case out of the statute, since they cannot properly be said to be done by way of part performance of the agreement. The acts should be so clear, certain and definite in their object and design as to refer exclusively to a complete and perfect agreement, of which they are a part execution."⁷²

⁷² Citing, also, 2 Story's Eq. Jur., §§ 761, 762; *Byrne v. Romaine*, 2 Edw. Ch. (N. Y.) 445; *Jervis v. Smith*, 1 Hoffm. (N. Y.) 470; *Wolfe v. Frost*, 4 Sand. Ch. (N. Y.) 77. The English decisions are on the same lines. In *Maddison v. Alderson*, L. R. 8 App. Cas. 467, Lord Chancellor Selborne said: "All the authorities

show that the acts relied upon as part performance must be unequivocally, and in their own nature, referable to some such agreement as that alleged: *Cooth v. Jackson*, 6 Ves. 38, 31 Eng. Reprint, 913; *Frame v. Dawson*, 14 Ves. 386; 33 Eng. Reprint, 569; *Morphet v. Jones*, 1 Sw. 181, 36 Eng. Reprint, 344."

CHAPTER 15.

PAROL EVIDENCE TO EXPLAIN WRITINGS.

- § 434. Parol Evidence Inadmissible to Vary Written Instruments—Reasons for the Rule.
- § 435. The Rule Does not Prevent Proof of Fraud—Sealed and Unsealed Instruments.
- § 436. Illegality of Contract may be Shown—Incapacity.
- § 437. As to Mistakes of Fact—Reformation of Contract.
- § 437a. As to Mistakes in Law.
- § 438. Mistakes as to Dates.
- § 439. Proof of Independent or Collateral Contracts—Subject Matter Thereof.
- § 440. Parol Evidence When the Writing is Incomplete.
- § 441. Sales of Personal Property.
- § 442. Parol Proof of Subsequent Agreement.
- § 443. Same—As to Specialties.
- § 444. Subsequent Agreement as to Contracts Within the Statute of Frauds.
- § 445. Same—Tendency of Decisions in the United States.
- § 446. To Show That Instruments Apparently Absolute are Only Securities.
- § 447. Same—Real Intention of the Parties to be Ascertained.
- § 448. Not Limited to Deeds and Mortgages.
- § 449. Rule as to Parol Evidence not Applicable to Strangers to the Instrument.
- § 450. Parol Evidence to Identify and Apply the Subject Matter.
- § 451. Same—Use of Property—Identifying Parties.
- § 452. Same—Further Illustrations—General Rule.
- § 453. Proof of Surrounding Facts.
- § 454. Such Evidence Only Received When the Language is of Doubtful Import.
- § 455. Proof of Meaning of Words.
- § 456. Same—Intention—Meaning of Words and Phrases.
- § 457. Usages of Trade.
- § 458. Same—Principal and Agent.
- § 459. Proof of Usage—Bills of Lading—Insurance.
- § 460. Same—Contracts for Services.
- § 461. Proof of Custom Between Landlord and Tenant—Other Contracts.
- § 462. General Requisites of Usages—Must be Reasonable.
- § 463. The Usage must be an Established One.
- § 464. The Usage must be Known.
- § 465. The Usage must be Consistent With the Contract.
- § 466. Proof That the Usage is General, Uniform and Certain, Continuous and Obligatory, Peaceable.
- § 467. To Admit Parol Proof the Usage must be Lawful.
- § 468. Parol Evidence as to Consideration.
- § 469. Proof of Consideration in Deeds.
- § 470. Same—In Cases of Fraud.

- § 471. Parol Proof as to Execution and Delivery—Suspension of Operation.
- § 472. Parol Proof of Latent Ambiguities.
- § 473. Parol Evidence not Allowed in Case of Patent Ambiguities.
- § 474. Patent Ambiguity—The True Rule—How Ascertained—Inaccuracies.
- § 475. Parol Evidence as to Wills—In General.
- § 476. Wills—Parol Evidence to Identify Property.
- § 477. Wills—Evidence to Identify Devisee or Legatee.
- § 478. The Rule Where the Description is More Applicable to One Subject or Person Than Another.
- § 479. Wills—Meaning of Words and Terms—Proof in Case of Latent Ambiguity—Declarations of Testator.
- § 480. Where There is No Latent Ambiguity, Declarations of Testator Rejected—Where Doubt as to Nature of Instrument, Whether Testamentary or not.
- § 481. Proof of Declarations of Testator—Time of Making.
- § 482. Same—To Show Mental Condition, etc.
- § 483. Same—Declarations—How Limited.
- § 484. Parol Proof of Declarations as to Revocation—Lost Wills.
- § 485. Parol Evidence to Explain Deeds—Latent Ambiguities.
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- § 490. Parol Proof as to Acknowledgments.
- § 491. Parol Evidence to Explain Receipts.
- § 492. Effect of Receipts When not Explained.
- § 493. Warehouse Receipts.
- § 494. Parol Evidence as to Bills and Notes.
- § 495. Qualifications of the General Rule as Applied to Negotiable Paper.
- § 496. Indorsements on Negotiable Paper.
- § 497. Same—Qualifications.
- § 498. Bills of Lading—Contractual Stipulations—Receipts.
- § 499. Parol Evidence as to Mortgages.

§ 434 (437, 438, 439). Parol evidence inadmissible to vary written instruments—Reasons for the rule.—This chapter brings us to the discussion of admittedly one of the most difficult branches of our subject—the admissibility of parol evidence to explain or vary written instruments. The rule in its shortest form is that parol testimony cannot be received to contradict, vary, add to or subtract from the terms of a valid written instrument.¹ The admissibility of

¹ *Tayl. Ev.*, 10th ed., § 1132; parol evidence and collection of the *Greenl. Ev.*, § 275. For a general authorities, see articles by James B. discussion of the admissibility of Thayer, 6 *Harv. Law Rev.* 325, 417.

extrinsic parol testimony to affect written instruments has, perhaps, called for more controversial elucidation, has given

Valuable notes discussing the general subject of parol proof will be found in *Sullivan v. Lear*, 11 Am. St. Rep. 394; *Hersom v. Henderson*, 53 Am. Dec. 187; *Donley v. Tindall*, 5 Am. Rep. 241; *Keller v. Webb*, 28 Am. Rep. 210; *Wilmering v. Gaughey*, 6 Am. Rep. 678; *Thompson's Lessee v. White*, 1 Am. Dec. 257; *Rearich v. Swinehart*, 51 Am. Dec. 546; *Harris v. Murphy*, 56 Am. St. Rep. 659; *Diven v. Johnson*, 3 L. R. A. 308, 330, 761, 796, 801; *Ferguson v. Rafferty*, 6 L. R. A. 33-47; *Collar v. Collar*, 13 L. R. A. 621; *Durkin v. Cobleigh*, 17 L. R. A. 270. A written contract cannot be altered by parol evidence to show that a particular ship different from that described in the *policy* of insurance was verbally accepted at the time of the contract: *Weston v. Emes*, 1 Taunt. 115, 127 Eng. Reprint, 775; that the *acceptor* of a *draft* should not be called on to pay: *Davis v. Randall*, 115 Mass. 547, 15 Am. Rep. 146; that an *indorsement* of a note in blank was agreed to be *without recourse*: *Martin v. Cole*, 104 U. S. 30, 26 L. ed. 647; *Thompson v. McKee*, 5 Dak. 172, 37 N. W. 367; *Knoblauch v. Foglesong*, 38 Minn. 352, 37 N. W. 586; *Cake v. Pottsville Bank*, 116 Pa. 264, 2 Am. St. Rep. 600, 9 Atl. 302; that there was a *guaranty* of payment, where *indorsement* was *without recourse*: *Youngberg v. Nelson*, 51 Minn. 172, 38 Am. St. Rep. 496, 53 N. W. 629; that the date of payment be changed: *Wells v. Baldwin*, 18 Johns. (N. Y.) 45; *Wright v. Taylor*, 9 Wend. (N. Y.) 538; *Hoare v. Graham*, 3 Camp. 57; *Besant v. Cross*, 10 Com. B. 895; *Church etc. (Hanson) v. Stetson*, 5 Pick. (Mass.) 506; *Van Syckel v.*

Dalrymple, 32 N. J. Eq. 233; *Spring v. Lovett*, 11 Pick. (Mass.) 417; that the mode of payment be changed: *Stull v. Thompson*, 154 Pa. 43, 25 Atl. 890; that *payment* should be made out of a particular fund: *Campbell v. Hodgson*, Gow. 74; or out of the profits of a business: *Smith v. Kemp*, 92 Mich. 357, 52 N. W. 639; or on a contingency: *Abrey v. Crux*, L. R. 5 C. P. 37; *Rawson v. Walker*, 1 Stark. 361; *Adams v. Wordley*, 1 Mees. & W. 374, 2 Gale, 29; *Erwin v. Saunders*, 1 Cow. (N. Y.) 249, 13 Am. Dec. 520; *Hunt v. Adams*, 7 Mass. 518; that a *certificate of deposit* should bear interest: *Read v. Bank of Attica*, 124 N. Y. 671, 27 N. E. 250; that an *agreement* to pay might be *revoked* by giving notice: *Wemple v. Knopf*, 15 Minn. 440, 2 Am. Rep. 147; that an *obligor* on a bond or indemnity should *not* be *liable* thereon: *Cowel v. Anderson*, 33 Minn. 374, 23 N. W. 542; that a promissory note was intended as a mere receipt: *Phillips v. Jarvis*, 19 Wis. 204; that articles not described in a *contract of sale* might be included: *Osborn v. Hendrickson*, 7 Cal. 282; *Angomar v. Wilson*, 12 La. Ann. 857; that an *agreement* contemplated a line of railroad already established, where the contract to convey read "as it should be laid out": *Applegate v. Burlington & S. W. R. Co.*, 41 Iowa, 214; that timber should be cut by a certain time, where the contract provided a reasonable time: *Jenkins v. Lykes*, 19 Fla. 148, 45 Am. Rep. 19; that the risk under an *insurance policy* was not to commence until the vessel reached a certain point: *Kaines v. Knightly*, Skin. 54, 90 Eng. Reprint, 26; that there

more occasion for the consideration of its difficult problems, and is responsible for more elaborate opinions than any

were other *exceptions* than those stated: *Hovey v. Newton*, 7 Pick. (Mass.) 29; that there was a prior or contemporaneous *warranty* not expressed in the contract: See § 441, *post*, and cases cited; that a *sale* was for an agreed price, where the agreement is for cost price or current rates: *Sharp v. Radebaugh*, 70 Ind. 547; that goods might be delivered in parcels where the *agreement* was to *deliver* a gross amount: *Baker v. Higgins*, 21 N. Y. 397; that *credit* was intended where the contract fixes no time of payment: *Ford v. Yates*, 2 Man. & G. 549; that the seller agreed to furnish the buyer the money with which to buy: *Snyder v. Koons*, 20 Ind. 389; that an *unconditional* contract of *sale* was intended as a bailment: *Allen v. Bryson*, 67 Iowa, 591, 56 Am. Rep. 358, 25 N. W. 820; that a *condition* was intended: *Daly v. Kimball*, 67 Iowa, 132, 24 N. W. 756; that inconsistent conditions were intended in a deed: See § 485 et seq., *post*; that omissions were made in a *will*: *Abercrombie v. Abercrombie*, 27 Ala. 489: See § 475, *post*; that the testator by the word "children" meant "illegitimate children": *Shearman v. Angel*, 1 Bail. Eq. (S. C.) 351, 23 Am. Dec. 166; that there is a mistake in a will as to the description of land: *Funk v. Davis*, 103 Ind. 281, 2 N. E. 739; see § 475 et seq., *post*; that there was a *warranty* that premises were in good repair, there being a written lease: *Naumberg v. Young*, 44 N. J. L. 331, 43 Am. Rep. 380, with full discussion of the rule; that machinery purchased thereunder was to be set up by the vendor: *Murray v. Putnam* (Tex. Civ. App.), 130

S. W. 631; that there was a contemporaneous agreement that part of the written contract was to be erased: *American Copying Co. v. Muleski*, 138 Mo. App. 419, 122 S. W. 384; that in addition to the consideration of monthly payments during the life of certain letters patent, the vendee was to perform some service not contained in the written contract: *Kruger v. Brown*, 79 N. J. L. 418, 75 Atl. 171; that a guaranty was to be limited in its extent and not to be a continuing one: *Newcomb v. Kloeblen*, 77 N. J. L. 791, 30 L. R. A., N. S., 724, 74 Atl. 511; that liability as maker of a note was limited: *Pitt v. Little*, 58 Wash. 355, 108 Pac. 941; that the uncommunicated intention of one of the parties was different from that expressed in the contract: *Brent v. Chas. H. Lilly Co.*, 174 Fed. 877. The following useful illustrations are extracted from 15 Current Law, pages 1739, 1740: Contract with the United States as to water rights being subject to approval by Secretary of Interior, oral representations by government agent prior to such approval could not be proved to vary contract: *United States v. Cantrall*, 176 Fed. 949. Cause of action being based on contract, previous representations contained in prospectus immaterial: *Idaho Fruit Land Co. v. Great Western Beet Sugar Co.*, 18 Idaho, 1, 107 Pac. 989. Where sale contract was in writing, though there was prior oral agreement, statements made at time of execution of contract that it would be satisfactory provided seller received full price in accordance with oral agreement were incompetent: *Brown v. Holloway's Estate*, 47 Colo.

other branch of the law of evidence.² "Few things are darker than this, or fuller of subtle difficulties. . . . The chief reason is that most of the questions brought under this head are out of place; there is a grouping together of a mass of incongruous matter, and then it is looked at in a wrong focus. Because the rules intimated by this title deal with writings, i. e., with things which in their nature are evidence of what they record, it is assumed that they belong to the law of evidence. But in truth most of the matters with which they are concerned have no special place in the law of evidence."³ Thayer, from whom we have quoted the foregoing passages, properly endeavors to impress the necessity for discrimination between the rules that belong to the substantive law of the subject and the general rules

461, 108 Pac. 25. Contract of sale of vegetables by oral evidence of agreement as to sale of cans, made at same time or before written contract was made: *Orrick & Son Co. v. Dawson*, 67 W. Va. 402, 68 S. E. 39. Where minute-book was provided for by act of April 15, 1834 (P. L. 537), supervisors not allowed to contradict it by parol evidence after minutes had been approved and stood unquestioned for long time: *Geiser Mfg. Co. v. Frankford Tp.*, 40 Pa. Super. Ct. 97. Ordinarily, contract made by unrestricted indorsement of note cannot be varied by parol: *First Nat. Bank v. Reinman*, 93 Ark. 376, 125 S. W. 443. Where sale contract specifies no time for delivery, law implies that delivery is to be made within reasonable time, and proof of oral agreement inconsistent therewith is incompetent: *Cameron Coal & Mercantile Co. v. Universal Metal Co.*, 26 Okl. 615, 31 L. R. A., N. S., 618, 110 Pac. 720. It is presumed, under Civ. Code, § 3100, that note which does not specify place of payment is payable at place of residence of maker. Hence, parol evidence is incompetent

to show agreement whereby note of foreign corporation was payable in state: *Atwood v. Little Bonanza Quicksilver Co.*, 13 Cal. App. 594, 110 Pac. 344. Landlord not bound to make repairs unless he expressly covenants so to do; if lease is silent on question of repairs, duty rests on tenant; oral agreement to contrary incompetent to vary lease: *Tribelhorn v. Hanavah*, 65 Misc. Rep. 22, 119 N. Y. Supp. 262. Parol evidence cannot be given to contradict a *legal presumption*: *Central Ry. Co. v. Hasselkus*, 91 Ga. 382, 44 Am. St. Rep. 37, 17 S. E. 838; *Schultz v. Plankinton Bank*, 141 Ill. 116, 33 Am. St. Rep. 290, 30 N. E. 346. See note on "Extrinsic Evidence as to Extent of Liability Assumed by Obligor Under Bond," to *Orion Knitting Mills v. United States Fidelity etc. Co.*, 2 Ann. Cas. 891. See note on "Admissibility of Parol Evidence to Affect Terms of Contract of Guaranty," to *Merchants' Nat. Bank v. Cole*, Ann. Cas. 1912A, 781.

² 2 Taylor, Ev., 9th ed., § 1128.

³ Thayer, Prel. Treat. on Ev., 390.

of evidence, and gives the excellent illustration in his notes of the English case,⁴ wherein Martin, B., said: "When a judge says, 'I found my judgment on one of the most useful rules in the law, namely, that when parties have put their contract into writing, that writing determines what the bargain is,' he is not stating a rule of evidence." The so-called parol evidence rule forbids any addition to or contradiction of the terms of a written instrument by testimony purporting to show that at or before the signing of the written paper other, further, or different terms were orally agreed upon by the parties—provided, always, that the written instrument appears, on its face, to express an agreement complete in all essential terms. This is not a mere rule of evidence. It is a rule of the substantive law.⁵ There is some foundation for the charge of grouping together a mass of incongruous matter, but the answer to it is that it is the most convenient way of using that matter for reference, and that its distribution to its topical subjects would unduly and inconveniently enlarge a work on the subject. There are many subjects treated in a work on evidence which logically do not belong there, but the text-writer, in his anxiety to throw light on the subject generally, and, very often because the subject has theretofore always been included, is constrained to treat it *en passant*. The great compiler of the English digest of evidence modestly says, in speaking of what evidence may be given for the interpretation of documents: "Perhaps the subject matter of this article does not fall strictly within the law of evidence, but it is generally considered to do so; and as it has always been treated as a branch of the subject, I have

⁴ Thayer, Prel. Treat. on Ev., 391; Layton v. Higgins, 4 Hurl. & N. 402.

⁵ Lee v. Lamprecht, 196 N. Y. 32, 89 N. E. 365; Stanton v. Granger, 125 App. Div. 174, 109 N. Y. Supp. 134; Pitcairn v. Philip Hess Co., 125 Fed. 110, 61 C. C. A. 657. The Cal. Civ. Code, § 1625, is a typical illus-

tration of the enactment of this law: "The execution of a contract in writing, whether the law requires it to be written or not, supersedes all the negotiations or stipulations concerning its matter which preceded or accompanied the execution of the instrument."

thought it best to deal with it.”⁶ Returning, then, to the subject, we have the following interesting statement of the rule by an undoubtedly reliable text-writer: “When parties have deliberately put their engagements into writing, in such terms as import a legal obligation, without any uncertainty as to the object or extent of such engagement, it is conclusively presumed that the whole engagement of the parties, and the extent and manner of their undertaking, was reduced to writing; and all oral testimony of a previous *colloquium* between the parties, or of conversations or declarations at the time when it was completed, or afterward, as it would tend, in many cases, to substitute a new and different contract for the one which was really agreed upon, to the prejudice, possibly, of one of the parties, is rejected. In other words, as the rule is now more briefly expressed, ‘parol contemporaneous evidence is inadmissible to contradict or vary the terms of a valid written instrument.’”⁷ Stephen states the rule more fully and in much more guarded language as follows: “When any judgment of any court, or any other judicial or official proceeding, or any contract or grant, or any other disposition of property, has been reduced to the form of a document or series of documents, no evidence may be given of such judgment or proceeding, or of the terms of such contract, grant or other disposition of property, except the document itself, or secondary evidence of its contents in cases in which secondary evidence is admissible under the provisions hereinbefore contained. Nor may the contents of any such document be contradicted, altered, added to or varied by oral evidence.”⁸ It is hardly necessary to cite authorities⁹ in

⁶ Reynolds’ Stephen on Evidence, p. 229.

⁷ 1 Greenl. Ev., § 275.

⁸ Steph. Ev., art. 90. See, also, Kelly v. Fahrney, 145 Ill. App. 80; Seass v. Monroe, 146 Ill. App. 56.

⁹ The following, however, will be found among the later decisions on the rule: Delaney v. Jackson, 95 Ark.

131, 128 S. W. 859; Bradley Gin Co. v. Means Mach. Co., 94 Ark. 130, 126 S. W. 81; Baume v. Morse, 13 Cal. App. 456, 110 Pac. 350; Hatch v. Fritz, 48 Colo. 530, 111 Pac. 74; Hartman Stock Farm v. Henley, 8 Ga. App. 255, 68 S. E. 957; Buffalo Oolitic Limestone Quarries Co. v. Davis, 45 Ind. App. 116, 90 N. E.

support of the general rule above stated as it is recognized in nearly all the cases hereafter cited in this chapter. The numerous exceptions and qualifications which limit the rule will appear in the discussion that follows. If the rule were strictly applied to those writings which are incomplete, informal or transitory in their character, it might be deemed unreasonably rigid and harsh, but there can be no such criticism of the rule when applied to those more solemn documents in which parties have made a distinct and complete memorial of their agreement. In such cases it is impliedly, if not expressly, agreed that, in the event of misunderstanding, the document shall be taken as the best evidence of their intention. For many reasons such written instruments deliberately agreed to by the parties must be deemed better evidence than the "uncertain testimony of slippery memory." When parties sign a memorandum expressing all the terms essential to a complete agreement, they are to be protected against both the doubtful veracity of interested witnesses and the uncertain memory of the disinterested concerning the terms of their agreement. And the only way in which they can be so protected is by holding each of them conclusively bound by the terms of the agreement as expressed in the writing.¹⁰ It is but a corollary of

327; *Jennings v. Puffer*, 203 Mass. 534, 89 N. E. 1036; *Graham v. Savage*, 110 Minn. 510, 136 Am. St. Rep. 527, 19 Ann. Cas. 1022, 126 N. W. 394; *Piretti v. Firestone Tire & Rubber Co.*, 120 N. Y. Supp. 782; *Williams v. Mount Hood R. & P. Co.*, 57 Or. 251, Ann. Cas. 1913A, 177, 110 Pac. 490, 111 Pac. 17; *International Land Co. v. Parmer* (Tex. Civ. App.), 123 S. W. 196; *Western Mfg. Co. v. Freeman* (Tex. Civ. App.), 126 S. W. 924; *Fentress v. Steele & Sons*, 110 Va. 578, 66 S. E. 870; *Klueter v. Schlitz Brew. Co.*, 143 Wis. 347, 128 N. W. 43; *Kilpinski v. Bishop*, 143 Wis. 390, 127 N. W. 974.

¹⁰ *Piretti v. Firestone Tire & Rub-*

ber Co., 120 N. Y. Supp. 782. When such a memorandum has once been signed, therefore, it is quite immaterial, in an action brought upon the contract, what other or different terms were orally agreed upon at or before the time when the memorandum was signed. Such oral agreements or understandings may sometimes be important for the purpose of securing a reformation or cancellation of the instrument in equity, but so long as the instrument stands unreformed, the prior contemporaneous oral agreements or stipulations are of no legal effect. Testimony concerning them is therefore immaterial, and, even though admitted without objec-

the main proposition that, where there is no imperfection or ambiguity in the language of a contract, it will be *deemed to express the entire and exact meaning* of the parties,—that every material part of the contract is therein expressed.¹¹ On the same principle all *conversations* and *parol agreements* between the parties *prior* to the written agreement are so *merged* therein that they cannot be given in evidence for the purpose of changing the contract or showing an intention or understanding different from that expressed in the written agreement.¹² An oral restrictive covenant,

tion, the party against whom it was admitted is still entitled to claim that it shall not be considered against him: *Morowsky v. Rohrig*, 4 Misc. Rep. 167, 23 N. Y. Supp. 880; *Pitcairne v. Philip Hess Co.*, 125 Fed. 110, 61 C. C. A. 657.

¹¹ *Preston v. Merceau*, 2 W. Black. 1249, 96 Eng. Reprint, 736; *Adams v. Wordley*, 1 Mees. & W. 374, 2 Gale, 29; *Bayard v. Malcolm*, 1 Johns. (N. Y.) 453; *Glendalt Woolen Co. v. Protection Ins. Co.*, 21 Conn. 19, 54 Am. Dec. 309; *Boorman v. Jenkins*, 12 Wend. (N. Y.) 566, 27 Am. Dec. 158; *Whitworth v. Brown*, 85 Wis. 375, 55 N. W. 422; *Packer v. Roberts*, 140 Ill. 671, 29 N. E. 668; *Culver v. Wilkinson*, 145 U. S. 205, 36 L. Ed. 676, 12 Sup. Ct. Rep. 832; *Rigdon v. Conley*, 141 Ill. 565, 30 N. E. 1060; *National Gas Co. v. Bixby*, 48 Minn. 223, 51 N. W. 217.

¹² *Cole v. Spann*, 13 Ala. 537; *Delaney v. Jackson*, 95 Ark. 131, 128 S. W. 859; *Bradley Gin Co. v. Means Mach. Co.*, 94 Ark. 130, 126 S. W. 81; *Baume v. Morse*, 13 Cal. App. 456, 110 Pac. 350; *Beall v. Fisher*, 95 Cal. 568, 30 Pac. 773; *Hatch v. Fritz*, 48 Colo. 530, 111 Pac. 74; *Beattie v. McMullen*, 82 Conn. 484, 74 Atl. 767; *Dean v. Mason*, 4 Conn. 428, 10 Am. Dec. 162; *Hartman Stock Farm v. Henley*, 8 Ga. App. 255, 68 S. E. 957;

Logan v. Bond, 13 Ga. 192; *Buffalo Oölitic Limestone Quarries Co. v. Davis*, 45 Ind. App. 116, 90 N. E. 327; *Cincinnati etc. R. Co. v. Pearce*, 28 Ind. 502; *Pilmer v. Branch of State Bank*, 16 Iowa, 321; *Gelpeke v. Blake*, 15 Iowa, 387, 83 Am. Dec. 418; *Chadwick v. Perkins*, 3 Me. 399; *Jennings v. Puffer*, 203 Mass. 534, 89 N. E. 1036; *Cook v. First Nat. Bank*, 90 Mich. 214, 51 N. W. 206; *Savercool v. Farwell*, 17 Mich. 308; *Graham v. Savage*, 110 Minn. 410, 136 Am. St. Rep. 527, 19 Ann. Cas. 1022, 126 N. W. 394; *Herndon v. Henderson*, 41 Miss. 584; *Walker v. Engler*, 30 Mo. 130; *Watson v. Roode*, 30 Neb. 264, 46 N. W. 491; *Cox v. Bennet*, 13 N. J. L. 165; *Piretti v. Firestone Tire & Rubber Co.*, 120 N. Y. Supp. 782; *Societa etc. v. Sulzer*, 138 N. Y. 468, 34 N. E. 193; *Williams v. Mount Hood R. & P. Co.*, 57 Or. 251, Ann. Cas. 1913A, 177, 110 Pac. 490, 111 Pac. 17; *Ellmaker v. Franklin Fire Ins. Co.*, 5 Pa. 183; *Bedford v. Flowers*, 11 Humph. (Tenn.) 242; *Western Mfg. Co. v. Freeman* (Tex. Civ. App.), 126 S. W. 924; *International Land Co. v. Parmer* (Tex. Civ. App.), 123 S. W. 196; *Smith v. Higbee*, 12 Vt. 113; *Fentress v. Steele & Sons*, 110 Va. 578, 66 S. E. 870; *Klueter v. Schlitz Brew. Co.*, 143 Wis. 347, 128 N. W. 43; *Kilpinski v. Bishop*, 143

or any oral promise to do or refrain from doing something affecting the property about which a written contract is made and executed between the parties, will not be enforced, not because the parties should not fulfill their promises and their legal and moral obligations, but because the covenants and agreements being promissory and contractual in their nature and a part of, or collateral to, a principal contract, the entire agreement between the parties must be deemed to have been merged in the writing.¹³ The value of a writing would be very seriously impaired if the rule mentioned in regard to including the entire agreement in such writing were not enforced.¹⁴ It is a principle to which we shall frequently have occasion to allude that, "in order to exclude oral evidence of a contract, it *must be first established*

Wis. 390, 127 N. W. 974; Taylor v. Davis, 82 Wis. 455, 52 N. W. 756; Downie v. White, 12 Wis. 176, 78 Am. Dec. 731; De Witt v. Berry, 134 U. S. 306, 38 L. Ed. 896, 10 Sup. Ct. Rep. 536. The same rule has been held to apply although the written agreement is lost and must itself be proved by parol: Nicholson v. Tarpey, 89 Cal. 617, 26 Pac. 1101. Letters cannot be received to change a contract subsequently made: Gage v. Phillips, 21 Nev. 150, 37 Am. St. Rep. 494, 26 Pac. 60.

¹³ Adams v. Gillig, 199 N. Y. 314, 92 N. E. 670. From the opinion in this case the following remarks of Chase, J., are taken: "A strict enforcement of such rule tends to greater security and safety in business transactions, and leaves less opportunity for dishonesty and false swearing, induced, perhaps, by a change of purpose or a failure to obtain the result that was anticipated when the transaction was originally consummated and reduced to writing. Such rule makes it necessary for the parties to a written contract to in-

clude everything therein pertaining to the subject matter of the principal contract, and if, by mistake or otherwise, an oral agreement, a part of the transaction, is omitted from the writing, it can only be made effective and enforceable by a reformation of the writing, so that the same shall include therein the entire agreement between the parties."

¹⁴ Dollar v. International Banking Corp., 13 Cal. App. 331, 109 Pac. 499; O'Loughlin v. Poli, 82 Conn. 427, 74 Atl. 763; McCaskey Register Co. v. Curfman, 45 Ind. App. 297, 90 N. E. 323; Jennings v. Puffer, 203 Mass. 534, 89 N. E. 1036; Phelan v. Edwards, 112 Minn. 345, 128 N. W. 23; Robinson & Co. v. Ligon (Mo. App.), 124 S. W. 590; Egger v. Egger, 225 Mo. 116, 135 Am. St. Rep. 566, 123 S. W. 928; Fureuli v. Bittner, 69 Misc. Rep. 112, 125 N. Y. Supp. 36; Adams v. Gillig, 199 N. Y. 314, 92 N. E. 670; De Rue v. McIntosh, 26 S. D. 42, 127 N. W. 532; Ryan v. Nuce, 67 W. Va. 485, 68 S. E. 110; United States v. Cantrall, 176 Fed. 949.

that there is a subsisting written contract between the parties; and where the immediate issue is whether there is or was a writing covering the contract, it is not competent to exclude oral testimony bearing on that issue upon an assumption of such writing. To do so is to beg the question."¹⁵ The rule that prior or contemporaneous negotiations cannot be used to contradict, add to, or vary a written contract, applies not only to the letter of the written document, but also to its legal effect, as, for example, where no time of performance is fixed, the law implies that a reasonable time is given, and evidence that a specific time had been agreed upon is inadmissible.¹⁶ It not infrequently happens that some confusion is created between the "parol evidence" rule and the "best evidence" rule, and that an effort is made to use parol evidence which has not been objected to to vary the terms of a contract. Parol or secondary evidence, unobjected to, might supply the terms or purport of a contract which had been reduced to writing, and, in this form, furnish sufficient proof to sustain a finding; but parol evidence would neither be admissible to vary a contract, nor, if admitted without objection, be sufficient to support a finding which is in conflict with or which in

¹⁵ Benj. Sales, § 232, note; *Kalamazoo Novelty Mfg. Works v. Macalister*, 40 Mich. 84; *Thomas v. Barnes*, 156 Mass. 581, 31 N. E. 683; *Edwards etc. Lumber Co. v. Baker*, 3 N. D. 170, 54 N. W. 1026; *Bank of British North America v. Cooper*, 137 U. S. 473, 34 L. Ed. 759, 11 Sup. Ct. Rep. 160.

¹⁶ *Standard Box Co. v. Mutual Biscuit Co.*, 10 Cal. App. 746, 103 Pac. 938. See, also, the following illustrative cases: *Barringer v. Sneed*, 3 Stew. (Ala.) 201, 20 Am. Dec. 74; *Rector v. Bernaschina*, 64 Ark. 650, 44 S. W. 222; *McCall v. Wilkes*, 121 Ga. 722, 49 S. E. 722; *Fawkner v. Lew Smith Wall Paper Co.*, 88 Iowa, 169, 45 Am. St. Rep. 230, 55 N. W. 200, (Iowa) 49 N. W. 1003; *Barrett*

v. Kansas etc. Coal Co., 70 Kan. 649, 79 Pac. 150; *Coger v. McGeer*, 2 Bibb (Ky.), 321, 5 Am. Dec. 610; *Richards v. McKenney*, 43 Me. 177; *Warren v. Wheeler*, 8 Met. (Mass.) 97; *Davis v. Tandy*, 107 Mo. App. 437, 81 S. W. 457; *Riddell v. Peck-Williamson Heating etc. Co.*, 27 Mont. 44, 69 Pac. 241; *Thompson v. Phelan*, 22 N. H. 339; *Crocker v. Crocker*, 5 Hun (N. Y.), 587; *Clendening v. Red River Valley Nat. Bank*, 12 N. D. 51, 94 N. W. 901; *Douglass v. Campbell*, 24 Ohio C. C. 241; *Barringer v. Wilson* (Tex. Civ. App.), 81 S. W. 533; *Brown v. Hitchcock*, 28 Vt. 452; *Cliver v. Heil*, 95 Wis. 364, 70 N. W. 346; *Godkin v. Monahan*, 83 Fed. 116, 27 C. C. A. 410.

any manner varied the original written contract which the parties entered into. "The purpose of the rule relating to the varying of a writing by parol evidence is to prohibit this from being done, while the rule relating to the admission of secondary evidence goes only to the form in which the evidence may be introduced."¹⁷ The parol evidence rule, however, is limited to the parties, or their privies, to the contract. Where the controversy is between a party to a written contract and one who is neither a party nor a privy to it, the rule excluding parol evidence tending to vary, modify or contradict the writing does not apply.^{17a}

§ 435 (440). The rule does not prevent proof of fraud—Sealed and unsealed instruments.—It may always be shown that the document in question never had any legal existence. On this ground rests the very important exception that *duress or fraud* in the inception of the contract may be proved, although accompanied by the most solemn formalities. Such proof does not recognize the contract as ever existing as a valid agreement, and is received, from the necessity of the case, to show that that which appears to be a contract is not and never was a contract.¹⁸ An excel-

¹⁷ *Dollar v. International Banking Corporation*, 13 Cal. App. 331, 109 Pac. 499.

^{17a} *Phillips v. Bradshaw*, 167 Ala. 199, 52 South. 662; *Lane & Co. v. Western Union Tel. Co.*, 149 Ill. App. 562; *Trainer v. Johnson*, 146 Ill. App. 27; *Weis v. Bach*, 146 Iowa, 320, 125 N. W. 211; *Cox v. American Exp. Co.*, 147 Iowa, 137, 124 N. W. 202; *Heisler Pumping Engine Co. v. Baum*, 86 Neb. 1, 136 Am. St. Rep. 660, 124 N. W. 916; *Electric Carriage Call & Specialty Co. v. Herman*, 67 Misc. Rep. 394, 123 N. Y. Supp. 231; *Ronginsky v. Freudenthal*, 134 App. Div. 422, 119 N. Y. Supp. 409; *Smith v. Farmers & Merchants' Nat. Bank*, 57 Or. 82, 110 Pac. 410; *Vansickle v. Watson*, 103 Tex. 37, 123 S. W. 112.

¹⁸ *Waddell v. Glassell*, 18 Ala. 561, 54 Am. Dec. 170; *Bottomley v. United States*, 1 Story, 135, Fed. Cas. No. 1688; *Gatling v. Newell*, 9 Ind. 572; *Hamilton v. Conyers*, 28 Ga. 276; *Akin v. Drummond*, 2 La. Ann. 92; *Farrell v. Bean*, 10 Md. 217; *Holbrook v. Burt*, 22 Pick. (Mass.) 546; *Sandford v. Handy*, 23 Wend. (N. Y.) 260; *Hunter v. Bilyeu*, 30 Ill. 228; *Razor v. Razor*, 39 Ill. App. 527, 142 Ill. 375, 31 N. E. 678; *Baltimore etc. Steamboat Co. v. Brown*, 54 Pa. 77; *Starke v. Littlepage*, 4 Rand. (Va.) 368; *Isenhoot v. Chamberlain*, 59 Cal. 630; *Vicknair v. Trosclair*, 45 La. Ann. 373, 12 South. 486; *Benicia Works v. Estes*, 3 Cal. Unrep. 855, 32 Pac. 938; *Thomas v. Scutt*, 127 N. Y. 133, 27 N. E. 961; *Lilienthal v. Her-*

lent illustration of *duress* sufficient to avoid a contract is contained in a recent Maryland case.¹⁹ A lessee had possession of the fire policies on certain leased property, and a fire having occurred and the lessor being unable to collect the amount covered by the policies, without having such policies in his possession, the lessee threatened to destroy the policies except the lessor agreed to pay him a certain sum and deliver up a note of the lessee then held by the lessor. The evidence established the facts stated, and the court said it would be difficult to imagine a clearer case of fraud and duress in exacting such an agreement of the lessor before he could obtain possession of the policies which belonged to him; and that it would be a reflection upon the administration of justice to permit a plaintiff to recover on an agreement obtained as above shown.²⁰ If the fraud is clearly proven, one of the essential elements of the contract—*consent*—is wanting. Thus, it may be proved by parol that any material part of the contract was fraudulently omitted or inserted by the other party;²¹ or that it was fraudulently misread to one not able to read, and that he was thus induced to give his signature;²² or that a part of the contract was not reduced to writing because of the fraud of one of the parties, in which case the whole trans-

ren, 42 Wash. 209, 84 Pac. 829. See note to *Ferguson v. Rafferty*, 6 L. R. A. 45. See, also, the late cases: *Jersey Farm Co. v. Atlanta Realty Co.*, 164 Cal. 412, 129 Pac. 593; *Palister v. Camenisch*, 21 Colo. App. 79, 121 Pac. 958; *McLaughlin v. Thomas* (Conn.), 85 Atl. 370; *Loyless v. Hesse etc. Co.*, 10 Ga. App. 660, 74 S. E. 90; *Crawford v. M. Livingston & Co.*, 153 Ky. 58, 154 S. W. 407; *Doylestown Agr. Co. v. Brackett etc. Co. (Me.)*, 84 Atl. 146; *Tiffany v. Times Square Auto. Co.*, 168 Mo. App. 729, 154 S. W. 865; *J. I. Case Threshing Mach. Co. v. McKay* (N. C.), 77 S. E. 848; *American Trust Co. v. Chitty* (Okl.), 129 Pac. 51; *Kirby v.*

Thurmond (Tex. Civ. App.), 152 S. W. 1099; *Boynton v. Johnson*, 68 Wash. 370, 123 Pac. 522; *Suravitz v. Pristasz*, 201 Fed. 335.

¹⁹ *Moore v. Putts*, 110 Md. 490, 73 Atl. 149.

²⁰ See, also, *Crane v. Crane*, 81 Ill. 165; *Vickmair v. Trosclair*, 45 La. Ann. 373, 12 South. 486; *Heeter v. Glasgow*, 79 Pa. 79, 21 Am. Rep. 46.

²¹ See cases last cited.

²² *McKesson v. Sherman*, 51 Wis. 303, 8 N. W. 204; *Kranich v. Sherwood*, 92 Mich. 397, 52 N. W. 741; *Gross v. Drager*, 66 Wis. 150, 28 N. W. 141, where the person could not read English.

action is open to explanation by parol evidence.²³ In brief, if one person fraudulently imposes on another, and procures the latter's signature to an instrument he had not agreed to sign, did not know he was signing, and did not intend to execute, this amounts to fraud in the execution of the instrument, which may be proved by parol, and, if satisfactorily established, will justify a finding against the validity of the instrument, and would not be obligatory on the person so signing.²⁴ For the purpose of proving the fraud, verbal statements which are material and fraudulent, although made before or at the same time with the written agreement, may be proved. In such case the rule that prior negotiations are merged in the written agreement does

²³ *Phyfe v. Wardell*, 2 Edw. Ch. (N. Y.) 47; *Elliott v. Connell*, 13 Miss. 91; *Kennedy v. Kennedy*, 2 Ala. 571; *Blanchard v. Moore*, 4 J. J. Marsh. (Ky.) 471; *Wesley v. Thomas*, 6 Har. & J. (Md.) 24; *Chetwood v. Brittan*, 2 N. J. Eq. 438.

²⁴ *St. Louis & S. F. R. Co. v. Dearborn*, 60 Fed. 880, 9 C. C. A. 286. See, also, *Blackman v. Johnson*, 35 Ala. 252; *St. Louis etc. R. Co. v. Hambright*, 87 Ark. 614, 113 S. W. 803; *Jones v. Grieve*, 15 Cal. App. 561, 115 Pac. 333; *Johnson v. Cummings*, 12 Colo. App. 17, 55 Pac. 269; *Gustafson v. Rustemeyer*, 70 Conn. 125, 66 Am. St. Rep. 92, 39 L. R. A. 644, 39 Atl. 104; *Thomas v. Grise*, 1 Penne. (Del.) 381, 41 Atl. 883; *Cotharin v. Davis*, 4 Mackey (D. C.), 146; *Harris v. Brandon*, 135 Ga. 131, 68 S. E. 1040; *Race v. Weston*, 86 Ill. 91; *Equitable Trust Co. v. Milligan*, 31 Ind. App. 20, 65 N. E. 1044; *Sass v. Thomas*, 6 Ind. Ter. 60, 11 L. R. A., N. S., 260, 89 S. W. 656; *Hinsdale v. McCune*, 135 Iowa, 682, 113 N. W. 478; *Investment Co. v. Wallace*, 73 Kan. 291, 85 Pac. 139; *Neyaus v. Dickinson*, 138 Ky. 760, 129 S. W. 100; *Barrow v. Grant's Es-*

tate, 116 La. 952, 41 South. 220; *Morton v. Chandler*, 7 Me. 44; *Stouffer v. Alford*, 114 Md. 110, 78 Atl. 387; *Price v. Rosenberg*, 200 Mass. 36, 85 N. E. 887; *Rambo v. Patterson*, 133 Mich. 655, 95 N. W. 722; *Vilett v. Moler*, 82 Minn. 12, 84 N. Y. 452; *Sistrunk v. Wilson*, 98 Miss. 672, 54 South. 89; *Carroll v. Peak*, 156 Mo. App. 446, 136 S. W. 961; *Minneapolis Threshing Mach. Co. v. Otis*, 78 Neb. 233, 110 N. W. 550; *Anderson v. Scott*, 70 N. H. 350, 47 Atl. 607; *Wooden v. Shotwell*, 23 N. J. L. 465; *Callanan v. Keeseville etc. R. Co.*, 199 N. Y. 268, 92 N. E. 747; *American Food Co. v. Elliott*, 151 N. C. 393, 66 S. E. 451; *Sargent v. Cooley*, 12 N. D. 1, 94 N. W. 576; *Cooper v. Potts*, 185 Pa. 115, 39 Atl. 824; *Smith v. Thesmann*, 20 Okl. 133, 93 Pac. 977; *Wilcox v. Priestester*, 68 S. C. 106, 46 S. E. 553; *Sioux Remedy Co. v. Lindgren*, 27 S. D. 123, 130 N. W. 49; *Barnard v. Roane Iron Co.*, 85 Tenn. 139, 2 S. W. 21, 17 Morr. Min. Rep. 94; *Crockett & Sons v. Anselin* (Tex. Civ. App.), 132 S. W. 99; *Vaillancourt v. Grand Trunk R. Co.*, 82 Vt. 416, 74 Atl. 99; *Starke v. Littlepage*, 4 Rand. (Va.) 368;

not apply.²⁵ No rule is better settled than this,—where fraud is alleged, a very *broad range* is given to the testimony. Parol evidence is admissible in such cases to show the circumstances surrounding the transaction and the motives and intentions that prompted the parties to execute the same. Such evidence is permissible to show fraud in a transaction, which, if shown, annuls the contract, and prevents its enforcement. It is not admitted for the purpose of varying the terms of a contract, but merely to ascertain whether it is a *bona fide* transaction or a sham. If there is no fraud, the contract will stand. Conversely, if there is fraud, the purpose of the admission of the parol testimony is served.²⁶ This is perhaps most often illustrated in those cases where creditors attack *transfers of property alleged to be fraudulent*. In such cases any secret agreement or trust may be shown by them, although directly contradicting the face of the conveyances. The consideration may be inquired into,²⁷ the purpose and object of mortgages or assignments may be shown,²⁸ and generally the entire transaction may be investigated. Again, in actions upon a written contract brought by one of the contracting parties against the other, the rule under discussion is constantly invoked; and parties are allowed to prove fraudulent representations or conduct which

Naden v. Christopher, 62 Wash. 413, 113 Pac. 1116; Cushwa v. Improvement etc. Assn., 45 W. Va. 490, 32 S. E. 259; Lepley v. Anderson, 142 Wis. 668, 33 L. R. A., N. S., 836, 125 N. W. 433; Marnell v. Blake, 2 Ball. & B. 35, 4 Dow. 248, 3 Eng. Reprint, 1153; McLeod v. Lawson, 8 Ont. W. R. 213.

²⁵ Prentiss v. Russ, 16 Me. 30; Mallory v. Leach, 35 Vt. 156, 82 Am. Dec. 625; Holbrook v. Burt, 22 Pick. (Mass.) 546; Scrogin v. Wood, 87 Iowa, 497, 54 N. W. 437; Dano v. Sessions, 65 Vt. 79, 26 Atl. 585; Hick v. Thomas, 90 Cal. 289, 27 Pac. 208, 376; Tinsley v. Jemison, 74 Fed. 177,

20 C. C. A. 371; Johnson v. Cummings, 12 Colo. App. 17, 55 Pac. 265; Leicher v. Keeney, 98 Mo. App. 394, 72 S. W. 145; Equitable Trust Co. v. Milligan, 31 Ind. App. 20, 65 N. E. 1044. In State v. Cass, 52 N. J. L. 77, 18 Atl. 972, evidence of fraudulent representations was received, although there was also a written warranty.

²⁶ Fairbanks v. Simpson (Tex. Civ. App.), 28 S. W. 128; Comeau v. Hurley, 22 S. D. 310, 117 N. W. 371.

²⁷ Gray v. Handkinson, 1 Bay (S. C.), 278; Adams v. Wylie, 1 Nott & McC. (S. C.) 78.

²⁸ Winner v. Hoyt, 66 Wis. 227, 57 Am. Rep. 257, 28 N. W. 380.

formed an inducement to the contract. But in such cases the *evidence should be strong and clear*; and the written contract should not be impeached or changed, unless it appears that one of the parties was fraudulently misled or deceived. Without enumerating them, the rule applies practically to all classes of private writings.²⁹ The mere allegation of the fraud in the pleadings is not, of course, sufficient to warrant the introduction of such parol evidence as would vary the writing. The foundation is the evidence of the fraud, and upon it is built the evidence of the actual agreement (if any) between the parties. There must be evidence of fraud other than that which may be derived from the mere difference in the parol and written terms. It is not enough that there are parol stipulations contradictory of the written agreement.³⁰ The rule which prefers written to unwritten evidence does not so apply as to exclude the latter, when its object is to prove that the former had been fraudulently obtained, and thereby to avoid the contract evidenced by it, or to secure indemnity to the party injured.³¹ Thus, in actions for fraudulent representations on sales of chattels, or in defenses on the ground of fraud,

²⁹ Among the later cases the following will be found to contain valuable reference: *Assignments*: Hobart's Admr. v. Vail, 80 Vt. 152, 66 Atl. 820. *Commercial paper*: Thomason & Son v. Goldman & Co., 9 Ga. App. 349, 71 S. E. 596; White v. Smith, 79 Kan. 96, 98 Pac. 766; Alexander v. Vidootzky, 49 Misc. Rep. 471, 97 N. Y. Supp. 992. *Ordinary contracts*: Hodgkins v. Dunham, 10 Cal. App. 690, 103 Pac. 351; Providence Jewelry Co. v. S. Fessler & Son, 145 Iowa, 74, 123 N. W. 957; Machin v. Prudential Trust Co., 210 Pa. 253, 59 Atl. 1073; Kinnane v. Conroy, 52 Wash. 651, 101 Pac. 223; The Ucayali, 164 Fed. 897. *Insurance contracts*: Hinton v. Mutual etc. L. Assn., 135 N. C. 314, 102 Am. St. Rep. 545, 65 L. R. A. 161, 47 S. E. 474. *Land contracts*: Hartley v.

Gilhofer, 109 Ill. App. 527; Rectenbaugh v. Northwestern Port Huron Co., 22 S. D. 410, 118 N. W. 697; State v. Emblem, 66 W. Va. 360, 66 S. E. 499. *Subscriptions to stock*: Collins v. Southern Brick Co., 92 Ark. 504, 135 Am. St. Rep. 197, 19 Ann. Cas. 882, and note, 123 S. W. 652.

³⁰ Vansant v. Runyon, 19 Ky. Law Rep. 1981, 44 S. W. 949; Thorne v. Warfflein, 100 Pa. 519; Callanan v. Judd, 23 Wis. 343; Murray Co. v. Putnam (Tex. Civ. App.), 130 S. W. 631.

³¹ Cozzins v. Whitaker, 3 Stew. & P. (Ala.) 322; Beecker v. Vrooman, 13 Johns. (N. Y.) 302; Johnson v. Miln, 14 Wend. (N. Y.) 195; Tayloe v. Riggs, 1 Pet. (U. S.) 591, 7 L. Ed. 275; State v. Perry, 1 Wright (Ohio), 662.

other representations than those contained in the written agreement may be received;³² and the same rule applies to contracts respecting the sale of lands.³³ It was formerly held that, in an *action on a specialty*, fraud could not be given in evidence as a defense, unless it went to the very execution of the instrument. Although it might be proved that the contract was falsely read or that the party was deceived as to the nature of the instrument,³⁴ yet it could not be proved that the contract was procured by false representations as to other material facts.³⁵ But later cases have applied the general rule to contracts under seal, and have held in such cases that false representations, material to the contract, may be shown as a defense in courts of equity or of law.³⁶ The fraud, whereof the allegation opens the door to the admission of parol evidence to affect title to real estate, is that kind of fraud which, in the nature of things, admits of no other kind of proof, as, for instance, the fraud that is the cause of error in contracts, and the

³² Cozzins v. Whitaker, 3 Stew. & P. (Ala.) 322; McFarlane v. Moore, 1 Overt. (Tenn.) 174; Fleming v. Slocum, 18 Johns. (N. Y.) 403, 9 Am. Dec. 224.

³³ Monell v. Colden, 13 Johns. (N. Y.) 395, 7 Am. Dec. 390; Russell v. Rogers, 15 Wend. (N. Y.) 351; Johnson v. Cummings, 12 Colo. App. 17, 55 Pac. 269.

³⁴ Thoroughgood's Case, 2 Coke, 4, 76 Eng. Reprint, 401; Greenfield's Estate, 14 Pa. 489; Jackson v. Rayner, 12 Johns. (N. Y.) 291; Farmers & Manufacturers' Bank v. Whinfield, 24 Wend. (N. Y.) 419; Anthony v. Wilson, 14 Pick. (Mass.) 303; Chestnut Hill Reservoir Co. v. Chase, 14 Conn. 123; Franchot v. Leach, 5 Cow. (N. Y.) 506; Dale v. Roosevelt, 5 Johns. Ch. (N. Y.) 174; Schuylkill County v. Copley, 67 Pa. 386, 5 Am. Rep. 441. As to subsequent modification of specialty by parol, see § 443, *infra*.

³⁵ Vrooman v. Phelps, 2 Johns. (N. Y.) 177; Stevens v. Judson, 4 Wend. (N. Y.) 471; Burrows v. Alter, 7 Mo. 424; Hartshorn v. Day, 19 How. (U. S.) 211, 15 L. Ed. 605; Taylor v. King, 6 Munf. (Va.) 358, 8 Am. Dec. 746; Franchot v. Leach, 5 Cow. (N. Y.) 506; Parker v. Parmele, 20 Johns. (N. Y.) 130, 11 Am. Dec. 253; Dale v. Roosevelt, 9 Cow. (N. Y.) 307.

³⁶ Martin v. Evans, 163 Ala. 657, 50 South. 997; Willey v. Clements, 146 Cal. 91, 79 Pac. 850; Adams v. Jones, 39 Ga. 479; Young v. Hefferman, 67 Ill. App. 354; Belohradsky v. Kuhn, 69 Ill. 547; Ewing v. Smith, 132 Ind. 205, 31 N. E. 464; Creveling v. Banta, 138 Iowa, 47, 115 N. W. 598; Hinsdale v. McHume, 135 Iowa, 682, 113 N. W. 478; Lyons v. Lawrence, 118 La. 461, 43 South. 51; Barth v. Kasa, 30 La. Ann. 940; Holley v. Young, 66 Me. 520; Goodspeed v. Fuller, 46 Me. 141, 71 Am.

fraud by which a debtor puts his property beyond the reach of his creditors. In Louisiana, it has been held that the fraud by which a person buys real estate in his own name, instead of that of his principal, is not provable by parol. This proposition, however, is not generally accepted.³⁷ Parol evidence is not admissible between the parties to show that there was a contemporary agreement that a written contract was a mere sham and intended only to deceive the creditors of one of the parties.³⁸

§ 436 (441). Illegality of contract may be shown—Incapacity.—No instrument is so sacred when tinctured with illegality as to place it beyond the scrutiny of parol testimony.³⁹ In a well-known Massachusetts case, in which it was sought to prevent the admission of parol evidence to expose the illegality of the contract, Parker, C. J., said: "The plaintiff is demanding in this action the price of an unlawful contract; and cannot by a fiction consider the defendant as suing to recover back that price, as if it had once been paid. The rule of law is of universal operation, that none shall, by the aid of a court of justice, obtain the fruits of an unlawful bargain. . . . If such evidence is not

Dec. 572; *Hazard v. Irwin*, 18 Pick. (Mass.) 95; *Partridge v. Messer*, 14 Gray (Mass.), 180; *Davis v. Hamblin*, 51 Md. 525; *Cooper v. Finke*, 38 Minn. 2, 35 N. W. 469; *Stone v. Barrett*, 34 Mo. App. 15; *Batura v. McBride*, 77 N. J. L. 779, 73 Atl. 600; *State Bank of New Brunswick v. Moore*, 5 N. J. L. 470; *Hoitt v. Holcomb*, 23 N. H. 535; *Tannenbaum v. Schaffer*, 122 N. Y. Supp. 180; *Meyers v. Rosenback*, 5 Misc. Rep. 337, 25 N. Y. Supp. 521; *Johnson v. Miln*, 14 Wend. (N. Y.) 195; *Cutler v. Roanoke R. & Lumber Co.*, 128 N. C. 477, 39 S. E. 30; *Cover v. Manaway*, 115 Pa. 338, 2 Am. St. Rep. 552, 8 Atl. 393; *Phillips v. Potter*, 7 R. I. 289, 82 Am. Dec. 598; *Paris Grocer*

Co. v. Burks, 56 Tex. Civ. App. 223, 120 S. W. 552; *Tomlinson v. Mason*, 6 Rand. (Va.) 169; *Chew v. Moffett*, 6 Munf. (Va.) 120; *Troll v. Carter*, 15 W. Va. 567; *Chandler v. Von Roeder*, 24 How. (U. S.) 224, 16 L. Ed. 633; *Hardshorn v. Day*, 19 How. (U. S.) 211, 15 L. Ed. 605.

³⁷ *Barrow v. Grant's Estate*, 116 La. 952, 41 South. 220. See interesting discussion of this question and the consequences of denial of agency in *Browne*, Stat. of Frauds, § 96.

³⁸ *Conner v. Carpenter*, 28 Vt. 237; *Graham v. Savage*, 110 Minn. 510, 136 Am. St. Rep. 527, 19 Ann. Cas. 1025, and note, 126 N. W. 394.

³⁹ *Wilhite v. Roberts*, 4 Dana (Ky.), 172. —

admissible, parties can always control the laws, by the terms of their contracts; and in order to defeat an illegal contract, it would be necessary that the parties should be weak enough to expose the illegality in the instrument they adopt for their security."⁴⁰ And as it may always be shown that the document in question never had legal existence, it follows that it may be shown to be tainted with illegality.⁴¹ In such case the court will go behind the apparently valid written instrument, and deal with the transaction on its merits; and it is immaterial whether the illegality of the instrument is created by the statute, or whether it is immoral, or in some other way contravenes the general policy of the law. Under such circumstances the parol agreement cannot be said to be merged in the pretended written agreement, for it is only by virtue of its superior obligation that a written contract has the

⁴⁰ Russell v. De Grand, 15 Mass. 35.

⁴¹ As that the contract is *usurious*: Fenwick v. Ratliff, 6 T. B. Mon. (Ky.) 154; Newsom v. Thighen, 30 Miss. 414; Ferguson v. Sutphen, 8 Ill. 547; Roe v. Kiser, 62 Ark. 92, 54 Am. St. Rep. 288, 34 S. W. 534; Chamberlain v. McClurg, 8 Watts & S. (Pa.) 31; Hammond v. Hopping, 13 Wend. (N. Y.) 505; or *champertous*: Martin v. Clarke, 8 R. I. 389, 5 Am. Rep. 586; or that a lease was for an *unlawful purpose*: Sherman v. Wilder, 106 Mass. 537; or that the contract was in furtherance of an *adulterous intercourse*: Fletcher, Succession of, 11 La. Ann. 59; or in *restraint of trade*: Detroit Salt Co. v. Nat. Salt Co., 134 Mich. 103, 96 N. W. 1; or for compounding a *felony*: Dale v. Roosevelt, 9 Cow. (N. Y.) 307; Worcester, Inhabitants of, v. Eaton, 11 Mass. 368; or for *suppressing evidence* on a criminal prosecution: Dale v. Roosevelt, 9 Cow. (N. Y.) 307; or for the *sale of an office*: Dale v. Roosevelt, 9 Cow. (N. Y.) 307; or for money won at play: Pope

v. St. Legier, 5 Mod. 3, 87 Eng. Reprint, 481; Wheeler v. Metropolitan Stock Exch., 72 N. H. 315, 56 Atl. 754; or for any other contract forbidden by statute or common law: Bank of United States v. Owens, 2 Pet. (U. S.) 527, 7 L. Ed. 508; Roby v. West, 4 N. H. 285, 17 Am. Dec. 423; Pettit v. Pettit, 32 Ala. 288; Chandler v. Johnson, 39 Ga. 85; Sherman v. Wilder, 106 Mass. 537; Snyder v. Willey, 33 Mich. 483; Lindsay v. Smith, 78 N. C. 328, 24 Am. Rep. 463; Shackell v. Rosier, 2 Bing. N. C. 634, 132 Eng. Reprint, 245. See note on "Admissibility of Parol Evidence to Show Illegality of Contract," to Muskogee Land Co. v. Mullins, 16 Ann. Cas. 388, in which there is an excellent collection of illustrative cases. See the late cases: Smith v. David B. Crockett Co., 85 Conn. 282, 39 L. R. A., N. S., 1148, 82 Atl. 569; McNamara v. Georgia Cotton Co., 10 Ga. App. 669, 73 S. E. 1092; Manufacturers' etc. Bureau v. Everwear Hosiery Co. (Wis.), 138 N. W. 624.

effect of extinguishing the verbal contract upon which it is founded; and of course when it has no obligation, it can have no such effect.⁴² On the same general principle under discussion it may be shown by parol that the apparent written contract has no legal existence by reason of the *incapacity* of the party to make a contract; and whether such incapacity was physical, or mental, or due to lack of authority or other legal impediment.⁴³

§ 437 (442). As to mistakes of fact—Reformation of contract.—The rectification of mistakes of fact has long been part of the equitable jurisdiction of the courts. The amelioration of the rigid rules of the common-law side has been one of the marked features of the equity administration. The difference in the remedy offered by the co-ordinate branches of the law has given rise to the idea that the equitable doctrines frequently create exceptions to those promulgated from the common-law courts. Hence it is that we find it laid down, among many similar propositions, that one of the well-recognized exceptions to the general rule against varying the terms of a written contract by parol evidence is that the rule does not apply in all cases to ex-

⁴² *Lear v. Yarnel*, 3 A. K. Marsh. (Ky.) 419; *Kranich v. Sberwood*, 92 Mich. 397, 52 N. W. 741.

⁴³ As where he was *intoxicated*: *Barrett v. Buxton*, 2 Aik. (Vt.) 167, 16 Am. Dec. 691; *Prentice v. Achorn*, 2 Paige Ch. (N. Y.) 30; *Taylor v. Purcell*, 60 Ark. 606, 31 S. W. 567; *Reynolds v. Dechaums*, 24 Tex. 174, 76 Am. Dec. 101; *insane or otherwise mentally incompetent*: *Den v. Clark*, 10 N. J. L. 217, 18 Am. Dec. 417; *Grant v. Thompson*, 4 Conn. 203, 10 Am. Dec. 119; *Jackson v. King*, 4 Cow. (N. Y.) 207, 15 Am. Dec. 354; *Mitchell v. Kingman*, 5 Pick. (Mass.) 431; *Rice v. Peet*, 15 Johns. (N. Y.) 503; *Hosler v. Beard*, 54 Ohio St. 398, 56 Am. St. Rep. 720, 35 L. R. A.

161, 43 N. E. 1040; or that some legal impediment prevented the making of a binding contract, such as *infancy*: *Van Valkenburgh v. Rouk*, 12 Johns. (N. Y.) 337; *Webster v. Woodford*, 3 Day (Conn.), 90; *Ayers v. Burns*, 87 Ind. 245, 44 Am. Rep. 759; or *coverture*: *Dale v. Roosevelt*, 9 Cow. (N. Y.) 307; *Pelzer v. Durham*, 37 S. C. 354, 16 S. E. 46; *Bradley etc. Co. v. Caswell*, 65 Vt. 231, 26 Atl. 956. For the rule as applied to cases of unauthorized agency, see *Meserole v. Archer*, 3 Bosw. (N. Y.) 376; and to cases of want of authority in public officers, see *Hubbard v. Town of Lyndon*, 28 Wis. 674; *Sherman v. Buick*, 93 U. S. 209, 23 L. Ed. 849.

clude evidence of mistake of fact. But here no such broad latitude is allowed as in the case of fraud. Indeed, the right to vary a written instrument by proof of mistake has often been based solely on the ground that it would operate as a fraud upon the party in the given case, if the alleged mistake could not be corrected. The question is attended with the least difficulty where *actions* are brought expressly *to reform* or correct a written instrument on the ground that a mutual mistake of fact has been made in reducing it to writing. For the purpose of reforming or rescinding written agreements on the ground of mutual mistake, courts of equity allow full inquiry into all the facts. And that inquiry includes parol evidence of the mistake, of the difference between the contract as it is written and of the contract as it should have been written.⁴⁴ Before the writing can be thus changed or reformed, the alleged mistake *must be clearly proved* by evidence which is clear, convincing and satisfactory.⁴⁵ There has been some difference as to

⁴⁴ House v. McMullen, 9 Cal. App. 664, 100 Pac. 344; Long v. Gilbert, 133 Ga. 691, 66 S. E. 894; Ewing v. Sandoval Coal etc. Co., 110 Ill. 290; Clute v. Frasier, 58 Iowa, 268, 12 N. W. 327; Inskoe v. Proctor, 6 T. B. Mon. (Ky.) 311; Sims v. Jeter, 129 La. 262, 55 South. 877; Farley v. Bryant, 32 Me. 474; Busby v. Littlefield, 31 N. H. 193; Meyer v. Lathrop, 73 N. Y. 315; Newsom v. Bufferlow, 16 N. C. 379; Forester v. Van Auken, 12 N. D. 175, 96 N. W. 301; Davenport v. Sovil, 6 Ohio St. 459; Huss v. Morris, 63 Pa. 367; Hampton v. Blakely, 3 McCord (S. C.), 469; Hughes v. Payne, 22 S. D. 293, 117 N. W. 363; Barnes v. Gregory, 1 Head (Tenn.), 230; Syler v. Culp (Tex. Civ. App.), 138 S. W. 175; Barry v. Harris, 49 Vt. 392; French v. Chapman, 88 Va. 317, 13 S. E. 479; Fishack v. Ball, 34 W. Va. 644, 12 S. E. 856; Ivinson v. Hutton, 98 U. S. 79, 25 L. Ed. 66.

⁴⁵ Greil v. Tillis, 170 Ala. 391, 54 South. 524; Johnson v. Steuart, 97 Ark. 635, 135 S. W. 354; Home & Farm Co. v. Freitas, 153 Cal. 680, 96 Pac. 308; Loukowski v. Pryor, 46 Colo. 584, 106 Pac. 7; Bishop v. Clay, Fire & M. Ins. Co., 49 Conn. 167; Newell v. Brewing Co. (Del.), 80 Atl. 672; Prior v. Davis, 58 Fla. 510, 50 South. 535; Wall v. Arrington, 13 Ga. 88; Houser v. Austin, 2 Idaho. 240 (188), 10 Pac. 37; Sapp v. Phelps, 92 Ill. 588; Linn v. Barkey, 7 Ind. 69; Bushert v. A. W. Stevenson Co. (Iowa), 113 N. W. 916; Patrick v. Prater, 144 Ky. 771, 139 S. W. 938; Aetna Indemnity Co. v. Baltimore etc. R. Co., 112 Md. 389, 136 Am. St. Rep. 376, 21 Ann. Cas. 268, 76 Atl. 251; Eustis Mfg. Co. v. Saco Brick Co., 201 Mass. 391, 87 N. E. 596; Dillie v. Longwell, 163 Mich. 439, 128 N. W. 782; Fritz v. Fritz, 94 Minn. 264, 102 N. W. 705; Dochterman v. Marshall, 92 Miss.

whether a mere preponderance of the evidence is sufficient, but the weight of authority is that a strong preponderance of the evidence is required.⁴⁶ The necessity for the preliminary establishment of mistake is just the same as in cases where fraud is alleged. The burden rests upon the moving party of overcoming the strong presumption arising from the terms of a written instrument. If the proofs are doubtful and unsatisfactory, if there is a failure to overcome this presumption by testimony entirely plain and convincing beyond reasonable controversy, the writing will be held to express correctly the intention of the parties. "A judgment of the court, a deliberate deed or writing, are of too much solemnity to be brushed away by loose and inconclusive testimony."⁴⁷ We repeat, the mistake must be clearly es-

747, 46 South. 542; Moran Bolt etc. Co. v. St. Louis Car Co., 210 Mo. 715, 109 S. W. 47; Strauss v. Monitor Specialty Co., 89 Neb. 176, 131 N. W. 193; Tilton v. Tilton, 9 N. H. 385; Kunz v. Mason, 75 N. J. Eq. 616, 73 Atl. 869; Baird v. Erie R. Co., 72 Misc. Rep. 162, 129 N. Y. Supp. 329; Clements v. Life Ins. Co. of Virginia, 155 N. C. 57, 70 S. E. 1076; Stewart v. Gordon, 60 Ohio St. 170, 53 N. E. 797; Smith v. Interior Warehouse Co., 51 Or. 578, 94 Pac. 508, 95 Pac. 499; Gailley v. Plaster Co., 34 Pa. Sup. Ct. 533; Tossini v. Donahoe, 22 S. D. 277, 117 N. W. 148; Eatherly v. Eatherly, 1 Cold. (Tenn.) 461, 78 Am. Dec. 499; Bonneville v. Dunn (Tex. Civ. App.), 128 S. W. 1179; Abbott v. Flint, 78 Vt. 274, 62 Atl. 721; Perkins v. Herring, 110 Va. 822, 19 Ann. Cas. 342, 67 S. E. 515; Rohlinger v. Coletta Land etc. Co., 64 Wash. 348, 116 Pac. 1095; Isner v. Nydegger, 63 W. Va. 677, 60 S. E. 793; Grant Marble Co. v. Abbott, 142 Wis. 279, 124 N. W. 264; Stoll v. Nagle, 15 Wyo. 86, 86 Pac. 26; Western Loan etc. Co. v. Thibodeau, 159 Fed. 370, 86 C. C. A. 370; Brad-

ford v. Romney, 30 Beav. 431, 8 Jur., N. S., 403, 31 L. J. Ch. 496, 54 Eng. Reprint, 956.

⁴⁶ Brantley v. West, 27 Ala. 542; Fudge v. Payne, 86 Va. 306, 10 S. E. 7; Peterson v. Grover, 20 Me. 363; Blanchard v. Moore, 4 J. J. Marsh. (Ky.) 471; Perry v. Pearson, 1 Humph. (Tenn.) 431; Van Ness v. City of Washington, 4 Pet. (U. S.) 232, 7 L. Ed. 842; Gibson v. Watts, 1 McCord Eq. (S. C.) 490; Brown v. Lamphear, 35 Vt. 252; Stockbridge Iron Co. v. Hudson Iron Co., 102 Mass. 45; Mead v. Westchester Fire Ins. Co., 64 N. Y. 453; Tesson v. Atlantic Mut. Ins. Co., 40 Mo. 33, 93 Am. Dec. 293; Lestrade v. Barth, 19 Cal. 660; Newton v. Holley, 6 Wis. 592; Lyman v. United Ins. Co., 17 Johns. (N. Y.) 373; Shay v. Pettes, 35 Ill. 360; Edmond's Appeal, 59 Pa. 220; Potter v. Potter, 27 Ohio St. 84; Heavenridge v. Mondy, 49 Ind. 434. See, also, note to 6 L. R. A. 46. See § 432, *ante*.

⁴⁷ Howland v. Blake, 97 U. S. 624, 24 L. Ed. 1027; Northwestern etc. Ins. Co. v. Nelson, 103 U. S. 544, 26 L. Ed. 436.

tablished. Where no fraud is alleged, and both the parties to the instrument know its character and contents, it cannot be reformed merely on the ground that one of the parties would have exacted, and would have been entitled to exact, a different instrument had he been acquainted with facts rendering it to his interest to do so, or which, if he had known them, would have caused him to reject the instrument which he accepted. "It is beyond the power even of a court of equity to make contracts for parties. The jurisdiction to reform written instruments in cases free from fraud is exercised only where the instrument actually executed differs from what both parties intended to execute and supposed they were executing or accepting, and this mistake will be corrected in equity only on the clearest proof, and then only by making the instrument conform to what both parties intended."⁴⁸ But an instrument or covenant, the nature and contents of which are fully comprehended by both parties at the time of its execution, cannot be altered in its terms by the court.^{48a} If it were otherwise, any purchaser of lands who accepted a deed without covenants might have recourse against his grantor for a subsequently discovered encumbrance or defect in the title, provided he could show that, under his contract for purchase, he might have insisted on a deed with covenants, and that he believed the title to be clear when he accepted one without covenants. If a grantor and a grantee both intended that their deed should contain covenants, and supposed at the time of its delivery that it did contain them, but, through a mistake of the scrivener, they had been omitted, the court might insert them. But that mistake would have to be established, as we have before shown—clearly and sufficiently. It is also well settled that where

⁴⁸ *Whittemore v. Farrington*, 76 N. Y. 452. See the late cases: *Massie v. Chatom*, 163 Cal. 772, 127 Pac. 56; *Thompson v. Hill*, 137 Ga. 308, 73 S. E. 640; *Columbia Malting Co. v. Glenmore Distilleries Co.*, 150 Ky.

229, 150 S. W. 53; *Wyss-Thalman v. Maryland Casualty Co.*, 193 Fed. 55; *Graham v. Gill*, 223 U. S. 643, 56 L. Ed. 586, 32 Sup. Ct. Rep. 396.

^{48a} See *Wilson v. Deens*, 74 N. Y. 531, and authorities there cited.

actions are brought to compel a defendant to specifically perform a written contract, parol evidence may be given by him to show that the alleged agreement is not the true agreement; in other words, that by reason of some mistake there was *no consent* to the apparent agreement.⁴⁹ "In suits for the specific enforcement of agreements, even when written, the defendant may by means of parol evidence show that, through the mistake of both or either of the parties, the writing does not express the real agreement, or that the agreement itself was entered into through a mistake as to its subject matter or as to its terms. In short, a court of equity will not grant its affirmative remedy to compel the defendant to perform a contract which he did not intend to make, or which he would not have entered into had its true effect been understood."⁵⁰ Under proper pleadings the defendant may have the *mistake corrected in the same proceeding* by showing the actual agreement; this is especially true in those states where the modern system of pleadings has been adopted.⁵¹ So in other actions, legal or equitable in their nature, brought on written instruments, either party is at liberty under proper pleadings to prove a mistake, and to have reformation of the contract.⁵² Among recent cases will be found the following illustrations: A written contract on its face expressed to be an absolute contract of sale. The purchaser sued for specific performance. The defense was that the vendor only intended to give an option for purchase during one year, and

⁴⁹ Webster v. Cecil, 30 Beav. 62; Goode v. Riley, 153 Mass. 585, 28 N. E. 228; Quinn v. Roath, 37 Conn. 16; Best v. Stow, 2 Sand. Ch. (N. Y.) 298 (329); Coles v. Bowne, 10 Paige Ch. (N. Y.) 526; Ryno v. Darby, 20 N. J. Eq. 231; Towner v. Lucas, 13 Gratt. (Va.) 705; Chambers v. Livermore, 15 Mich. 381; Cathcart v. Robinson, 5 Pet. (U. S.) 264, 8 L. Ed. 120; Fitschen v. Thomas, 9 Mont. 52, 22 Pac. 540; Gillespie v. Moon, 2 Johns. Ch. (N. Y.) 585, 7 Am. Dec.

559; Somerville v. Coppage, 101 Md. 519, 61 Atl. 318; Wieneke v. Deputy, 31 Ind. App. 621, 68 N. E. 921.

⁵⁰ 2 Pom. Eq., § 860; McLaughlin v. Leonhardt, 113 Md. 261, 77 Atl. 647.

⁵¹ Bradford v. Union Bank, 13 How. (U. S.) 57, 14 L. Ed. 50; Quinn v. Roath, 37 Conn. 16; McComas v. Easley, 21 Gratt. (Va.) 23; Chambers v. Livermore, 15 Mich. 381; Murphy v. Rooney, 45 Cal. 78.

⁵² Andrews v. Gillespie, 47 N. Y.

so informed the purchaser's agent, a practicing attorney, who told the vendor that the agreement as drawn by him contained the terms set out in the defense. In giving the vendor relief the court said that where the true intention of the parties to a contract is not expressed by the writing to which the contract is reduced, it is competent for the parties to allege and prove that the real contract between them by mistake of the draftsman had not been reduced to writing; and it is immaterial whether the mistake is due to a misapprehension as to the effect of the words used or to a mistake in any other respect.⁵³ It is likewise true that a mistake on one side is ground for relief when such mistake is caused by fraud of the other party.⁵⁴ If both the vendor and the vendee's agent were mistaken as to the legal effect of the instrument, that would be a case of mutual mistake. On the other hand, if the vendee's agent knowingly represented that the written contract expressed the true agreement between the parties, when, as a matter of fact, it did not, and the vendor was thereby induced to sign it, it

487; *Kee v. Davis*, 137 Cal. 456, 70 Pac. 294; *Finishing & Warehouse Co. v. Ozment*, 132 N. C. 839, 44 S. E. 681; *Knowlton v. Campbell*, 48 W. Va. 294, 37 S. E. 581.

⁵³ *Germer v. Gambill*, 140 Ky. 469, 131 S. W. 268, citing *Kentucky etc. Loan Assn. v. Lawrence*, 106 Ky. 88, 49 S. W. 1059. These cases are to be distinguished from those in which a document is signed without reading it when the signer had full opportunity to read it if he wished, and carelessly neglected to do so, and about which no element of fraud exists. The courts refuse relief from the consequence of gross negligence: *Bostwick v. Duncan*, 60 Ga. 383; *Branan v. Warfield*, 3 Ga. App. 586, 60 S. E. 325; *Faucett v. Currier*, 109 Mass. 79. See, also, *Day v. Raguett*, 14 Minn. 273. In *Overscers of Poor*

v. Mitchell, 74 N. J. L. 342, 68 Atl. 89, defendant in an action brought upon a bond signed by him, purporting to secure payment of weekly sums for his wife's support, being called as a witness in his own behalf respecting the execution of the bond, and having admitted the signature and testified that he could not read English (the bond being written in that language), was prevented by erroneous rulings of the trial judge from answering questions tending to show that the bond was not read to him, that he did not know its purport, and was given to understand that it only required him to make an appearance in court.

⁵⁴ *Bergen v. Ebey*, 88 Ill. 269; *Simmons Creek Coal Co. v. Doran*, 142 U. S. 417, 35 L. Ed. 1063, 12 Sup. Ct. Rep. 239.

would be a case of mistake upon one side and fraud upon the other. In either event, the vendee would not be entitled to relief.⁵⁵ In a Maryland case,⁵⁶ the terms of a verbal agreement for sale were for forty shares of corporate stock, thirteen shares each from two of the three vendors and fourteen from the third. The written agreement which was supposed to embody these terms provided for the sale by *each* of the vendors of forty shares, or one hundred and twenty shares in all. Parol evidence was given that when the agreement was signed the number of shares to be sold by each of the vendors was left blank, as it had not been arranged which one was to sell the fourteen shares. The court said that there were significant facts in support of the contention that the agreement was not made in good faith, and was part of a fraudulent scheme; and that if the purchasers were not guilty of fraudulent conduct in connection with the execution of the agreement, "then, to say the least, they are unfortunate in being the victims of circumstances which seriously assail the *bona fides* of this transaction and strongly point to deception and wrongdoing on their part." In an Arkansas case⁵⁷ the written contract of sale was admitted by both parties, but the purchaser alleged that the goods were sold to him on commission to sell and that the seller would take back those unsold; and that a memorandum in writing was written on the back of the contract by the seller's agent. This did not appear from the contract itself, but the evidence of it was clear. The absence of the memorandum was accounted for by the fact that the seller's agent, when turning over the leaf of the book in which the contract was written, either designedly or accidentally turned over two pages. The seller's agent did not testify. The court held the parol testimony admissible, because it did not tend to vary or contradict the written contract, but tended to show that no written contract was entered into of the kind introduced in evidence by the seller

⁵⁵ Germer v. Gambill, *supra*.

⁵⁷ Brooks Medicine Co. v. Jeffries,

⁵⁶ McLaughlin v. Leonhardt, *supra*. ⁹⁴ Ark. 575, 127 S. W. 960.

as the basis of his action. In some cases it has been held that the defense of mistake can be proved, *though no equitable relief is asked* by the defendant in his pleading.⁵⁸ But in other states a different rule prevails. The question is, however, rather one of pleading than of evidence.⁵⁹ Parol evidence may be received in *actions at law upon insurance policies* to show an omission or insertion made by mistake by the insured in the application for insurance, where it is claimed that the insured made true answers and that the agent of the insurance company wrote the answers incorrectly. Such evidence is received on the theory of estoppel.⁶⁰ And so in cases of misdescription of the property insured. In a recent Texas case,⁶¹ the insured sought a reformation of a policy of insurance on the ground that it did not cover the articles agreed to be insured and which were alleged to have been omitted by the mistake of the insurer. "If it appear," said the court, "that the policy does not embody or express the contract of the parties, and the party seeking the relief has not understandingly accepted it as written, it may be reformed so as to speak the real intention of the parties; and in order to arrive at such intention, parol evidence is admissible of all that was said and done by them during the progress of the negotiations."⁶²

⁵⁸ Dobson v. Pearce, 12 N. Y. 156, 62 Am. Dec. 152; Seeley v. Engell, 13 N. Y. 542; New York Cent. Ins. Co. v. National Protection Ins. Co., 14 N. Y. 85; Lloyd v. Sandusky, 203 Ill. 621, 68 N. E. 154.

⁵⁹ Follett v. Heath, 15 Wis. 601; Lombard v. Cowham, 34 Wis. 486; Van Horn v. Van Horn, 49 N. J. Eq. 327, 23 Atl. 1079; Frost v. Brigham, 139 Mass. 43, 29 N. E. 217; Van Syckel v. Dalrymple, 32 N. J. Eq. 233.

⁶⁰ Moliere v. Pennsylvania Fire Ins. Co., 5 Rawle (Pa.), 342, 28 Am. Dec. 675; Manhattan Ins. Co. v. Webster, 59 Pa. 227, 98 Am. Dec. 332; North American Fire Ins. Co. v.

Throop, 22 Mich. 146, 7 Am. Rep. 638; Plumb v. Cattaraugus Co. Mut. Ins. Co., 18 N. Y. 392, 72 Am. Dec. 526, and note; Farmers' Ins. Co. v. Williams, 39 Ohio St. 584, 48 Am. Rep. 474; Planters' Ins. Co. v. Myers, 55 Miss. 479, 30 Am. Rep. 521; Grattan v. Metropolitan Life Ins. Co., 80 N. Y. 281, 36 Am. Rep. 617, 92 N. Y. 274, 44 Am. Rep. 372; McCall v. Phoenix Mut. Life Ins. Co., 9 W. Va. 237, 27 Am. Rep. 558.

⁶¹ Delaware Ins. Co. v. Hill (Tex. Civ. App.), 127 S. W. 283.

⁶² If the assured accept a policy without dissent, it is a presumption of fact that he knew its contents, and the burden is upon him to over-

The same case contains the dictum that logically no difference can be made in the application of the rule by reason of the time which may have elapsed between the making of the original verbal agreement and the written version of it, of which reformation is sought.

§ 437a. **As to mistakes in law.**—It follows from the presumption of knowledge of the law⁶³ that the same ground for reformation does not exist for mistake in law as for mistake in fact. The law is that mistake in law cannot *per se* be relieved against,⁶⁴ but only where it has been induced by the party who seeks to take advantage of it. With that exception the rule may be taken to be that parol evidence of such mistake is not admissible.⁶⁵ The wholesome rule that a party shall not be permitted to introduce contemporaneous evidence to contradict or vary the terms of his own unambiguous written contract is not to be departed from because the party, having mistaken the law, may find himself under legal liabilities which he did not contemplate when he entered into that

come such presumption by proving that he did not know its contents when it was accepted, as by showing that when he received it he put it away without examination, or that he relied upon the knowledge of the insurer and supposed he had correctly drawn it. And a policy may be reformed after loss, as well as before, if the insured has not been guilty of laches: See *Wood on Fire Ins.*, 2d ed., § 507; 4 *Joyce, Ins.*, §§ 3510, 3511. The fact that the conversation occurred some weeks prior to the issue of the policy does not affect the rights of the assured: *Delaware Ins. Co. v. Hill*, *supra*.

⁶³ § 23 et seq., *ante*.

⁶⁴ *Loftus v. Fischer*, 106 Cal. 616, 39 Pac. 1064; *Dever v. Dever*, 19 Ky. Law Rep. 1988, 44 S. W. 986; *Missouri-Lincoln Trust Co. v. Third Nat. Bank*, 154 Mo. App. 89, 133 S. W. 357; *Greene v. Smith*, 160 N. Y. 533,

55 N. E. 210; *Clapp v. Hoffman*, 159 Pa. 531, 28 Atl. 362; *Texarkana & Ft. S. R. Co. v. Sabine Tram. Co.* (Tex. Civ. App.), 129 S. W. 198; *Bexar Bldg. etc. Assn. v. Seebe* (Tex. Civ. App.), 40 S. W. 875; *Atlanta Trust etc. Co. v. Nelms*, 116 Ga. 915, 43 S. E. 380; *Deseret Nat. Bank v. Dinwoodey*, 17 Utah, 43, 53 Pac. 215; *Jeakins v. Frazier*, 64 Kan. 267, 67 Pac. 854; *In re McFarlin* (Del.), 75 Atl. 281; *People v. Chicago & A. R. Co.*, 247 Ill. 373, 93 N. E. 424; *Bolinger v. Beacham*, 81 Kan. 746, 106 Pac. 1094; *Errett v. Wheeler*, 109 Minn. 157, 26 L. R. A., N. S., 816, 123 N. W. 414; *Mackin v. Dwyer*, 205 Mass. 472, 91 N. E. 893; *City of Mobile v. Mobile County*, 169 Ala. 539, 53 South. 793; *Knickerbocker Trust Co. v. Oneonta etc. R. Co.*, 138 App. Div. 687, 123 N. Y. Supp. 822.

⁶⁵ *Meckley's Estate*, 20 Pa. 478.

contract. Especially, now that the party may be by law a witness in his own case, should the rule be adhered to which precludes him from contradicting orally that which his own written admission in the instrument declared on has established as a fact in the case by which the rights of the parties are to be determined.⁶⁶ In an old and well-known Connecticut case⁶⁷ the question was squarely presented. The mistake in that case was that the plaintiff mistook the legal effect of a plain note of hand. He ignorantly supposed a note, payable by the terms of it, in three years, to be in law a note payable at the death of the obligee; and then not actually to be paid, but to be delivered up. It was sought to introduce parol evidence to show the mistake. Bissell, J., in a well-considered opinion, cites the leading authorities and among them that of Washington, J.:⁶⁸ "The question, then, is, Ought the court to grant the relief which is asked for, upon the ground of mistake arising from any ignorance of law? We hold the general rule to be, that a mistake of this character is not a ground for reforming a deed, founded on such mistake; and whatever exceptions there may be to this rule, they are not only few in number, but they will be found to have something very peculiar in their characters." That "something very peculiar" referred to by the court is frequently that variation of circumstances which may introduce an element of fraud, or the basis of a mistake in fact, on which the court could justifiably assume the responsibility of reformation.

§ 438 (443). **Mistakes as to dates.**—Dates of written instruments are, like the consideration, *prima facie* correct. Where the date is treated as one of the mere formal parts of the instrument, parol evidence is often admitted to show that, through mistake or some other reason, the date named is incorrect; and what the true date is.⁶⁹ Illustrations of

⁶⁶ Potter v. Sewall, 54 Me. 142.

⁶⁷ Wheaton v. Wheaton, 9 Conn. 96.

⁶⁸ Hunt v. Rousamere, 1 Pet. (U. S.) 1, 7 L. Ed. 27.

⁶⁹ Burns v. Moore, 76 Ala. 339, 52 Am. Rep. 332; Howell v. Rye, 35 Ark. 470; Gately v. Irvine, 51 Cal. 172; District of Columbia v. Camden Iron Works, 15 App. Cas. (D. C.)

such cases are given in the note.⁷⁰ Ordinarily, the true date of every paper is the time of its delivery, and this may, even as between the parties themselves, be shown by parol evidence, although a different date be upon the paper. In-

198; *Russell v. Carr*, 38 Ga. 459; *Lambe v. Manning*, 171 Ill. 612, 49 N. E. 509; *Haughton v. Aetna Ins. Co.*, 165 Ind. 32, 73 N. E. 592, 74 N. E. 613; *Barlow v. Buckingham*, 68 Iowa, 169, 26 N. W. 58; *McFall v. Murray*, 4 Kan. App. 554, 45 Pac. 1100; *Perrin v. Broadwell*, 3 Dana (Ky.), 596; *State v. Allen*, 113 La. 705, 37 South. 614; *Partridge v. Swazey*, 46 Me. 414; *Stockham v. Stockham*, 32 Md. 196; *Sever v. Bickford*, 15 Gray (Mass.), 73; *Hinson v. Forsdick* (Miss.), 25 South. 353; *Hall v. Huffman*, 32 Mo. 519; *Germania Bank v. Distler*, 64 N. Y. 642; *Cutlar v. Cutlar*, 3 N. C. 154; *Jessup v. Dennison*, 2 Disn. (Ohio) 150; *Cutter v. Pierson*, 26 Pa. Sup. Ct. 10; *Pressly v. Hunter*, 1 Speers (S. C.), 133; *Erickson v. Brookings County*, 3 S. D. 434, 18 L. R. A. 347, 53 N. W. 587; *Garner v. Johnston*, 7 Peck (Tenn.), 24; *Dunn v. Taylor* (Tex. Civ. App.), 107 S. W. 952; *Wilmot v. Lathrop*, 67 Vt. 671, 32 Atl. 861; *Moore v. Smead*, 89 Wis. 558, 62 N. W. 426; *Harden v. Card*, 17 Wyo. 210, 97 Pac. 1075; *Russo-Chinese Bank v. National Bank*, 187 Fed. 80, 109 C. C. A. 398. See the Canadian case: *Doe d. Connel v. Dickinson*, 1 Han. 459.

⁷⁰ It may be shown that a note offered in evidence is the one secured by a mortgage, though it vary in date from the description of it given in the mortgage: *Sweetser v. Lowell*, 33 Me. 446; *Clark v. Houghton*, 12 Gray (Mass.), 38; *Goddard v. Sawyer*, 9 Allen (Mass.), 78; *Partridge v. Swazey*, 46 Me. 414; that a *deed* was *executed*: *Miller v. Hampton*, 37

Ala. 342; *McComb v. Gilkey*, 29 Miss. 146; *Draper v. Snow*, 20 N. Y. 331, 75 Am. Dec. 408; *Moore v. Smead*, 89 Wis. 558, 62 N. W. 426; or *delivered*: *Bruce v. Slemph*, 82 Va. 352, 4 S. E. 692; *Moody v. Hamilton*, 22 Fla. 298; *Saunders v. Blythe*, 112 Mo. 1, 20 S. W. 319; *Vaughan v. Parker*, 112 N. C. 96, 16 S. E. 908 (before or after the date stated therein); that a *writ* bearing date on Sunday was in fact made on a different day: *Trafton v. Rogers*, 13 Me. 315; that a *release* was made subsequent to its date: *Churchill v. Bailey*, 13 Me. 64. Parol evidence has been allowed to correct mistakes in the *date of letters*: *Stockham v. Stockham*, 32 Md. 196; *notes*: *Barlow v. Buckingham*, 68 Iowa, 169, 26 N. W. 58; *wills*: *Reffel v. Reffel*, L. J. 35 P. & M. 121; *deeds*: *Harrison v. Trustees of Phillips Academy*, 12 Mass. 456; *Jackson v. Schoonmaker*, 2 Johns. (N. Y.) 230; *Moore v. Smead*, 89 Wis. 558, 62 N. W. 426; and *other instruments*: *Hall v. Cazenove*, 4 East, 476, 102 Eng. Reprint, 937; *Hartsell v. Myers*, 57 Miss. 135; *Gately v. Irvine*, 51 Cal. 172; *Lambe v. Manning*, 171 Ill. 612, 49 N. E. 509. The true date of a document, left *blank*: *Rapley v. Price*, 9 Ark. 428; the error in an *advertisement*: *Arberry v. Noland*, 2 J. J. Marsh. (Ky.) 421; the date of acceptance of a sight draft, which had been lost: *Russo-Chinese Bank v. National Bank of Commerce*, 187 Fed. 80, 109 C. C. A. 398; the *date of the execution* of a contract as distinguished

deed, this is the rule, unless there are in the document itself provisions that refer to its date as material and show it to be essential to the rights of the parties.⁷¹ The rule that dates are presumed to be correct does not apply where there is reason to suspect that the date is false because of *collusion*. The most common illustration of this is in cases where adultery is the issue, and the dates of letters between the parties become material. In such cases no presumption of correctness should be relied upon, but the dates should be proved to be correct.⁷²

§ 439 (444). Proof of independent or collateral contracts—Subject matter thereof.—The general rule under discussion is not violated by allowing parol evidence to be given of the contents of a distinct, valid, contemporaneous agreement between the parties which was not reduced to writing, when the same is not in conflict with the provisions of the written agreement.⁷³ The exception is thus stated some-

from the *date it bore*, when the terms of the contract provided for delivery "within 136 days after the date of the execution of the contract": *District of Columbia v. Camden Iron Works*, 181 U. S. 453, 45 L. Ed. 948, 21 Sup. Ct. Rep. 680. See, also, the late case of *Breeding v. Tandy*, 148 Ky. 345, 146 S. W. 742.

⁷¹ Taylor on Evidence, § 1150; *Perrin v. Broadwell*, 3 Dana (Ky.), 596; *Miller v. Hampton*, 37 Ala. 342; *Aldridge v. Branch Bank of Decatur*, 17 Ala. 45; *Burns v. Moore*, 76 Ala. 339, 52 Am. Rep. 332; *Battles v. Fobes*, 21 Pick. (Mass.) 239; *Shaughnessey v. Lewis*, 130 Mass. 355; *Russell v. Carr & Co.*, 38 Ga. 459. See, also, *Scribner v. Mansfield*, 68 Me. 74; *Milliken v. Coombs*, 1 Me. 343, 10 Am. Dec. 70; *Huston v. Young*, 33 Me. 85 (a note in the hands of an indorsee); *Kingsley v. Siebrecht*, 92 Me. 23, 69 Am. St. Rep.

486, 42 Atl. 249; *Ehrmann v. Stitzel*, 121 Ky. 751, 123 Am. St. Rep. 224, 90 S. W. 275.

⁷² *Trelawney v. Coleman*, 2 Stark. 193, 1 Barn. & Ald. 90, 106 Eng. Reprint, 33; *Houlston v. Smyth*, 2 Car. & P. 24, 3 Bing. 127, 10 Moore, 482, 130 Eng. Reprint, 462; *Sinclair v. Baggaley*, 4 Mees. & W. 318, 7 L. J. Ex. 305, 2 Jur. 683.

⁷³ *Phillips v. Bradshaw*, 167 Ala. 199, 52 South. 662; *Burgie v. Bailey*, 91 Ark. 383, 18 Ann. Cas. 389, 121 S. W. 266; *Weaver v. Fletcher*, 27 Ark. 510; *Savings Bank of Southern California v. Asbury*, 117 Cal. 96, 48 Pac. 1081; *Mosier v. Kershaw*, 16 Colo. App. 453, 66 Pac. 449; *Chamberlain v. Lesley*, 39 Fla. 452, 22 South. 736; *Carter v. Griffin*, 114 Ga. 321, 40 S. E. 290; *Millers' Nat. Ins. Co. v. Kinneard*, 35 Ill. App. 105; *Bradshaw v. Combs*, 102 Ill. 428; *Harvey v. Million*, 67 Ind. 90; *Welz v. Rhodius*, 87 Ind. 1, 44 Am. Rep.

what more guardedly by Stephen: The party may prove "the existence of any separate, oral agreement as to any matter on which a document is silent, and which is not inconsistent with its terms, if, from the circumstances of the case, the court infers that the parties did not intend the document to be a complete and final statement of the whole of the transaction between them, or the existence of any separate oral agreement, constituting a condition precedent to the attaching of any obligation under any such con-

747; *Fox v. Tyler*, 3 Ind. Ter. 1, 53 S. W. 462; *McCaskey Register Co. v. Hall*, 140 Iowa, 87, 117 N. W. 1124; *Sutton v. Weber*, 127 Iowa, 361, 101 N. W. 775; *Sutton v. Griebel*, 118 Iowa, 78, 91 N. W. 825; *Farmers' Alliance Ins. Co. v. Hanks*, 83 Kan. 96, 110 Pac. 99; *Southern R. Co. v. Graddy*, 28 Ky. Law Rep. 1347, 91 S. W. 1125; *Dwight v. Linton*, 3 Rob. (La.) 57; *Cook v. Littlefield*, 98 Me. 299, 56 Atl. 899; *Bonney v. Morrill*, 57 Me. 368; *Hawley Down-Draft Furnace Co. v. Hooper*, 90 Md. 390, 45 Atl. 456; *Coates v. Sangston*, 5 Md. 121; *Taylor v. Wilcox*, 167 Mass. 572, 46 N. E. 115; *Willis v. Hulbert*, 117 Mass. 151; *Shaw v. Mitchell*, 2 Met. (Mass.) 65; *Buhl v. Mechanics' Bank*, 123 Mich. 591, 82 N. W. 282; *Doty v. Martin*, 32 Mich. 462; *King v. Dahl*, 82 Minn. 240, 84 N. W. 737; *Phoenix Pub. Co. v. Riverside Clothing Co.*, 54 Minn. 205, 55 N. W. 912; *Levelsmeier v. St. Louis etc. R. Co.*, 114 Mo. App. 412, 90 S. W. 104; *Kelly v. Ellis*, 39 Mont. 597, 104 Pac. 873; *Huffman v. Ellis*, 64 Neb. 623, 90 N. W. 552; *Travis v. Epstein*, 1 Nev. 116; *Hersom v. Henderson*, 21 N. H. 224, 53 Am. Dec. 185; *Naumberg v. Young*, 44 N. J. L. 331, 43 Am. Rep. 380; *Davies v. Hotchkiss*, 112 N. Y. Supp. 233; *Juilliard v. Chaffee*, 92 N. Y. 529; *Chapin v. Dobson*, 78 N. Y. 74, 34 Am. Rep. 512; *Anderson v. American Suburban*

Corp., 155 N. C. 131, 71 S. E. 221; *Miller v. Florer*, 15 Ohio St. 148; *Peterson v. Creason*, 47 Or. 69, 81 Pac. 574; *Bruch v. Shafer*, 45 Pa. Sup. Ct. 612; *Warwick etc. Water Co. v. Allen (R. I.)*, 35 Atl. 579; *Virginia-Carolina Chemical Co. v. Moore*, 61 S. C. 166, 39 S. E. 346; *Schuler v. Citizens' Bank*, 13 S. D. 188, 82 N. W. 389; *Quigley v. Shedd*, 104 Tenn. 560, 58 S. W. 266; *Hockersmith v. Ferguson*, 63 Wash. 581, 116 Pac. 11; *Reynolds v. Hooker*, 76 Vt. 184, 56 Atl. 988; *Green v. Randall*, 51 Vt. 67; *Gordon v. Parke etc. Mach. Co.*, 10 Wash. 18, 38 Pac. 755; *Rymer v. South Penn. Oil Co.*, 54 W. Va. 530, 46 S. E. 559; *Kipp v. Laun*, 146 Wis. 591, 131 N. W. 418; *Hubbard v. Marshall*, 50 Wis. 322, 6 N. W. 497; *Hahn v. Doolittle*, 18 Wis. 196, 86 Am. Dec. 757; *Godkin v. Monahan*, 83 Fed. 116, 27 C. C. A. 410; *Erschine v. Adeane*, L. R. 8 Ch. App. 756, 42 L. J. Ch. 835, 29 L. T., N. S., 234; *Heyworth v. Hutchinson*, L. R. 2 Q. B. 447; *Morgan v. Griffith*, L. R. 6 Ex. 70; *Lindley v. Lacey*, 17 Com. B., N. S., 578, 10 Jur., N. S., 1103; *Jackson v. Allan*, 11 Manitoba, 36. See, also, the late cases: *Snodgrass v. E. A. Zander & Co. (Ark.)*, 154 S. W. 212; *James J. Stevinson v. Joy*, 164 Cal. 279, 128 Pac. 751; *Abbott v. Lee (Conn.)*, 85 Atl. 526; *Toller v. Hewitt (Ga. App.)*, 77 S. E. 650; *Stewart v. Gardner*, 152 Ky.

tract, grant or disposition of property.”⁷⁴ In a note, Stephen says of the distinction to be marked between cases in which documents are exclusive evidence of the transactions which they embody and cases involving the interpretation of documents by oral evidence: “The two subjects are so closely connected together, that they are not usually treated as distinct; but they are so in fact. A and B make a contract of marine insurance on goods, and reduce it to writing. They verbally agree that the goods are not to be shipped in a particular ship, though the contract makes no such reservation. They leave unnoticed a condition usually understood in the business of insurance, and they make use of a technical expression, the meaning of which is not commonly known. The law does not permit oral evidence to be given of the exceptions as to the particular ship. It does

120, 153 S. W. 3; *The Louis Eckels etc. Co. v. Cornell Economizer Co.* (Md.), 86 Atl. 38; *Neal v. Wilson* (Mass.), 100 N. E. 544; *Smith v. Mathis* (Mich.), 140 N. W. 548; *Providence Jewelry Co. v. Gray Mercantile Co.*, 92 Neb. 633, 139 N. W. 215; *Borough Dev. Co. v. Harmon*, 139 N. Y. Supp. 362; *Lytton Mfg. Co. v. House Lumber Co.* (N. C.), 77 S. E. 233; *McCulloch v. Bauer* (N. D.), 139 N. W. 318; *Lowry v. Roy*, 238 Pa. 9, 85 Atl. 986; *Magnolia Warehouse etc. Co. v. Davis* (Tex. Civ. App.), 153 S. W. 670; *Vance v. Heath* (Utah), 129 Pac. 365; *Gafford v. Globe etc. Storage Co.*, 71 Wash. 204, 128 Pac. 228; *Sells v. City of Chicago*, 201 Fed. 874.

⁷⁴ Steph. Ev., art. 90; *Hope v. Balen*, 58 N. Y. 380. Parol evidence may be received of a collateral agreement to show that the contract never had any legal existence: *Brewster v. Reel*, 74 Iowa, 506, 38 N. W. 381; see cases cited in § 435 et seq., ante; of a contemporaneous agreement by the vendor of property not to carry

on a competing business: *Fusting v. Sullivan*, 41 Md. 162; *Pierce v. Woodward*, 6 Pick. (Mass.) 206 (contra, *Smith v. Gibbs*, 44 N. H. 335; *Costello v. Eddy*, 128 N. Y. 650, 29 N. E. 146); of an agreement of one, not an attorney, not to charge for certain services performed under a written power of attorney authorizing him to defend a suit: *Joannes v. Mudge*, 6 Allen (Mass.), 245; of an agreement as to the place of carrying out a contract, the written agreement being silent on that point: *Cummings v. Putnam*, 19 N. H. 569; *Musselman v. Stoner*, 31 Pa. 265; of an oral agreement of an indorser, as between indorser and indorsee, to waive demand and notice: *Sanborn v. Southard*, 25 Me. 409, 43 Am. Dec. 288; *Fullerton v. Rundlett*, 27 Me. 31; *Dye v. Scott*, 35 Ohio St. 194, 35 Am. Rep. 604; see § 496, post; of an agreement by all the parties to a note that payment should be demanded of the maker at a particular bank, the note being silent as to the place of payment

permit oral evidence to be given to annex the condition, and thus far it decides that for one purpose the document shall, and that for another it shall not, be regarded as exclusive evidence of the terms of the actual agreement between the parties. It also allows the technical term to be explained, and in doing so it interprets the meaning of the document itself. The two operations are obviously different, and their proper performance depends upon different principles. The first depends upon the principle that the object of reducing transactions to a written form is to take security against bad faith or bad memory, for which reason a writing is presumed, as a general rule, to embody the final and considered determination of the parties to it. The second depends on the consideration of the imperfections of language, and of

or demand: *Pearson v. Bank of the Metropolis*, 1 Pet. (U. S.) 89, 7 L. Ed. 65 (as to notes and bills in general, see § 494 et seq., *post*); of an agreement by the payee to hold the *sureties harmless* by paying the note out of a particular fund: *Stewart v. Albuquerque Bank* (Ariz.), 30 Pac. 303; of an oral agreement for *transportation* by a common carrier, though a ticket is given: *Van Buskirk v. Roberts*, 31 N. Y. 661; of an agreement to *pay* for property sold by bill of sale *by taking up* the vendor's note or acceptance: *Lindley v. Lacey*, 17 Com. B., N. S., 578, 10 Jur., N. S., 1103; or in some other way: *Sowers v. Earnhart*, 64 N. C. 96; of an agreement of *warranty* where the bill of sale is silent on the subject, see discussion and cases, § 441, *post*; of an agreement between two *indorsers* as to the mode of adjusting the loss between them: *Phillips v. Preston*, 5 How. (U. S.) 278, 12 L. Ed. 152; of an agreement *by a grantor* to pay for a sewer in process of construction at the time of the execution of the deed and ad-

jacent to the property sold: *Carr v. Dooley*, 119 Mass. 294; *Cole v. Hadley*, 162 Mass. 579, 39 N. E. 279; and of the *mode of paying for land*, the contract of sale being silent on the subject: *Paul v. Owings*, 32 Md. 402; *Sivers v. Sivers*, 97 Cal. 518, 32 Pac. 571. Parol evidence may also be received of an agreement as to the ownership of and payment for a house to be erected on leased property and agreed to be treated as personal property, such evidence not being inconsistent with the lease: *Searle v. Roman Catholic Bishop of Springfield*, 203 Mass. 493, 17 Ann. Cas. 340, 25 L. R. A., N. S., 992, 89 N. E. 809; of an agreement to settle other accounts between the maker and payee of a note given on those conditions: *Jackson v. McCalla*, 133 Ga. 749, 66 S. E. 918. See the Canadian cases: *Dunsmuir v. Lowenberg*, 30 S. C. R. 334; *McMillan v. Williams*, 5 A. R. 518. See, also, note to *Johnson v. McClure*, 2 Ann. Cas. 146, on supplementing written contract by proof of collateral oral agreement.

the inadequate manner in which people adjust their words to the facts to which they apply." The admission of the evidence is not affected by the fact that the writing contains no reference to it.⁷⁵ The proffered parol agreement must not be inconsistent with the writing.⁷⁶ The law is that agreements or representations made prior to the written contract under which the party was induced to sign the contract may be shown; in other words, where the parol

⁷⁵ *Bonney v. Morrill*, 57 Me. 368; *Thomas v. Loose*, 114 Pa. 35, 6 Atl. 326; *Downey v. Hatter* (Tex. Civ. App.), 48 S. W. 32.

⁷⁶ *Miles v. Sledge*, 157 Ala. 528, 47 South. 595; *Borden v. Peay*, 20 Ark. 293; *Pierce v. Edwards*, 150 Cal. 650, 89 Pac. 600; *Welles v. Colorado Nat. Life Assur. Co.*, 49 Colo. 508, 113 Pac. 524; *Adams v. Turner*, 73 Conn. 38, 46 Atl. 247; *Gam v. Cordrey*, 4 Penne. (Del.) 143, 53 Atl. 334; *Randle v. Davis Coal etc. Co.*, 15 App. Cas. (D. C.) 357; *Chamberlain v. Lesley*, 39 Fla. 452, 22 South. 736; *Carter v. Griffin*, 114 Ga. 321, 40 S. E. 290; *Tyson v. Neill*, 8 Idaho, 603, 70 Pac. 790; *Halliday v. Mulligan*, 113 Ill. App. 177; *Buffalo Oolitic Limestone Quarries Co. v. Davis*, 45 Ind. App. 116, 90 N. E. 327; *Fox v. Tyler*, 3 Ind. Ter. 1, 53 S. W. 462; *Bounanni v. White Bronze Monument Co.*, 131 Iowa, 304, 108 N. W. 524; *Robieson v. Royce*, 63 Kan. 886, 66 Pac. 646; *Varney Electrical Supply Co. v. Carter*, 133 Ky. 90, 115 S. W. 763, 116 S. W. 1176; *Davies v. Bierce*, 114 La. 663, 38 South. 488; *Neal v. Flint*, 88 Me. 72, 33 Atl. 669; *Merritt v. Peninsular Constr. Co.*, 91 Md. 453, 46 Atl. 1013; *Searle v. Bishop*, 203 Mass. 493, 17 Ann. Cas. 340, 25 L. R. A., N. S., 92, 89 N. E. 809; *Campau v. National Film Co.*, 159 Mich. 169, 123 N. W. 606; *American Fruit Product Co. v. Barrett*, 113 Minn. 22, 128 N.

W. 1009; *Red Snapper Sauce Co. v. Bolling*, 95 Miss. 752, 50 South. 401; *National Livestock Comm. Co. v. Thero*, 154 Mo. App. 508, 135 S. W. 961; *Aultman v. Hawk*, 4 Neb. Unof. 582, 95 N. W. 695; *Loxley v. Studebaker*, 75 N. J. L. 599, 68 Atl. 98; *Lossing v. Cushman*, 195 N. Y. 386, 88 N. E. 649; *De Haven v. Coup*, 5 Ohio Dec. 562, 6 Am. L. Rec. 593; *Clinton Nat. Bank v. McKennon*, 26 Okl. 835, 110 Pac. 649; *Williams v. Mount Hood Ry. etc. Co.*, 57 Or. 251, Ann. Cas. 1913A, 177, 110 Pac. 490, 111 Pac. 17; *Ridgeway Dynamo etc. Co. v. Pennsylvania Cement Co.*, 221 Pa. 160, 18 L. R. A., N. S., 613, 70 Atl. 557; *Virginia-Carolina Chemical Co. v. Moore*, 61 S. C. 166, 39 S. E. 346; *Haag v. Burns*, 22 S. D. 51, 115 N. W. 104; *Murray Co. v. Putnam* (Tex. Civ. App.), 130 S. W. 631; *McCornick v. Levy*, 37 Utah, 134, 106 Pac. 660; *Nelson v. Godfrey*, 74 Vt. 470, 52 Atl. 1037; *Farmers' Mfg. Co. v. Woodworth*, 109 Va. 596, 64 S. E. 986; *Hubenthal v. Spokane etc. R. Co.*, 43 Wash. 677, 86 Pac. 955; *Providence Washington Ins. Co. v. Board of Education*, 49 W. Va. 360, 38 S. E. 679; *Ady v. Barnett*, 142 Wis. 18, 124 N. W. 1061; *George v. Emery*, 18 Wyo. 352, 107 Pac. 1; *Crilly v. Galliee*, 148 Fed. 835, 73 C. C. A. 525; *Ersine v. Adeane*, L. R. 8 Ch. 756, 42 L. J. Ch. 835; *Pheerill v. Pherrill*, 13 Grant Ch. (U. C.) 476.

contemporaneous agreement was the inducing and moving cause of the written contract, or where the parol agreement forms part of the consideration for a written contract, and where the written contract was executed upon the faith of the parol contract or representations, such evidence is admissible.⁷⁷ The supreme court of the United States has expressed itself clearly on the subject. "Undoubtedly the existence of a separate oral agreement as to any matter on which a written contract is silent, and which is not inconsistent with its terms, may be proven by parol, if under the circumstances of the particular case it may properly be inferred that the parties did not intend the written paper to be a complete and final statement of the whole of the transaction between them. But such an agreement must not only be collateral, but must relate to a subject distinct from that to which the written contract applies, that is, it must not be so closely connected with the principal transaction as to form part and parcel of it. And when the writing itself upon its face is couched in such terms as import a complete legal obligation, without any uncertainty as to the object or extent of the engagement, it is conclusively presumed that the whole engagement of the parties, and the extent and manner of their undertaking, was reduced to writing."⁷⁸ To deny the admission of evi-

⁷⁷ *De Rue v. McIntosh*, 26 S. D. 42, 127 N. W. 532. See, also, *Chapin v. Dobson*, 78 N. Y. 74, 34 Am. Rep. 512; *Thomas v. Loose*, 114 Pa. 35, 6 Atl. 326; *Dicken v. Morgan*, 54 Iowa, 684, 7 N. W. 145; *Cullmans v. Lindsay*, 114 Pa. 166, 6 Atl. 332; *Barnett v. Pratt*, 37 Neb. 349, 55 N. W. 1050; *Ayer v. R. W. Bell Mfg. Co.*, 147 Mass. 46, 16 N. E. 754; *Davis v. Cochran*, 71 Iowa, 369, 32 N. W. 445; 9 Ency. Evid. 350; *Ferguson v. Rafferty*, 128 Pa. 337, 6 L. R. A. 33, 18 Atl. 484; *Hines v. Willcox*, 96 Tenn. 148, 54 Am. St. Rep. 823, 34 L. R. A. 824, 33 S. W. 914; *Walker v. France*, 112 Pa. 203, 5 Atl. 208. In *Walker v. France*, *supra*, the su-

preme court of Pennsylvania, in discussing this subject, says: "That a written agreement may be modified, explained, reformed or altogether set aside by parol evidence of an oral promise or undertaking material to the subject matter of the contract made by one of the parties at the time of the execution of the writing, and which induced the other party to put his name to it, must now be regarded as a principle of law so well settled as to preclude discussion."

⁷⁸ *Seitz v. Brewers etc. Machine Co.*, 141 U. S. 510, 35 L. Ed. 837, 12 Sup. Ct. Rep. 46.

dence in such a case, if relevant to the issues made by the pleadings, would be to allow one of the parties to induce another to enter into the engagement under false representations, and to aid him to enforce it against his adversary, notwithstanding the fraud practiced upon him, by holding out to him the fraudulent inducement. This principle, however, does not apply to a case in which the oral promise relates directly to the subject of the contract, even though the claim be that the complaining party signed the instrument upon such promise.⁷⁹ Parol evidence may be received of a collateral agreement to show that the contract never had any legal existence;⁸⁰ that it was not, in fact, delivered as a present contract, and was only to become an absolute obligation on a named contingency.⁸¹ In an action upon a written instrument, the defense was that it was understood between the parties at the time the instrument was signed that it should not be of any effect unless in certain named contingencies, which, it was shown, never occurred. Mr. Justice Miller said: "We are of opinion that this evidence shows that the contract upon which this suit is brought never went into effect; that the condition upon which it was to become operative never occurred, and that it is not a question of contradicting or varying a written instrument by parol testimony, but that it is one of that class of cases, well recognized in the law, by which an instrument, whether

⁷⁹ Kelly v. Lewis, 39 Mont. 597, 104 Pac. 873; Armington v. Stelle, 27 Mont. 13, 94 Am. St. Rep. 811, 69 Pac. 115.

⁸⁰ Corbin v. Sistrunk, 19 Ala. 203; Graham v. Remmel, 76 Ark. 140, 6 Ann. Cas. 167, 88 S. W. 899; Hartman Stock Farm v. Henley, 8 Ga. App. 255, 68 S. E. 957; Robinson v. Nessel, 86 Ill. App. 212; Brewster v. Reel, 74 Iowa, 506, 38 N. W. 381; Birely & Sons v. Dodson, 107 Md. 229, 68 Atl. 488; Earle v. Rice, 111 Mass. 17; Atwood v. Gillett, 2 Doug. (Mich.) 206; Poindexter v. McDow-

ell, 110 Mo. App. 233, 84 S. W. 1133; Boulevard Globe etc. Co. v. Kern Incandescent Gaslight Co., 67 N. J. L. 279, 51 Atl. 704; O'Brien v. Paterson Brewing etc. Co., 69 N. J. Eq. 117, 61 Atl. 437; Koehler v. Duggan, 49 Misc. Rep. 100, 96 N. Y. Supp. 1025; Koester v. Northwestern Port Huron Co., 24 S. D. 546, 124 N. W. 740; Perry v. Central Southern R. Co., 5 Cold. (45 Tenn.) 138; Gregg v. Groesbeck, 11 Utah, 310, 32 L. R. A. 266, 40 Pac. 202.

⁸¹ Burke v. Dulaney, 153 U. S. 228, 38 L. Ed. 698, 14 Sup. Ct. Rep. 816.

delivered to a third person as an escrow or to the obligee in it, is made to depend, as to its going into operation, upon events to occur or to be ascertained thereafter.”⁸² The distinction in point of law is that evidence to vary the terms of an agreement in writing is not admissible, but evidence to show that there is no agreement at all is admissible.⁸³ The manual delivery of an instrument may always be proved to have been on a condition which has not been fulfilled in order to avoid its effect. This is not to show any modification or alteration of the written agreement, but that it never became operative, and that its obligation never commenced.⁸⁴

§ 440 (445). Parol evidence when the writing is incomplete.—The examples given in the notes to the last section were cited more particularly for the purpose of illustrating

⁸² *Ware v. Allen*, 128 U. S. 590, 32 L. Ed. 563, 9 Sup. Ct. Rep. 174. Citing *Pym v. Campbell*, 6 El. & Bl. 370, 373, 119 Eng. Reprint, 903; *Davies v. Jones*, 17 Com. B. 625, 25 L. J. C. P. 21; *Wallis v. Littell*, 11 Com. B., N. S., 369, 31 L. J. C. P. 100, 8 Jur., N. S., 745; *Wilson v. Power*, 131 Mass. 539; and *Pawling v. United States*, 8 U. S. (4 Cranch) 219, 2 L. Ed. 601.

⁸³ *Pym v. Campbell*, *supra*. In that case, which was an action upon an alleged agreement for the sale of an invention, the defense was that when the parties met the defendants said they would not purchase except the invention was reported on favorably by two engineers. One was absent, and it was then proposed that, as the parties were together and might find it troublesome to meet again, a writing should then be drawn up and signed, which, if the absent engineer approved the invention, should be the agreement, but if he did not approve it, should not be one. The absent engineer did not

approve of the invention when he saw it, and the defendants contended that there was no bargain. *Crompton, J.*, said that he knew of no rule of law estopping parties from showing that a paper, purporting to be a signed agreement, was in fact signed on the terms that it should not be an agreement till money was paid or something else done. “The parties,” he observed, “may not vary a written agreement, but they may show that they never came to an agreement at all, and that the signed paper was never intended to be the record of the terms of the agreement; for they never had agreeing minds. Evidence to show that does not vary an agreement and is admissible.”

⁸⁴ *Wilson v. Powers*, 131 Mass. 539. See, also, *Reynolds v. Robinson*, 110 N. Y. 654, 18 N. E. 127; *Juilliard v. Chaffee*, 92 N. Y. 529; *Benton v. Martin*, 52 N. Y. 570; *McFarland v. Sikes*, 54 Conn. 250, 1 Am. St. Rep. 111, 7 Atl. 408.

what the rule is when there is a distinct and independent oral contract. Some of the cases there cited also afford instances of the admission of parol evidence on the ground of the incompleteness of the written contract. "Where a writing, although embodying an agreement, is manifestly incomplete, and is not intended by the parties to exhibit the whole agreement, but only to define some of its terms, the writing is conclusive as far as it goes. But such parts of the actual contract as are not embraced within its scope may be established by parol."⁸⁵ According to the better

⁸⁵ Wood, Ev., § 23; Franklin Co. v. Layman, 145 Ill. 138, 33 N. E. 1094; Sheffield v. Page, 1 Sprague (U. S.), 285, Fed. Cas. No. 12,743; Kieth v. Kerr, 17 Ind. 284; Taylor v. Galland, 3 G. Greene (Iowa), 17; Palmer v. Roath, 86 Mich. 602, 49 N. W. 590; Moss v. Green, 41 Mo. 389; Landt v. Schneider, 31 Mont. 15, 77 Pac. 307; Johnson v. Kindred Bank, 12 N. D. 336, 96 N. W. 588; Fosha v. O'Donnell, 120 Wis. 336, 97 N. W. 924; Webster v. Hodgkins, 25 N. H. 128; Kentucky Cement Co. v. Cleveland, 4 Ind. App. 171, 30 N. E. 802; Miller v. Fichthorn, 31 Pa. 252; Winn v. Chamberlin, 32 Vt. 318; Gilbert v. Stockman, 76 Wis. 62, 20 Am. St. Rep. 23, 44 N. W. 845; Seitz v. Brewers' Refrigerating Mach. Co., 141 U. S. 510, 35 L. Ed. 837, 12 Sup. Ct. Rep. 46; Morrison v. Dickey, 119 Ga. 698, 46 S. E. 863; Ebert v. Arends, 190 Ill. 221, 60 N. E. 211; Meader v. Allen, 110 Iowa, 588, 81 N. W. 799; Locke v. Lyon Medicine Co., 27 Ky. Law Rep. 1, 84 S. W. 307; Potter v. Easton, 82 Minn. 247, 84 N. W. 1011. For the purpose of completing the contract parol evidence is admissible to show the *place* where the timber is to be cut: Pinney v. Thompson, 3 Iowa, 74; the *amount of merchandise* to be delivered: Potter v. Hopkins, 25 Wend.

(N. Y.) 417; Norton v. Woodruff, 2 N. Y. 153; the *amount of compensation to be paid for services*: Sayre v. Wilson, 86 Ala. 151, 5 South. 157; Guidery v. Green, 95 Cal. 630, 30 Pac. 786; the *date of delivery*: Johnston v. McRary, 5 Jones (N. C.), 369; the *omitted terms* of a contract which is clearly ambiguous: Hurd v. Bovee, 134 N. Y. 595, 31 N. E. 624; Wolfert v. Pittsburgh etc. Ry. Co., 44 Mo. App. 330; Neal v. Rears, 88 Ga. 298, 14 S. E. 617; Paugh v. Paugh, 40 Ill. App. 143; Martin etc. Cooker Co. v. Olive, 82 Iowa, 122, 47 N. W. 980; MacDonald v. Dana, 154 Mass. 152, 27 N. E. 993; a *verbal acceptance* of a written proposal: Pacific Iron Works v. Newhall, 34 Conn. 67; where there is a *memorandum*, to show the entire contract: Mobile Marine Dock etc. Ins. Co. v. McMillan, 31 Ala. 711; Kreuzberger v. Wingfield, 96 Cal. 251, 31 Pac. 109; the *description of stock sold at auction*: Hadley v. Clinton Importing Co., 13 Ohio St. 502, 82 Am. Dec. 454. Where there is a *direct reference* in the written agreement to an *oral contract*, the former may be proved by parol, even though the effect is to add material terms to the written instrument: Ruggles v. Sanwick, 6 Minn. 526. The following are late cases upon the subject of the text:

view the only criterion of the completeness of the written contract as a full expression of the agreement of the parties is the writing itself. If it imports on its face to be a complete expression of the whole agreement,—that is, contains such language as imports a complete legal obligation,—it is to be presumed that the parties introduced into it every material item and term; and parol evidence cannot be admitted to add another term to the agreement, although the writing contains nothing on the particular one to which the parol evidence is directed. The rule forbids to add by parol when the writing is silent, as well as to vary where it speaks,⁸⁶ and the law controlling the operation of a written contract becomes a part of it, and cannot be varied by parol

Alabama Great So. R. Co. v. Norris, 167 Ala. 311, 52 South. 891; Mobile etc. R. Co. v. Hawkins, 163 Ala. 565, 51 South. 37; New Amsterdam Casualty Co. v. Union Sawmill Co., 95 Ark. 140, 128 S. W. 861; Montgomery & Co. v. Arkansas Cold Storage & Ice Co., 93 Ark. 191, 124 S. W. 768; Loud v. Collins, 12 Cal. App. 786, 108 Pac. 880; McCaskey Register Co. v. Curfman, 45 Ind. App. 297, 90 N. E. 323; Canfield Lumber Co. v. Kint Lumber Co., 148 Iowa, 207, 127 N. W. 70; Farmers' Alliance Ins. Co. v. Hanks, 83 Kan. 96, 110 Pac. 99; Heskett v. Border Queen Mill & Elevator Co., 81 Kan. 356, 105 Pac. 432; Vumbaca v. West, 107 Me. 130, 77 Atl. 642; Hanson v. Wittenberg, 205 Mass. 319, 91 N. E. 383; Porteous v. Adams Exp. Co., 112 Minn. 31, 127 N. W. 429; Beattie v. New York & L. I. Const. Co., 196 N. Y. 346, 89 N. E. 831; Laughlin v. Manson, 65 Misc. Rep. 492, 120 N. Y. Supp. 110; Wood v. Boese, 135 App. Div. 810, 120 N. Y. Supp. 137; Coles v. Saitta, 119 N. Y. Supp. 253; Audit Co. v. Taylor, 152 N. C. 272, 67 S. E. 582; Willis v. Jarrett Const. Co., 152 N. C. 100, 67 S. E. 265; Stern

v. Benbow, 151 N. C. 460, 66 S. E. 445; Eureka Elastic Paint Co. v. Bennett-Hedgpeth Co., 85 S. C. 486, 67 S. E. 738; Missouri K. & T. R. Co. v. Stark Grain Co., 103 Tex. 542, 131 S. W. 410; Kelly Plow Co. v. London (Tex. Civ. App.), 125 S. W. 974; State Mut Life Ins. Co. v. Ballard (Tex. Civ. App.), 122 S. W. 267; Patterson v. Wenatchee Canning Co., 59 Wash. 556, 110 Pac. 379; Driver v. Galland, 59 Wash. 201, 109 Pac. 593; Eichbaum v. Caldwell Bros. Co., 58 Wash. 163, 108 Pac. 434; Roebeling's Sons Co. v. Washington Alaska Bank, 56 Wash. 102, 105 Pac. 174; Waterman v. Le Sage, 142 Wis. 97, 135 Am. St. Rep. 1062, 124 N. W. 1041; Haas v. Hamburg-Bremen Fire Ins. Co., 181 Fed. 916, 104 C. C. A. 354. See, also, the Canadian cases: Massicotte v. Poissant, Q. R., 35 S. C. 300; Turgeon v. Dubeau, Q. R. 35 S. C. 211; Odell v. Lavigne, Q. R. 32 S. C. 99; Forget v. Baxter, App. Cas. [1900] 467.

⁸⁶ 2 Phil. Ev. (Cow. & H. Notes), 669; Naumberg v. Young, 44 N. J. L. 331, 43 Am. Rep. 380; Hei v. Heller, 53 Wis. 415, 10 N. W. 620.

any more than what is written.⁸⁷ The rules embodied in this statement of the law by an eminent jurist in a well-known Minnesota case,⁸⁸ have been adopted in the decisions of the supreme court of the United States and for the most part of the state courts.⁸⁹ These rules have been extended in a subsequent opinion of the Minnesota court,⁹⁰ which deals with the point as to how the incompleteness of the written contract may be made to appear. To furnish a

⁸⁷ 2 Phil. Ev. (Cow. & H. Notes), 668; *La Farge v. Rickert*, 5 Wend. (N. Y.) 187, 21 Am. Dec. 209; *Creery v. Holly*, 14 Wend. (N. Y.) 26; *Stone v. Harmon*, 31 Minn. 512, 19 N. W. 88.

⁸⁸ *Mitchell, J., in Thompson v. Libby*, 34 Minn. 374, 26 N. W. 1. See note 91 to this section, *post*, where this case is alluded to by the same judge.

⁸⁹ *Main v. Radney* (Ala.), 39 South. 981; *Barry-Wehmiller Mach. Co. v. Thompson*, 83 Ark. 283, 104 S. W. 137; *Luitweiler Pumping Engine Co. v. Ukiah Water etc. Co.*, 16 Cal. App. 198, 116 Pac. 712; *Brosty v. Thomas*, 79 Conn. 133, 64 Atl. 1; *Telluride Power Transmission Co. v. Crane Co.*, 208 Ill. 218, 70 N. E. 319; *Reynolds v. Louisville etc. Ry. Co.*, 143 Ind. 579, 40 N. E. 410; *Mast v. Pearce*, 58 Iowa, 579, 43 Am. Rep. 125, 8 N. W. 632, 12 N. W. 597; *Thisler v. Mackey*, 65 Kan. 464, 70 Pac. 334; *Harrington v. F. W. Brockman Comm. Co.*, 107 Mo. App. 418, 81 S. W. 629; *Thompson v. Libby*, 34 Minn. 374, 26 N. W. 1; *Sylvester v. Carpenter Paper Co.*, 55 Neb. 621, 75 N. W. 1092; *Kruger v. Brown*, 79 N. J. L. 418, 75 Atl. 171; *Bandholz v. Judge*, 62 N. J. L. 526, 41 Atl. 723; *Piretti v. Tire etc. Co.*, 120 N. Y. Supp. 782; *Case v. Phoenix Bridge Co.*, 134 N. Y. 78, 31 N. E. 254; *Wilson v. Deen*, 74 N. Y. 531;

International etc. R. Co. v. Griffith (Tex. Civ. App.), 103 S. W. 225; *Fentress v. Steele & Sons*, 110 Va. 578, 66 S. E. 870; *Gordon v. Parke etc. Mach. Co.*, 10 Wash. 18, 38 Pac. 755; *J. I. Case Plow Works v. Niles & Scott Co.*, 90 Wis. 590, 63 N. W. 1013; *McQuaid v. Ross*, 77 Wis. 470, 46 N. W. 892; *Hei v. Heller*, 53 Wis. 415, 10 N. W. 620; *Ronan v. 155,453 Feet of Lumber*, 131 Fed. 345; *Phillips v. Iola Portland Cement Co.*, 125 Fed. 593, 61 C. C. A. 19; *Franklin v. Browning*, 117 Fed. 226, 54 C. C. A. 258; *Green v. Chicago etc. Ry. Co.*, 92 Fed. 873, 35 C. C. A. 68; *New York Life Ins. Co. v. McMaster*, 87 Fed. 63, 30 C. C. A. 532; *Godkin v. Monahan*, 83 Fed. 116, 27 C. C. A. 410; *Grand Avenue Hotel Co. v. Wharton*, 79 Fed. 43, 24 C. C. A. 441; *Wilson v. New U. S. Cattle Ranch Co.*, 73 Fed. 994, 20 C. C. A. 241; *Harrison v. Fortlage*, 161 U. S. 57, 40 L. Ed. 616, 16 Sup. Ct. Rep. 488; *Seitz v. Brewers' Refrigerating Co.*, 141 U. S. 510, 35 L. Ed. 837, 12 Sup. Ct. Rep. 46; *De Witt v. Berry*, 134 U. S. 306, 33 L. Ed. 896, 10 Sup. Ct. Rep. 536; *Bast v. Bank*, 101 U. S. 93, 25 L. Ed. 794.

⁹⁰ *Wheaton Roller Mill Co. v. John T. Noye Mfg. Co.*, 66 Minn. 156, 68 N. W. 854. See, also, the Canadian case of *Mason v. Brunskill*, 15 U. C. R. 300.

basis for the admission of parol evidence, the incompleteness need not be apparent on the face of the instrument. "If the written contract, construed in view of the circumstances in which, and the purpose for which, it was executed,—which evidence is always admissible to put the court in the position of the parties,—shows that it was not meant to contain the whole bargain between the parties, then parol evidence is admissible to prove a term upon which the writing is silent, and which is not inconsistent with what is written; but, if it shows that the writing was meant to contain the whole bargain between the parties, no parol evidence can be admitted to introduce a term which does not appear there."⁹¹ If the contract is one required by law to be in writing, it must be complete in itself.⁹² Thus, referring to the statute of frauds, we find Chancellor Kent said: "Unless the essential terms of the sale can be ascertained from the writing itself, or by a reference contained in it to something else, the writing is not a compliance with the statute; and if the agreement be thus defective, it can-

⁹¹ Mitchell, J., in the Minnesota case last above referred to, added that the true rule is that the only criterion of the completeness of the written contract as a full expression of the agreement of the parties is the writing itself; but in determining whether it is thus complete it is to be construed, as in any other case, according to its subject matter, and the circumstances under which it was executed. What was said on this subject in *Thompson v. Libby*, 34 Minn. 374, 26 N. W. 1, is perhaps incomplete, in not specifically adverting to this rule of construction, and for that reason capable of being understood as meaning that the incompleteness must appear on the face of the document from mere inspection. See, also, *Juilliard v. Chaffee*, 92 N. Y. 529; *Lutweiler Pumping Engine Co. v. Ukiah Water etc. Co.*,

16 Cal. App. 198, 116 Pac. 707, 712. See the late cases: *Cherokee Const. Co. v. Prairie Creek etc. Co.* (Ark.), 144 S. W. 927; *Toller v. Hewitt* (Ga. App.), 77 S. E. 650; *Wehnes v. Roberts*, 92 Neb. 696, 139 N. W. 212; *McDermott v. Fletcher*, 140 N. Y. Supp. 871; *G. Ober & Sons Co. v. Katzenstein* (N. C.), 76 S. E. 476; *Putnam v. Prouty* (N. D.), 140 N. W. 93; *Fisher v. Gossett* (Okla.), 128 Pac. 293; *Herlong v. Southern States Lumber Co.* (S. C.), 77 S. E. 219; *Woodsville etc. Bank v. Rogers* (Vt.), 83 Atl. 537; *Cerini v. Chicago etc. R. Co.*, 71 Wash. 310, 128 Pac. 666.

⁹² *Smith v. Mason*, 122 Cal. 426, 55 Pac. 143; *Henry v. McCardell*, 15 Tex. Civ. App. 497, 40 S. W. 172; *Potter v. Hopkins*, 25 Wend. (N. Y.) 417; *Saveland v. Western Wisconsin R. Co.*, 118 Wis. 267, 95 N. W. 130.

not be supplied by parol proof, for that would at once introduce all the mischiefs which the statute of frauds and perjuries was intended to prevent."⁹³ As we have already shown, however, parol evidence explanatory of the circumstances under which the contract was made, so far as they tend to aid its construction, is admissible.⁹⁴

§ 441 (446). Sales of personal property.—It is clear, on principles already stated, that where a written contract for the sale of personal property is manifestly a deliberate and complete contract between the parties, and there is no claim of fraud or mistake, the general rule excluding parol evidence applies in full force.⁹⁵ This is clearly the rule when the writing contains a warranty.⁹⁶ But where the contract is manifestly incomplete, or where an agreement wholly independent of and collateral to the written instrument is entered into, parol evidence is admissible to show a contemporaneous agreement that the property should be of a particular quality, kind or quantity; or if such contract consists of an informal bill or receipt not intended to embrace the entire contract, parol evidence of a warranty is admissible. These cases rest on the reasoning that such instruments as assignments, bills of sale and

⁹³ 2 Kent Comm. 511. See, also, § 429, *ante*.

⁹⁴ § 430, *ante*. See, also, Elwell v. Hicks, 238 Ill. 170, 87 N. E. 316; Browne, Stat. of Frauds, 5th ed., § 409 et seq.

⁹⁵ Thomas v. Scutt, 127 N. Y. 133, 27 N. E. 961; Kinnard v. Cutter Tower Co., 159 Mass. 391, 34 N. E. 460; Lilienthal v. Suffolk Brewing Co., 154 Mass. 185, 26 Am. St. Rep. 234, 12 L. R. A. 821, 28 N. E. 151; Willis v. Byars, 2 Tex. Civ. App. 134, 21 S. W. 320; American Mfg. Co. v. Klarquist, 47 Minn. 344, 50 N. W. 243; National Cash Register Co. v. Blumenthal, 85 Mich. 464, 48 N. W. 622; Rennell v. Kimball, 5 Allen (Mass.),

356; Exhaust Ventilator Co. v. Chicago Ry. Co., 69 Wis. 454, 34 N. W. 509; Epping v. Mockler, 55 Ga. 376; Woodcock v. Farrell, 1 Met. (Ky.) 437; Picard v. McCormick, 11 Mich. 68; Cushing v. Rice, 46 Me. 303, 71 Am. Dec. 579; Robinson v. McNeill, 51 Ill. 225; Proctor v. Cole, 66 Ind. 576; Smith v. Deere, 48 Kan. 416, 29 Pac. 603. See note to Durkin v. Cobleigh, 17 L. R. A. 270.

⁹⁶ Osborne & Co. v. Wigent, 127 Mich. 624, 86 N. W. 1022; Willard v. Ostrander, 46 Kan. 591, 26 Pac. 1017; Case Thresher Mach. Co. v. Hall, 32 Tex. Civ. App. 214, 73 S. W. 835; McQuaid v. Ross, 77 Wis. 470, 46 N. W. 892.

others of that character do not generally purport or attempt to state the entire agreement, but are adapted merely to transfer title in execution of an agreement they do not profess to show; and hence that the writing is not presumed to state the whole contract.⁹⁷ The following are illustrations of the admission of parol evidence when the contract was incomplete: Where, in the sale of a horse, a bill of sale was given and a receipt taken for the purchase price, but the party claiming the warranty did not rely on the written contract, parol evidence is admissible to show that the seller at the time of the sale warranted the horse to be sound, as that did not contradict or vary the writing.⁹⁸ So where a bill of parcels merely showed a sale of cloves without designating any particular kind, it might be shown by parol what kind of cloves were exhibited as a sample at the time of the sale.⁹⁹ Or where the seller agreed in writing to ship to the buyer a certain quantity of "good fine wine," parol evidence is admissible to show the actual terms of the sale, and that the wine shipped was that selected by the buyer himself.¹⁰⁰ There appears to be a conflict upon the question whether evidence is admissible to show an oral warranty with respect to articles

⁹⁷ *Hersom v. Henderson*, 21 N. H. 224, 53 Am. Dec. 185; *Perrine v. Cooley*, 39 N. J. L. 449; *Filkins v. Whyland*, 24 N. Y. 338; *Allen v. Pink*, 4 Mees. & W. 140, 1 H. & H. 207, 7 L. J. Ex. 206; *Atwater v. Clancy*, 108 Mass. 369; *Foot v. Bentley*, 44 N. Y. 166, 4 Am. Rep. 652; *Boorman v. Jenkins*, 12 Wend. (N. Y.) 566, 27 Am. Dec. 158; *Harris v. Johnston*, 3 Cranch (U. S.), 311, 2 L. Ed. 450; *Irwin v. Thompson*, 27 Kan. 643; *Chapin v. Dobson*, 78 N. Y. 74, 34 Am. Rep. 512; *Thomas v. Barnes*, 156 Mass. 581, 31 N. E. 683; *Red Wing Mfg. Co. v. Moe*, 62 Wis. 240, 22 N. W. 414; *Hahn v. Doolittle*, 18 Wis. 196, 86 Am. Dec. 757; *Neal v. Flint*, 88 Me. 72, 33 Atl. 669. As

to parol proof of warranties not expressed in contracts, see note to *Green v. Batson*, 5 Am. St. Rep. 197-199. On the admissibility of extrinsic evidence as to time for delivery of goods where none is specified in written contract, see note to *Cameron Coal etc. Co. v. Block*, in 31 L. R. A., N. S., 619.

⁹⁸ *Hersom v. Henderson*, 21 N. H. 224, 53 Am. Dec. 185. See, also, *Perrine v. Cooley*, 39 N. J. L. 449; *Filkins v. Whyland*, 24 Barb. (N. Y.) 379.

⁹⁹ *Bradford v. Manly*, 13 Mass. 139, 7 Am. Dec. 122.

¹⁰⁰ *Hogins v. Plympton*, 11 Pick. (Mass.) 97.

sold when the written contract for sale is complete in itself. One line of cases follows the New York decisions that where the memorandum or order may be construed as expressing the whole contract of sale, it is nevertheless competent "to prove any independent collateral agreement of warranty, constituting no part of the contract of sale, properly speaking."¹ The other line of cases follows the Minnesota decisions founded on the opinion of Mitchell, J., to which reference has been made.² There are occasionally those slight variations between the two lines of cases which lessen the line of demarcation between them, but we think with Mitchell, J., that the conflict is entirely due to the misapprehension as to the sense in which the term "collateral" is used in the rule invoked. There are a great many matters that, in a general sense, may be considered collateral to the contract; for example, in the case of leases, covenants for repairs, improvements, and payment of taxes are, in a sense, collateral to a demise of the premises. But parol evidence of these would not be admissible to add to the terms of a written lease. "So, in a sense," continues the learned judge, "a warranty is collateral to a contract of sale, for the title would pass without a warranty. It is also collateral in the sense that its breach is no ground for a rescission of the contract by the vendor, but that he must resort to his action on the warranty for damages. But, when made, a warranty is a part of the contract of sale. The common sense of men

¹ Chapin v. Dobson, 78 N. Y. 74, 34 Am. Rep. 512; Vaughn Mach. Co. v. Lighthouse, 64 App. Div. 138, 71 N. Y. Supp. 799; Puget Sound Iron etc. Works v. Clemmons, 32 Wash. 36, 72 Pac. 465; Eastern Granite Roofing Co. v. Princeton Storage Co., 140 Ky. 441, 131 S. W. 194; Tainter v. Wentworth, 107 Me. 439, 78 Atl. 572; Boulware v. Victor Automobile Mfg. Co., 152 Mo. App. 567, 134 S. W. 7; De Jonge v. Printz, 49 Misc. Rep. 112, 96 N. Y. Supp. 750.

² Thompson v. Libby, 34 Minn. 374, 26 N. W. 1. See, also, Kullman etc. v. Sugar Apparatus Mfg. Co., 153 Cal. 725, 96 Pac. 369; Flemming v. Satterfield, 4 Ga. App. 351, 61 S. E. 518; Scholl v. Killorin, 190 Mass. 493, 77 N. E. 382; Wheaton Roller Mill Co. v. John T. Noye Mfg. Co., 66 Minn. 156, 68 N. W. 854; Kummer v. Dubuque Turbine etc. Co., 4 Neb. (Unof.) 347, 93 N. W. 938.

would say, and correctly so, that when, on a sale of personal property, a warranty is given, it is one of the terms of the sale, and not a separate and independent contract. To justify the admission of a parol promise by one of the parties to a written contract on the ground that it is collateral, the promise must relate to a subject distinct from that to which the writing relates."³ It is well settled that a receipt or bill of parcels does not give rise to any presumption that the writing contains the whole contract. The mere receipt of a bill of parcels or bill of lading, on payment of money or delivery of goods, is not necessarily an assent to the proposition that such bill of parcels or bill of lading states the contract and the whole contract between the parties. Such bills may or may not be the contract. They may be nothing more, and intended to be nothing more, than memoranda or receipts. Whether they are the entire contract, or simply in the nature of receipts, is not a question of law for the court, but one of fact for the jury.⁴ If they do constitute the contract, then parol evidence to vary them is inadmissible.⁵ Following

³ The various illustrative cases in support of both lines of decisions are set forth in great length in the note to *R. M. Davis Photo. Stock Co. v. Photo-Jewelry Mfg. Co.*, 19 Ann. Cas. 541, and to *Electric Storage etc. Co. v. Waterloo etc. R. Co.*, 19 L. R. A., N. S., 1183.

⁴ *Alabama Great Southern R. Co. v. Norris*, 167 Ala. 311, 52 South. 891; *Brinser v. Fidelity Trust Co.*, 1 Boyce (Del.), 220, 75 Atl. 792; *Williams v. Empire Mut. Annuity & Life Ins. Co.*, 8 Ga. App. 303, 68 S. E. 1082; *Doyle v. Offutt*, 135 Ky. 296, 122 S. W. 156; *Atwater v. Clancy*, 107 Mass. 369; *Deweese v. Bostick Lumber & Mfg. Co.*, 96 Miss. 253, 50 South. 865; *Hahs v. Cape Girardeau & C. R. Co.*, 147 Mo. App. 262, 126 S. W. 524; *Thetford v. General Acc. Asur. Co.*, 140 Mo. App.

254, 124 S. W. 39; *Skiba v. Gustin*, 161 Mich. 358, 126 N. W. 464; *Webster v. Hodgkins*, 25 N. H. 128; *C. H. Rugg Co. v. Ormrod*, 198 N. Y. 119, 91 N. E. 366; *Brigg v. Hilton*, 99 N. Y. 517, 52 Am Rep. 63, 3 N. E. 51; *Filkins v. Whyland*, 24 N. Y. 338; *Gregory v. Huslander*, 227 Pa. 607, 76 Atl. 422; *Levan v. Atlantic Coast Line R. Co.*, 86 S. C. 514, 68 S. E. 770; *Patterson & Co. v. Gulf etc. R. Co.* (Tex. Civ. App.), 126 S. W. 336; *Smith v. Coleman*, 77 Wis. 343, 46 N. W. 664; *Bank of British North America v. Cooper*, 137 U. S. 473, 34 L. Ed. 759, 11 Sup. Ct. Rep. 160. As to order of goods, see *Boynnton Co. v. Clark*, 42 Minn. 335, 44 N. W. 121. See § 491, *post*.

⁵ *Alabama Great Southern R. Co. v. Norris*, 167 Ala. 311, 52 South. 891; *Cache Val. Lumber Co. v.*

the line of the conflict above referred to, it will be found that in those cases based on the New York decisions where there is a written agreement of sale, parol evidence has been received to show that the *sale* was by *sample*, and that the goods did not compare with the sample, although the contract was silent on this subject.⁶ But the contrary view is maintained by the greater weight of authority, and, as we have said, by the better law of those opinions founded on the Minnesota opinion of Mitchell, J.⁷ Summarizing the foregoing remarks, the weight of authority goes to show that where the instrument for the sale of personal property seems to be reasonably explicit, and to define the object and to measure the extent of the engagement, the *writing will be presumed to contain the entire agreement*, and hence that, in the absence of fraud or mistake, no warranty can be added by parol. But if it does not purport to disclose the contract, but is merely the execution of some part or detail of an unexpressed contract, and *is the act of one of the parties only* in the performance of his promise, the oral agreement, as we have already seen, may be shown.^{7a} For example, where a note

Culver Co., 93 Ark. 383, 125 S. W. 430; Williams v. Empire Mut. Annuity & Life Ins. Co., 8 Ga. App. 303, 68 S. E. 1082; Loeb v. Flannery, 148 Ill. App. 471; Doyle v. Offutt, 135 Ky. 296, 122 S. W. 156; Porteous v. Adams Exp. Co., 112 Minn. 31, 127 N. W. 429; Hurr v. Metropolitan St. R. Co., 141 Mo. App. 217, 124 S. W. 1057.

⁶ Koop v. Handy, 41 Barb. (N. Y.) 454; Boorman v. Jenkins, 12 Wend. (N. Y.) 566, 27 Am. Dec. 158; Cassidy v. Begoden, 6 Jones & S. (N. Y.) 180. See, also, cases cited above.

⁷ Meyer v. Everth, 4 Camp. 22, 15 R. R. 722; Gardiner v. Gray, 4 Camp. 144, 16 R. R. 764; Wiener v. Whipple, 53 Wis. 298, 40 Am. Rep. 775, 10 N. W. 433; Harrison v. McCormick, 89 Cal. 327, 23 Am. St. Rep.

469, 26 Pac. 830; Thompson v. Libby, 34 Minn. 374, 26 N. W. 1; Dowagiac Mfg. Co. v. Mahon, 13 N. D. 516, 101 N. W. 903; Thomson v. Gortner, 73 Md. 474,* 21 Atl. 371. See, also, cases cited above, and note 91 to § 440, *ante*.

^{7a} Bush v. Bradford, 15 Ala. 317; Hanger v. Evins, 38 Ark. 334; Johnson v. Powers, 65 Cal. 179, 3 Pac. 625; Hills v. Farmington, 70 Conn. 450, 39 Atl. 795; Barrie v. Smith, 105 Ga. 34, 31 S. E. 121; Telluride Power Trans. Co. v. Crane Co., 208 Ill. 218, 70 N. E. 319; Mast v. Pearce, 58 Iowa, 579, 43 Am. Rep. 125, and note, 8 N. W. 632, 12 N. W. 597; Ehlsam v. Brown, 64 Kan. 466, 67 Pac. 867; Willard v. Ostrander, 46 Kan. 591, 26 Pac. 1017; Buhler v. McHatton, 9 La. Ann. 192; Neal v.

was given for part of the purchase money of a horse, evidence of a parol warranty was admissible.⁸ If it be true that the failure of a vendee to exact a warranty when he takes a written contract precludes him from showing a warranty by parol, then it follows that he is precluded "*a multo fortiori* when his written contract contains a warranty on the identical question, and one in its terms inconsistent with the one claimed."⁹ The rule in such case is that where there is a written warranty on a sale of personal property, no prior or contemporaneous oral warranty can be shown.¹⁰

Flint, 88 Me. 72, 33 Atl. 669; Rice v. Forsyth, 41 Md. 389; Neale v. American etc. Vehicle Co., 186 Mass. 303, 71 N. E. 566; McCray Refrigerator etc. Co. v. Woods, 99 Mich. 269, 41 Am. St. Rep. 599, 58 N. W. 320; Thompson v. Libby, 34 Minn. 374, 26 N. W. 1; Jolliffe v. Collins, 21 Mo. 338; Reed v. Van Ostrand, 1 Wend. (N. Y.) 424, 19 Am. Dec. 529; Kummer v. Dubuque T. & R. Mills Co., 4 Neb. (Unof.) 347, 92 N. W. 938; Quinn v. Moss, 45 Neb. 614, 63 N. W. 931; Englehorn v. Reitlinger, 122 N. Y. 76, 9 L. R. A. 548, 25 N. E. 297; Etheridge v. Palin, 72 N. C. 213; Smith v. Cozart, 2 Head (Tenn.), 526; Linsley v. Lovely, 26 Vt. 123; Reed v. Wood, 9 Vt. 285; Merriam v. Field, 24 Wis. 640; Milwaukee Boiler Co. v. Duncan, 87 Wis. 120, 41 Am. St. Rep. 33, 58 N. W. 232; De Witt v. Berry, 134 U. S. 306, 33 L. Ed. 896, 10 Sup. Ct. Rep. 536; Randall v. Rhodes, 1 Curt. 90, 20 Fed. Cas. No. 11,556.

⁸ Nauman v. Ullman, 102 Wis. 92, 78 N. W. 159; and in National Drill Co. v. Maher, 49 Misc. Rep. 640, 97 N. Y. Supp. 1029, where the contract was in the form of notes in which was contained a provision as to possession during currency, parol evi-

dence of a warranty was admitted on the same ground.

⁹ De Witt v. Berry, 134 U. S. 306, 33 L. Ed. 896, 10 Sup. Ct. Rep. 536. See, also, Hanger v. Evins, 38 Ark. 334; Johnson v. Latimer, 71 Ga. 470; Electric Storage Battery Co. v. Waterloo etc. R. Co., 138 Iowa, 369, 19 L. R. A., N. S., 1183, 116 N. W. 144; Shepherd v. Gilroy, 46 Iowa, 193; Jackson v. Hays, 14 La. Ann. 577; Cosgrove v. Bennett, 32 Minn. 371, 20 N. W. 359; Watson v. Roode, 30 Neb. 264, 46 N. W. 491, 43 Neb. 348, 61 N. W. 625; Stucky v. Clyburn, Cheves (S. C.), 186, 34 Am. Dec. 590; Hogan v. Carland, 5 Yerg. (Tenn.) 283; McQuaid v. Ross, 77 Wis. 470, 46 N. W. 892. There are numerous well-considered cases that an express warranty of quality excludes any implied warranty that the articles sold were merchantable or fit for their intended use: International Pavement Co. v. Smith etc. Mach. Co., 17 Mo. App. 264; Johnson v. Latimer, 71 Ga. 470; Cosgrove v. Bennett, 32 Minn. 371, 20 N. W. 359; Shepherd v. Gilroy, 46 Iowa, 193; McGraw v. Fletcher, 35 Mich. 104.

¹⁰ Bradford v. Neil, 46 Minn. 347, 49 N. W. 193. A contract of sale being completed and evidenced by

§ 442 (447). **Parol proof of subsequent agreement.**—We have so far dealt only with parol evidence of agreements prior to or contemporaneous with the written contract, complete or incomplete as the case might be, and with the propriety of its general exclusion and exceptional admission. The general rule under discussion, however, does not prevent the proof of “the existence of any distinct, subsequent, oral agreement to rescind or modify any such contract, grant or disposition of property, provided that such agreement is not invalid under the statute of frauds or otherwise.”¹¹ The general rule does not purport to exclude negotiations respecting written contracts, unless they are prior to or contemporaneous with the making of the written instrument, and in a great variety of cases it has been held admissible to prove by parol a subsequent change, modification, addition or even discharge.¹² For example, it is admissible to show by parol

a written bill of sale, prepared by the purchaser, embracing particular warranties as to the property sold, precludes the purchaser from recovering upon oral representations (as warranties) made in the course of the negotiations: *Humphrey v. Merriam*, 46 Minn. 413, 49 N. W. 199.

¹¹ Reynolds' Steph. Ev., art. 90; *Goss v. Lord Nugent*, 5 Barn. & Ad. 58, 110 Eng. Reprint, 713.

¹² *Dorough v. Harrington*, 148 Ala. 305, 42 South. 557; *Von Berg v. Goodman*, 85 Ark. 605, 109 S. W. 1006; *Bradley v. Bush*, 11 Cal. App. 287, 104 Pac. 845; *Pearsall v. Henry*, 153 Cal. 314, 95 Pac. 154; *White v. Soto*, 82 Cal. 654, 23 Pac. 210; *Hatch v. Fritz*, 48 Colo. 530, 111 Pac. 74; *Sartor v. Wells*, 39 Colo. 84, 89 Pac. 797; *Barber v. Brace*, 3 Conn. 9, 8 Am. Dec. 149; *Wilson v. McClenny*, 32 Fla. 363, 13 South. 873; *Reams v. Thompson*, 5 Ga. App. 226, 62 S. E. 1014; *Sharkey v. Miller*, 69 Ill. 560; *Toledo etc. R. Co. v. Levy*, 127 Ind.

168, 26 N. E. 773; *Fox v. Tyler*, 3 Ind. Ter. 1, 53 S. W. 462; *Price etc. Piano Co. v. Sheenan*, 150 Iowa, 189, 129 N. W. 836; *Hill v. Maxwell*, 71 Kan. 72, 79 Pac. 1088; *Frick Co. v. Western Star Milling Co.*, 51 Kan. 370, 32 Pac. 1103; *Harmison v. Prestonburg*, 32 Ky. Law Rep. 864, 107 S. W. 337; *Janney v. Brown*, 36 La. Ann. 118; *Courtenay v. Fuller*, 65 Me. 156; *Morgan v. Dugan (Md.)*, 30 Atl. 558; *Allen v. Sowerby*, 37 Md. 410; *O'Brien v. Peck*, 198 Mass. 50, 84 N. E. 325; *Cummings v. Arnold*, 3 Met. (Mass.) 486, 37 Am. Dec. 155; *Kennebec Co. v. Augusta Ins. etc. Co.*, 6 Gray (Mass.), 204; *Marx v. King*, 162 Mich. 258, 127 N. W. 341; *Morgan v. Butterfield*, 3 Mich. 615; *Wilson v. Duffy*, 158 Mo. App. 509, 138 S. W. 918; *Campbell v. Kimball*, 87 Neb. 309, 127 N. W. 142; *McMurphy v. Garland*, 47 N. H. 316; *Huffman v. Hummer*, 17 N. J. Eq. 269; *Schneekloth v. Crown Silk Mfg. Co.*, 65 Misc. Rep. 514, 120 N. Y.

that the written contract has been *abandoned* except in so far as it has been modified by a new parol agreement;¹³ that the *time or place of payment* or of performance of the contract has been *changed*;¹⁴ that *performance* has been *prevented or waived* by the other party;¹⁵ that the *mode* of payment for services has been changed,¹⁶ or that the contract has been *wholly discharged*.¹⁷ Where a writ-

Supp. 67; Juilliard v. Chaffee, 92 N. Y. 529; Homer v. Guardian Mut. Life Ins. Co., 67 N. Y. 478; Rogers v. Gennett Lumber Co., 154 N. C. 108, 69 S. E. 788; Eleventh St. Church of Christ v. Pennington, 10 Ohio C. C. 408, 10 Ohio Cir. Dec. 74; McCauley v. Keller (Keller v. McCauley), 130 Pa. 53, 17 Am. St. Rep. 758, 18 Atl. 607; LeFevre v. LeFevre, 4 Serg. & R. (Pa.) 241, 8 Am. Dec. 696; Putnam Foundry etc. Co. v. Canfield, 25 R. I. 548, 1 Ann. Cas. 726, 56 Atl. 1033; Smith v. Lilley, 17 R. I. 119, 20 Atl. 227; Reetenbaugh v. Northwestern Port Huron Co., 22 S. D. 410, 118 N. W. 697; Rogers v. Bedell, 97 Tenn. 240, 36 S. W. 1096; Old River Rice Irr. Co. v. Stubbs (Tex. Civ. App.), 137 S. W. 154; Dunklee v. Goodnough, 68 Vt. 113, 34 Atl. 427; Norris v. China Traders' Ins. Co., 52 Wash. 554, 100 Pac. 1025; Shepherd v. Wysong, 3 W. Va. 46; Waterman v. Le Sage, 142 Wis. 97, 135 Am. St. Rep. 1062, 124 N. W. 1041; Bannon v. Aultman, 80 Wis. 307, 27 Am. St. Rep. 37, 49 N. W. 967; George v. Emery, 18 Wyo. 352, 107 Pac. 1; Grand Isle v. Kinney, 70 Vt. 381, 41 Atl. 130; Rowland v. Biesecker, 181 Fed. 128, 107 C. C. A. 615; Piatt's Admr. v. United States, 22 Wall. 496, 22 L. Ed. 858. See the late cases: England v. Houser, 163 Mo. App. 1, 145 S. W. 514; Douglass v. Thompson (Nev.), 127 Pac. 561; Union Nat. Bank v. Dean, 139 N. Y. Supp. 835; McCulloch v.

Bauer (N. D.), 139 N. W. 318; Roe v. Fleming, 32 Okl. 259, 122 Pac. 496; Lamar v. Anderson, 71 Wash. 314, 128 Pac. 672.

¹³ Willey v. Hall, 8 Iowa, 62; Chiles v. Jones, 3 B. Mon. (Ky.) 51; Raffensberger v. Cullison, 28 Pa. 426; Bryan v. Hunt, 4 Sneed (Tenn.), 543, 70 Am. Dec. 262; Toledo etc. Ry. Co. v. Levy, 127 Ind. 168, 26 N. E. 773; Graham v. Houghton, 153 Mass. 384, 26 N. E. 876; Harris v. Murphy, 119 N. C. 34, 56 Am. St. Rep. 656, 25 S. E. 708; Putnam Inv. Co. v. King, 82 Kan. 216, 107 Pac. 559.

¹⁴ Keating v. Price, 1 Johns. Cas. (N. Y.) 22, 1 Am. Dec. 92; Frost v. Everett, 5 Cow. (N. Y.) 497; Franklin v. Long, 7 Gill & J. (Md.) 407; Robinson v. Batchelder, 4 N. H. 40; Neil v. Cheves, 1 Bail. (S. C.) 537; Stallings v. Gottschalk, 77 Md. 429, 26 Atl. 524; Baker v. Whiteside, Breese (1 Ill.), 174, 12 Am. Dec. 168; Strauss v. Gross, 2 Tex. Civ. App. 432, 21 S. W. 305. See note to Harris v. Murphy, 56 Am. St. Rep. 664 et seq.; Gandy v. Seymour Slack Stave Co. (Ind. App.), 90 N. E. 915.

¹⁵ Medomak Bank v. Curtis, 24 Me. 36.

¹⁶ Schneekloth v. Crown Silk Mfg. Co., 65 Misc. Rep. 514, 120 N. Y. Supp. 67.

¹⁷ Low v. Treadwell, 12 Me. 441; Bailey v. Johnson, 9 Cow. (N. Y.) 115; Erwin v. Saunders, 1 Cow. (N. Y.) 249, 13 Am. Dec. 520; Trumbo

ten agreement between the owners and principal contractor fixed the time limit within which a work was to be completed and after which damages should be allowed if the work was not completed, it is within the power of the parties to change said time limit by oral agreement, afterward made, extending the time, and the courts will respect such change, made in good faith, and refuse damages suffered prior to the date fixed by the change.¹⁸ Where an action at law was brought on a contract signed by one party and signed and sealed by the other party, it was held that such contract was a simple contract as to the party whose name was not followed by a seal, and any subsequent agreement of the parties affecting the liability of the party whose signature was not so followed by a seal would be available to him as a defense and admissible in evidence.¹⁹ It is no objection to the competency of such testimony that the parol agreement is made soon after the written one, but it must clearly appear to be subsequent to it, and, if this is left in doubt, it will be presumed to be merged in the written agreement.²⁰ Thus, where the parties entered into a contract in writing regarding the sale of personal property, and immediately after it was signed, the vendee said he wanted a written indemnity against all claims on a portion of it, to which the vendor replied he would not give him a written indemnity, but that he had sold him the whole and would see him out in it, it was held that this was a valid promise of

v. Curtright, 1 A. K. Marsh. (Ky.) 582; Bryant v. Thesing, 46 Neb. 244, 64 N. W. 967.

¹⁸ Campbell v. Kimball, 87 Neb. 309, 127 N. W. 132.

¹⁹ Baltimore Pearl Hominy Co. v. Linthicum, 112 Md. 27, 136 Am. St. Rep. 383, 20 Ann. Cas. 1325, 75 Atl. 737. In Stabler v. Cowman, 7 Gill & J. (Md.) 284, where a contract in writing was entered into between two parties, intended to be signed and sealed by both, but which was signed

and sealed by one only, and signed by the other, but not sealed, it was held that both were bound, but in different forms; that while it was the covenant of the former, it was merely the parol contract of the latter, and an action as *assumpsit* against him was sustained: See Western Md. R. Co. v. Orendorff, 37 Md. 328.

²⁰ Bunce v. Beck, 43 Mo. 266; Smith v. Lilley, 17 R. I. 119, 20 Atl. 227; Field v. Mann, 42 Vt. 61.

indemnity, and, having been made after a written contract, it might be sued upon and a recovery had, and was perfectly admissible in evidence.²¹ It is not necessary to the admission of this kind of testimony that any *new consideration* be proved. "The same consideration which existed for the old agreement is imported into the new agreement which is substituted for it."²² It is a well-settled principle that a written contract not required by the statute of frauds to be in writing may be subsequently changed by oral agreement, and such subsequent agreement need not rest upon any new consideration.²³ The contract, when modified by the subsequent oral agreement, is substituted for the contract as originally made, and the original consideration attaches to and supports the modified contract.²⁴ Extrinsic verbal evidence is admissible to prove a new and distinct agreement upon a new consideration, whether it be a substitute for the written contract or in addition to and beyond it. It is a sufficient consideration for the new promise that the party claiming the benefit of it went on and completed the business in faith of it.²⁵ This subject gives little difficulty so long as the instrument sought to be altered or discharged

²¹ Brewster v. Countryman, 12 Wend. (N. Y.) 446; Richardson v. Hooper, 13 Pick. (Mass.) 446.

²² Lord Denman in Stead v. Dawber, 10 Ad. & E. 57, 66, 113 Eng. Reprint, 22; Thomas v. Barnes, 156 Mass. 581, 31 N. E. 683.

²³ Brown v. Everhard, 52 Wis. 205, 8 N. W. 725; Gobel v. Linn, 47 Mich. 489, 41 Am. Rep. 723, 11 N. W. 284; Strahl v. Western Grocer Co., 5 Neb. (Unof.) 482, 98 N. W. 1043.

²⁴ Byington v. Simpson, 134 Mass. 145; Malone v. Dougherty, 79 Pa. 46; Flanders v. Fay, 40 Vt. 316; Bishop v. Busse, 69 Ill. 403; Lattimore v. Harsen, 14 Johns. (N. Y.) 330; Goss v. Nugent, 5 Barn. & Ad. 58, 65, 110 Eng. Reprint, 713.

²⁵ Courtenay v. Fuller, 65 Me. 156, in which Dickerson, J., says: "We see no objection to applying this principle to cases where there has been a verbal agreement to change the written contract, wholly or in part, made contemporaneously with it, where such verbal agreement has been adopted by the parties subsequently to the execution of the written contract. The subsequent adoption of the verbal, contemporaneous agreement in the latter case places it upon the same footing, in respect to the written contract, as the subsequent parol agreement in the former one." Greenl. Ev., §§ 302, 303; Munroe v. Perkins, 9 Pick. (Mass.) 298, 20 Am. Dec. 475.

relates to *simple contracts*. As to such contracts the rule broadly declared by Lord Denman in an early case has been followed: "After the agreement has been reduced into writing, it is competent to the parties, at any time before breach of it, by a new contract not in writing, either altogether to waive, dissolve or annul the former agreements, or in any manner to add to, or subtract from or vary or qualify the terms of it and thus to make a new contract; which is to be proved partly by the written agreement and partly by the subsequent verbal terms engrafted upon what will be thus left of the written agreement."²⁶ And hence it is that the consideration expressed in the original agreement in such cases stands good in the substituted contract made by the parties. Cases of such variations arise most frequently after a discovery that the original contract cannot be carried out by the parties or one of them, and a variation in the directions above referred to is adopted. A well-known Michigan case furnishes an admirable illustration.²⁷ In that case an ice company had agreed with a brewer to furnish him ice for the ensuing season at one dollar and seventy-five cents a ton. The crop of ice harvested in the winter was a short one. Ice was furnished under the contract until May, when the ice company refused to furnish any more for less than three dollars and fifty cents a ton. The brewer agreed to pay this, and having given a note made up on the increased basis, the ice was furnished under this agreement. It was claimed by the brewer that the ice company took advantage of his necessities, and the new contract was made under duress. It was also claimed he obtained only what by his contract he was entitled to have at the lower price, and the new contract was without consideration. The court said: "It is very manifest that there is no ground for saying that the note in suit was

²⁶ Goss v. Lord Nugent, 5 Barn.

& Ad. 58, 65, 110 Eng. Reprint, 713.

²⁷ Goebel v. Linn, 47 Mich. 489,

41 Am. Rep. 723, 11 N. W. 284,

founded on the opinion of Cooley, J.,

in Moore v. Detroit Locomotive

Works, 14 Mich. 266.

given without consideration. It was given for the ice which was furnished by the payee to the defendants, which was owned by the payee and bought by the defendants, and for which defendants concede their liability to make payment. What the defendants dispute is the justice of compelling them to pay the sum stipulated in the note when, according to their previous contract, they ought to have received the ice for a sum much smaller. The defense, therefore, is not that the consideration has failed, but that a note for a sum greater than the contract price has been extorted under circumstances amounting to duress. It is to be observed of these circumstances that, if we confine our attention to the very time when the arrangement for an increased price was made, the defendants make out a very plausible case. They had then a very considerable stock of beer on hand, and the case they make is one in which they must have ice at any cost, or they must fail in business. If the ice company had the ability to perform their contract, but took advantage of the circumstances to extort a higher price from the necessities of the defendants, its conduct was reprehensible, and it would, perhaps, have been in the interest of good morals if defendants had temporarily submitted to the loss, and brought suit against the ice company on their contract. But the defendants did not elect to take that course. They chose, for reasons which they must have deemed sufficient at the time, to submit to the company's demand, and pay the increased price, rather than rely upon their strict rights under the existing contract. What these reasons were is not explained to us, except as above shown. . . . What is certain is that the parties immediately concerned, and who knew all the facts, joined in making a new arrangement, out of which the note in suit has grown. The case of *Moore v. Locomotive Works*, 14 Mich. 266, where a similar case was fully considered, is ample authority for supporting the new arrangement."²⁸ The fore-

²⁸ See, also, the following illustrative cases: *Warren v. Cash*, 143 Ala. 158, 39 South. 124; *Connelly v. Devoe*, 37 Conn. 570; *Bishop v. Busse*,

going discussion relates only to the consideration in contracts which have not been executed. It is elementary that after the contract has been carried out by one party, an agreement that it shall not be binding would require proof of a new consideration, without which it would be *nudum pactum*. This, however, properly belongs to the law of contracts.²⁹

§ 443 (448). **Same—As to specialties.**—Much more conflict of opinion has arisen as to contracts by specialty, and especially as to those contracts which are by statute required to be in writing. It was a familiar rule of the common law that an agreement by *deed* could only be dissolved by an instrument of an equally solemn character.³⁰ The old rule declared that nothing is so consonant to natural equity as that every contract should be dissolved by the same means which rendered it binding, and therefore every contract or agreement ought to be dissolved by matter of as high a nature as that which first made it obligatory. Hence it is laid down that, “an obligation is not made void by a release; for *Naturale est quidlibet dissolvi eo modo quo ligatur*: a record by a record; a deed by a deed; and a parol promise or agreement is dissolved

69 Ill. 403; *Coyner v. Lynde*, 10 Ind. 282; *Courtenay v. Fuller*, 65 Me. 156; *Rogers v. Rogers*, 139 Mass. 440, 1 N. E. 122; *Scanlon v. Northwood*, 147 Mich. 139, 110 N. W. 493; *Lindsly & Son v. Kansas City Viaduct etc. Co.*, 152 Mo. App. 221, 133 S. W. 389; *Noyes v. Young*, 32 Mont. 226, 79 Pac. 1063; *Edwards v. National Window Glass Jobbers' Assn.* (N. J. L. Sup.), 68 Atl. 800; *Napier v. Spielmann*, 127 App. Div. 711, 111 N. Y. Supp. 1009; *Dreifus v. Columbian Exposition Salvage Co.*, 194 Pa. 475, 75 Am. St. Rep. 704, 45 Atl. 370; *Lawrence v. Davey*, 28 Vt. 264; *Brodek v. Farnum*, 11 Wash. 565, 40 Pac. 189.

²⁹ The following are cited for reference: *Maness v. Henry*, 96 Ala. 454, 11 South. 410; *Davidson v. Burke*, 143 Ill. 139, 36 Am. St. Rep. 367, 32 N. E. 514; *George v. Lane*, 80 Kan. 94, 102 Pac. 55; *Moore v. Detroit Locomotive Works*, 14 Mich. 266; *Wilson v. Wilson*, 115 Mo. App. 641, 92 S. W. 145; *Bishop v. Smith* (N. J.), 57 Atl. 874.

³⁰ *Harris v. Goodwyn*, 2 Man. & G. 405, 133 Eng. Reprint, 803; *Doe v. Gladwin*, 6 Q. B. 953, 115 Eng. Reprint, 359; *Rawlinson v. Clarke*, 14 Mees. & W. 187, 14 L. J. Ex. 364. As to parol proof of fraud affecting specialties, see § 435, *ante*.

by parol; and an Act of Parliament by an Act of Parliament. This reason and this rule of law are always of force in the common law.'"³¹ Yet in quite early cases in this country the rule was recognized that *bonds* or other sealed instruments might be defeated by parol evidence of payment, or abandonment of the contract, or *waiver* of literal performance by the obligee, or partial abandonment of the written contract and of continuance under it as modified by parol, as well as of a different place or mode of performance. So there are many authorities which hold that in actions on *insurance policies* a waiver of a breach of condition or warranty may be shown after the breach.³² In most of the cases where evidence of this character has been received to show a subsequent modification of a written agreement, the parol contract had been executed, or so acted upon by the parties that the enforcement of the original agreement would have operated as

³¹ Broom's Legal Maxims, 876; Jenk. Cent. 166.

³² *Payment*: Munroe v. Perkins, 9 Pick. (Mass.) 298, 20 Am. Dec. 475; McCreery v. Day, 119 N. Y. 1, 16 Am. St. Rep. 793, 6 L. R. A. 503, 23 N. E. 198; Kane v. Cortesy, 100 N. Y. 132, 2 N. E. 874; *abandonment*: Dearborn v. Cross, 7 Cow. (N. Y.) 48; *partial abandonment*: Munroe v. Perkins, 9 Pick. (Mass.) 298, 20 Am. Dec. 475; Lattimore v. Harsen, 14 Johns. (N. Y.) 330; *waiver*: Dearborn v. Cross, 7 Cow. (N. Y.) 48; *performance*: Franchot v. Leach, 5 Cow. (N. Y.) 506; Canal Co. v. Ray, 101 U. S. 522, 25 L. Ed. 792; Dearborn v. Cross, 7 Cow. (N. Y.) 48; Fleming v. Gilbert, 3 Johns. (N. Y.) 528; *waiver of breach, in insurance cases*: Elliott v. Lycoming Co. Mut. Ins. Co., 66 Pa. 22, 5 Am. Rep. 318; Oshkosh Gaslight Co. v. Germania F. Ins. Co., 71 Wis. 454, 5 Am. St. Rep. 233, 37 N. W. 819; Wilson v. Min-

nesota F. M. F. Ins. Assn., 36 Minn. 112, 1 Am. St. Rep. 659, 30 N. E. 401; Sims v. State Ins. Co., 47 Mo. 54, 4 Am. Rep. 311; Pratt v. New York Cent. Ins. Co., 55 N. Y. 505, 14 Am. Rep. 304; Webster v. Phoenix Ins. Co., 36 Wis. 67, 17 Am. Rep. 479; Insurance Co. v. Wilkinson, 13 Wall. (U. S.) 222, 20 L. Ed. 617; Van Schoick v. Niagara Fire Ins. Co., 68 N. Y. 454; Combs v. Hannibal etc. Ins. Co., 43 Mo. 148, 97 Am. Dec. 383; Commercial Ins. Co. v. Spankneble, 52 Ill. 53, 4 Am. Rep. 582; Keith v. Globe Ins. Co., 52 Ill. 518, 4 Am. Rep. 634. See, also, the authorities collected in Browne, Parol Ev., 113-115. As to parol evidence rule as to varying or contradicting written contracts as affected by the doctrine of waiver or estoppel as applied to policies of insurance, see note to Haapa v. Metropolitan Life Ins. Co., 16 L. R. A., N. S., 1165.

a fraud upon one of the parties.³³ There have been many cases, especially the earlier ones, holding a somewhat stricter rule, but even those cases recognized the doctrine that *courts of equity* give relief, although the subsequent parol agreement might not be allowed in courts of law. In view of the modern tendency to administer legal and equitable relief in the same courts, and in view of the fact that specialties are rapidly losing their former superiority, as compared with other written contracts, it is suggested that, so far as the rule under discussion is concerned, no distinction between the two classes of contracts should be made. In fact, no distinction is now made as to the fixing or extension of time. It is no longer necessary that the agreement changing the terms of a contract should be in writing, for, after a breach of a sealed instrument, it may be modified in any respect, or even wholly rescinded by an

³³ Robinson v. Bullock, 66 Ala. 548; Hause v. Phillips, 2 Cal. App. 15, 82 Pac. 1127; Snow v. Griesheimer, 220 Ill. 106, 77 N. E. 110; Dickerson v. Board of Commrs. of Ripley County, 6 Ind. 128, 63 Am. Dec. 373; Herzog v. Sawyer, 61 Md. 344; Holdsworth v. Tucker, 143 Mass. 369, 9 N. E. 764; McClay v. Gluck, 41 Minn. 193, 42 N. W. 875; Pratt v. Morrow, 45 Mo. 404, 100 Am. Dec. 381; McMurphy v. Garland, 47 N. H. 316; Van Syckel v. O'Hearn, 50 N. J. Eq. 173, 24 Atl. 1024; New York Life Ins. Co. v. Casey, 81 N. Y. Supp. 1, 81 App. Div. 92; McKenzie v. Harrison, 120 N. Y. 260, 17 Am. St. Rep. 638, 8 L. R. A. 257, 24 N. E. 458; Cabe v. Jameson, 32 N. C. 193, 51 Am. Dec. 386; French v. Whitticar, 3 Phila. (Pa.) 51; Hydeville Co. v. Eagle R. etc. Co., 44 Vt. 395; Phelps v. Seely, 22 Gratt. (Va.) 573; Arbogaust v. Mylius, 55 W. Va. 101, 46 S. E. 809; Caldwell v. Schmulbach, 175 Fed. 429. A contract under seal may be abrogated,

canceled, or surrendered by an executed parol contract, and parol evidence is admissible to show this, but the question whether a sealed instrument has been so abrogated is one of fact for a jury: Alschuler v. Schiff, 164 Ill. 298, 45 N. E. 424. A contract under seal may be annulled by a new agreement by parol followed by actual performance of the substituted agreement, whether made before or after the breach. So, a new agreement, although without performance, if based on a good consideration, will be satisfaction, if accepted as such: McCreery v. Day, 119 N. Y. 1, 16 Am. St. Rep. 793, 6 L. R. A. 503, 23 N. E. 198. After breach of a sealed contract, a right of action under it may clearly be waived or released by a new parol contract: Miller v. Hemphill, 9 Ark. 488; Levy v. Very, 12 Ark. 148; Delacroix v. Bulkley, 13 Wend. (N. Y.) 71; Eddy v. Graves, 23 Wend. (N. Y.) 82. See note to Harris v. Murphy, 56 Am. St. Rep. 659.

executed parol agreement.³⁴ And parol evidence is equally admissible to prove a waiver of a covenant or condition in a sealed instrument, although this is, strictly speaking, not a variation or abrogation of the sealed instrument but rather a waiver of a right thereunder. Thus, where a lease contains a condition or forfeiture in case the tenant underlets the premises without the written consent of the lessor, if, after such condition is broken, the lessor does any act which is clearly inconsistent with his reliance upon it, such as the acceptance of rent with full knowledge of all the facts, such conduct amounts to a waiver of the condition, so as to preclude the lessor from afterward availing himself of the forfeiture.³⁵ So where a lease contained a covenant that the lessees would not make any alterations to the premises without the written consent of the lessor, and the lessees applied to their lessor to put in some stairs so as to give access to the basement of the demised premises, and their lessor replied that he would not be to the expense of putting them in, but that the lessees might do it, and for that purpose might use the old stairs which were then in the basement, and that they thereupon made the necessary opening in the floor and put in the stairs designated by the lessor, these facts showed a clear intention on the part of the lessor to waive his right of forfeiture growing out of the alteration in the premises thus authorized by him, and he was held to such waiver.³⁶

§ 444 (449). Subsequent agreement as to contracts within the statute of frauds.—Whether the rule of the

³⁴ *New York Life Ins. Co. v. Casey*, 81 App. Div. 92, 81 N. Y. Supp. 1; *Flanders v. Barstow*, 18 Me. 357; *Stryker v. Vanderbilt*, 25 N. J. L. 482; *Lawrence v. Miller*, 86 N. Y. 131; *Stone v. Sprague*, 20 Barb. (N. Y.) 509; *Barker v. Troy etc. R. R. Co.*, 27 Vt. 766.

³⁵ *Goodright v. Davids*, 2 Cowp. 803, 98 Eng. Reprint, 1371; *Wood*

on *Landlord and Tenant*, 530, and notes.

³⁶ *Moses v. Loomis*, 156 Ill. 392, 47 Am. St. Rep. 194, 40 N. E. 952. See, also, *Mayor etc. of New York v. Butler*, 1 Barb. (N. Y.) 325; *Devling v. Little*, 26 Pa. 502; *Becker v. Becker*, 250 Ill. 117, Ann. Cas. 1912B, 275, 95 N. E. 70; *Morehouse v. Terrill*, 111 Ill. App. 460.

common law that contracts in writing, with perhaps the exception of specialties, may be modified or discharged by subsequent verbal agreements of the parties, applies to those contracts required by the statute of frauds to be written, is a question upon which judicial opinion is conflicting. The leading text-writers seem to be unanimous in their belief that such contracts cannot afterward, as a general proposition, be orally varied;³⁷ and the supreme court of the United States has expressed itself the same way.³⁸ On this question there have been many diverse decisions in the English and American courts. The earlier cases held that the written agreement might be modified in this manner on the ground that the statute did not declare contracts affected by it void unless in writing.³⁹ When the question was presented to Lord Ellenborough, he held that the time of performance of a written contract for the sale of chattels, within the statute of frauds, might be enlarged by a subsequent verbal agreement; that the original contract continued, and there was only a substitution of different days of performance. This doctrine has been either expressly or tacitly adopted by numerous cases in this country, in which it has been held that the time of payment, or of performance of contracts, within the statute, may be changed by parol.⁴⁰ Later cases have,

³⁷ 1 Addison on Contracts, Abbott's ed., 201; 1 Chitty on Contracts, 11th Am. ed., 154; Bishop on Contracts, § 771; Fry on Specific Performance, 3d Am. ed., § 777; Browne on the Statute of Frauds, § 411 et seq.; 2 Reed on the Statute of Frauds, § 454 et seq.

³⁸ Emerson v. Slater, 22 How. (U. S.) 28, 42, 16 L. Ed. 360; Swain v. Seamens, 9 Wall. (U. S.) 254, 272, 19 L. Ed. 554.

³⁹ Cuff v. Penn, 1 Maule & S. 21, 105 Eng. Reprint, 8; Cummings v. Arnold, 3 Met. (Mass.) 486, 37 Am. Dec. 155; Stearns v. Hall, 9 Cush.

(Mass.) 31; Stryker v. Vanderbilt, 25 N. J. L. 482; Negley v. Jeffers, 28 Ohio St. 90; Marsh v. Bellew, 45 Wis. 36; Keating v. Price, 1 Johns. Cas. (N. Y.) 22, 1 Am. Dec. 92. On the general subject of this section, see note to Abell v. Munson, 100 Am. Dec. 169-172. As to subsequent parol agreement varying a writing, see note to Harris v. Murphy, 56 Am. St. Rep. 659.

⁴⁰ Cuff v. Penn, *supra*, and cases cited in preceding note. In the discussion on Cuff v. Penn, *supra*, in Browne, Stat. of Frauds, § 411, that learned writer points out that the

however, adopted a stricter rule;⁴¹ and the more recent English cases have very much guarded and limited the application of the rule laid down in the early ones. Thus where parol evidence goes to show, not a new contract, but simply a voluntary forbearance by the vendee, at the request of the vendor, as to the delivery of goods agreed to be sold, the statute, it is held, does not apply in an action by the vendee for breach of contract;⁴² and the departure by a vendor of goods from the terms of the original contract, within the statute of frauds, as to the route over which the goods were to be sent, may be ratified by the vendee without writing;⁴³ so where a vendor, under a written contract of sale of iron, of a greater value than ten pounds, voluntarily withheld delivery at the request of the vendees, no new contract being substituted for the original one, the vendor is entitled to maintain an action for breach of contract.⁴⁴ In his valuable work, Taylor con-

declaration in that action contained three counts, the first one the contract and the other two, on the contract as varied by the parol agreement.

⁴¹ *Emerson v. Slater*, 22 How. (U. S.) 28, 16 L. Ed. 360; *Swain v. Seamens*, 9 Wall. (U. S.) 254, 19 L. Ed. 554; *Abell v. Munson*, 18 Mich. 306, 100 Am. Dec. 165; *Stowell v. Robinson*, 3 Bing. N. C. 928, 132 Eng. Reprint, 668; *Marshall v. Lynn*, 6 Mees. & W. 109, 9 L. J. Ex. 106; *Hasbrouck v. Tappen*, 15 Johns. (N. Y.) 200; *Blood v. Goodrich*, 9 Wend. (N. Y.) 68, 24 Am. Dec. 121.

⁴² *Ogle v. Earl Vane*, L. R. 2 Q. B. 275; in error, L. R. 3 Q. B. 272.

⁴³ *Leather Cloth Co. v. Heironimus*, L. R. 10 Q. B. 140.

⁴⁴ *Hickman v. Haynes*, L. R. 10 C. P. 598, 605, *Lindley, J.*, saying: "The proposition that one party to a contract should thus discharge him-

self from his own obligations by inducing the other party to give him time for their performance, is, to say the least, very startling, and if well founded will enable the defendants in this case to make use of the statute of frauds, not to prevent a fraud upon themselves, but to commit a fraud upon the plaintiff. It need hardly be said that there must be some very plain enactment or strong authority to force the court to countenance such a doctrine. The statute of frauds contains no enactment to the effect contended for. The utmost effect of the seventeenth section is to invalidate any verbal agreement for the sale of goods in certain cases; and even if a verbal agreement for extending the time for the delivery of goods already agreed to be sold is within the statute, the plaintiff in this case is not attempting to enforce any such verbal agreement, but is suing on the original agreement

cludes that although it is the better opinion that such contracts may be wholly waived or abandoned by a subsequent oral agreement so as to prevent either party from recovering on the original written agreement, yet it is certain that no verbal agreement to abandon the contract in part or to modify its terms can be received.⁴⁵

§ 445 (450). Same—Tendency of decisions in the United States.—It would be a difficult matter to reconcile the decisions in the United States on this subject, or to formulate from them any satisfactory rule.⁴⁶ In numerous cases it has been held that substantial parts of a written contract which are necessary to its existence cannot be subsequently modified by parol, even when the contract itself would not have been valid, if made by parol.⁴⁷ Again, it has been ruled that *every* part of a contract under the statute is itself a material particular. “We think,” said Lord Denman,⁴⁸ “the object of the statute of frauds was to exclude all oral evidence as to contracts

which was in writing.” After reviewing the cases of *Noble v. Ward*, L. R. 1 Ex. 117, in error, L. R. 2 Ex. 135, *Stead v. Dawber*, 10 Ad. & E. 57, 113 Eng. Reprint, 22, *Marshall v. Lynn*, 6 Mees. & W. 109, 9 L. J. Ex. 106, *Goss v. Lord Nugent*, 5 Barn. & Ad. 58, 110 Eng. Reprint, 713, and *Stowell v. Robinson*, 3 Bing. N. C. 928, 132 Eng. Reprint, 668, referred to above, the judge continues: “The result of these cases appears to be that neither a plaintiff nor a defendant can at law avail himself of a parol agreement to vary or enlarge the time for performing a contract previously entered into in writing, and required so to be by the statute of frauds.”

⁴⁵ Tayl. Ev., 10th ed., §§ 1143, 1144.

⁴⁶ It was held in New York that a contract for the *sale of goods* which

was within the statute could not thus be changed to show that an increased amount was to be delivered: *Schultz v. Bradley*, 57 N. Y. 646. On the subject of this section, see note to *Abell v. Munson*, 100 Am. Dec. 169–172. See § 431, *ante*. Where a contract for the *sale of land* specified that the same should be surveyed by a certain person, it could not be shown by parol that another had been agreed upon: *Dana v. Hancock*, 30 Vt. 616.

⁴⁷ *Hill v. Blake*, 97 N. Y. 216; *Blood v. Goodrich*, 9 Wend. (N. Y.) 68, 24 Am. Dec. 121; *Swain v. Seamens*, 9 Wall. (U. S.) 254, 19 L. Ed. 554; *Cook v. Bell*, 18 Mich. 387; *Noble v. Ward*, L. R. 1 Ex. 117; *Brown v. Sanborn*, 21 Minn. 402.

⁴⁸ *Goss v. Lord Nugent*, 5 Barn. & Ad. 67, 110 Eng. Reprint, 713.

for the sale of lands, and that any contract which is sought to be enforced must be proved by writing only." And Mr. Baron Parke said⁴⁹ that it seemed to him "to be unnecessary to inquire what are the *essential* parts of the contract and what not, and that *every* part of the contract, in regard to which the parties are stipulating, must be taken to be material." And that "no doubt every particular of the contract need not be mentioned; but if mentioned it must be observed."⁵⁰ On the other hand, it has frequently been held that the time or manner of payment or mode of performing a contract which is within the statute of frauds might be changed by parol.⁵¹ These cases are mainly founded on the ruling of Lord Ellenborough already referred to,⁵² holding that the time of performance of a written contract within the statute might be enlarged by a subsequent verbal agreement, the action, however, being brought upon the written contract.⁵³ In the discussion of this class of contracts, Benjamin says:

⁴⁹ *Marshall v. Lynn*, 6 Mees. & W. 116, 9 L. J. Ex. 106.

⁵⁰ See full discussion in *Browne, St. of Frauds*, § 411 et seq., to which we are indebted for these references.

⁵¹ *Cummings v. Arnold*, 3 Met. (Mass.) 486, 37 Am. Dec. 155; *Stearns v. Hall*, 9 Cush. (Mass.) 31; *Vanhouten v. McCarty*, 4 N. J. Eq. 141; *Negley v. Jeffers*, 28 Ohio St. 90; *Marsh v. Bellew*, 45 Wis. 36; *Reed's Heirs v. Chambers*, 6 Gill & J. (Md.) 490. Parol evidence is admissible to prove an agreement to reduce the rate of *interest* on a mortgage, and to pay the interest semi-annually: *Sharp v. Wyckoff*, 39 N. J. Eq. 376; a vendee's agreement to waive a vendor's agreement to remove encumbrances from the land sold: *Negley v. Jeffers*, 28 Ohio St. 90; *Devling v. Little*, 26 Pa. 502; *time for the delivery of goods*, no time having been stated in the original contract: *Neil v. Cheves*, 1 Bail. (S.

C.) 537. As to admissibility of extrinsic evidence with regard to time for delivery of goods where none is specified in written contract, see note to *Cameron Coal etc. Co. v. Block*, 31 L. R. A., N. S., 619.

⁵² *Cuff v. Penn*, 1 Maule & S. 21, 105 Eng. Reprint, 8.

⁵³ *Whittier v. Dana*, 10 Allen (Mass.), 326; and although in some of the cases the original contract was under seal. "The statute requires a memorandum of the bargain to be in writing, that it may be made certain," says *Wilde, J.*, in *Cummings v. Arnold*, 3 Met. (Mass.) 486, 37 Am. Dec. 155, "but it does not undertake to regulate its performance. It does not say that such a contract shall not be varied by a subsequent oral agreement for a substituted performance. That is left to be decided by the rules and principles of law in relation to the admission of parol evidence to vary the terms of written contracts."

“No verbal agreement to abandon it in part or to add to or omit or modify any of its terms is admissible.”⁵⁴ This is the view taken by most of the text-writers on the subject, and it is, perhaps, supported by the weight of authority. Yet, the cases already cited have shown no little departure from the rule; and other cases have limited or qualified the rule by allowing parol evidence of a substituted agreement, especially when the latter has been partly performed or so relied upon that its denial would operate as a fraud, or when the enforcement of the original contract would cause serious injury.⁵⁵ And especially when the proof shows that the new parol agreement *has been executed*.⁵⁶ There is also conflict of authority as to whether it may be shown by parol that there has been a subsequent agreement for an abandonment or *rescission* of the whole contract. The view that such testimony is admissible is sustained by much authority, especially if the subsequent agreement has been executed.⁵⁷ From the diverse decisions above stated, the most the commentator can do, after examining the cases, is to show there is a preponderance of authority supporting the proposition that the abandonment or rescission may be shown by parol if it relates to the whole agreement and has been executed.⁵⁸

⁵⁴ *Benj. Sales*, § 240; *Barton v. Gray*, 57 Mich. 622, 24 N. W. 638; *Hill v. Blake*, 97 N. Y. 216; *Goldsmith v. Darling*, 92 Wis. 363, 66 N. W. 397; *Hanson v. Gunderson*, 95 Wis. 613, 70 N. W. 827; *Illinois Cent. Ry. Co. v. Manion*, 113 Ky. 7, 101 Am. St. Rep. 345, 67 S. W. 40.

⁵⁵ *Marsh v. Bellew*, 45 Wis. 36; *Price v. Dyer*, 17 Ves. 356, 34 Eng. Reprint, 137; *Long v. Hartwell*, 34 N. J. L. 116.

⁵⁶ *Doherty v. Doe*, 18 Colo. 456, 33 Pac. 165; *Boos v. Dulin* (Iowa), 68 N. W. 707; *Bowman v. Wright*, 65 Neb. 661, 91 N. W. 580, 92 N. W. 580; *McKenzie v. Harrison*, 120 N. Y. 260,

17 Am. St. Rep. 638, 8 L. R. A. 257, 24 N. E. 458.

⁵⁷ *Goss v. Lord Nugent*, 5 Barn. & Ad. 58, 110 Eng. Reprint, 713; *Johnson v. Worthy*, 17 Ga. 420; *Morrill v. Colehour*, 82 Ill. 618; *Norton v. Simonds*, 124 Mass. 19; *Stevens v. Cooper*, 1 Johns. Ch. (N. Y.) 425, 7 Am. Dec. 499; *Dearborn v. Cross*, 7 Cow. (N. Y.) 48; *Phelps v. Seely*, 22 Gratt. (Va.) 573; *Reed, Stat.*, § 461; *Browne, St. Frauds*, 5th ed., §§ 434-436.

⁵⁸ *Righetti v. Righetti*, 5 Cal. App. 249, 90 Pac. 50; *Howard v. Gresham*, 27 Ga. 347; *Morrill v. Colehour*, 82 Ill. 618; *Wulschner v. Ward*, 115 Ind.

Thus an executed oral agreement between the owner of a note and the payee, upon sufficient consideration, to waive the payment of interest thereon after maturity, has the effect of changing the stipulation of the note as to such interest.⁵⁹

219, 17 N. E. 273; Buel v. Miller, 4 N. H. 196; Long v. Hartwell, 34 N. J. L. 116; Thomson v. Poor, 147 N. Y. 402, 42 N. E. 13; Halsell v. Renfrow, 14 Okl. 674, 2 Ann. Cas. 286, 78 Pac. 118; Guthrie v. Thompson, 1 Or. 353; Lauer v. Lee, 42 Pa. 165; Phelps v. Seely, 22 Gratt. (Va.) 573; Sanderson v. Graves, L. R. 10 Ex. 234, 44 L. J. Ex. 210, 33 L. T., N. S., 269, 23 Wkly. Rep. 797.

⁵⁹ Righetti v. Rigetti, *supra*; Halsell v. Renfrow, *supra*. The syllabus in the last-named case prepared by Burford, C. J., contains an excellent *résumé* of much that is here contained, and is reproduced as a work of reference of great value. 1. An agreement for the sale of real estate is invalid unless the same or some note or memorandum thereof be in writing, and subscribed by the party to be charged or his agent, and such agreement, if made by an agent, is invalid unless the authority of the agent be in writing, subscribed by the party sought to be charged. 2. A complete contract, binding under the statute of frauds, may be gathered from letters, telegrams, and writings between the parties relating to the subject matter, and so connected with each other that they may be said to fairly constitute one paper relating to the contract. 3. A memorandum, to be sufficient under the statute of frauds, must be complete in itself, and leave nothing to rest in parol. 4. A contract for the sale of lands which a court of equity will enforce specific performance of, must be certain in its terms, and that certainty required

has reference to the parties contracting, the terms of the sale and the description of the property, and whenever the property to be conveyed cannot be identified as the property referred to in the contract, specific performance will be denied. 5. Where a sufficient description is given in the contract, parol evidence may be resorted to in order to fit the description to the thing; but where an insufficient description is given, or where there is no description, such evidence is inadmissible. A court will never receive parol evidence both to describe the land and to supply the description. 6. A written contract cannot be altered except by a contract in writing or by an executed oral agreement. 7. A parol agreement for the sale of real estate may be specifically enforced where there has been such part performance of the contract as would make it impracticable to place the parties in their original positions, and thus make it a fraud upon one of the parties not to enforce the agreement. 8. The payment of the purchase money is not alone such part performance of an agreement to sell real estate as will authorize a court to enforce its specific performance. But part payment and taking possession in good faith, or taking possession with the knowledge of the vendor and making valuable improvements, constitute such part performance as will ordinarily warrant a court in decreeing specific performance of the contract. 9. The acceptance of benefits under a contract which will impose consent to all the

And where one party has consented orally to an extension of time for performance of a written contract by the other, he cannot recall that consent when it has been acted upon and the other party has allowed the contract time to pass.⁶⁰ Where a contract not reduced to writing is taken out of the operation of the statute of frauds by the payment of earnest-money, it is held not to contravene the spirit or policy of the statute to allow its terms to be varied by parol in respect to the time of performance;⁶¹ and where no time for the delivery of goods sold under a written contract within the statute is fixed, evidence may be received to show that it was afterward agreed upon by parol.⁶² If a parol variation of a written contract within the statute has been so acted upon that the original contract cannot be enforced without injury, this may constitute a defense to a suit in equity thereon.⁶³ Upon a bill praying the performance of a written contract for the purchase of lands, but offering the defendant the benefit of certain variations contained in an unsigned memorandum of a subsequent date, the court will decree a specific performance of the contract with those variations, if the defendant elect to take advantage of them; and if he does not so elect, it will

obligations arising from such acceptance must be a voluntary acceptance with a knowledge of the facts affecting such acceptance, and payment of money to an agent will not constitute such voluntary acceptance unless it is shown that he was authorized to accept such payment. 10. A real estate broker, who has lands listed with him for sale, is only authorized to find a purchaser and submit a proposition, and he has no authority to make an agreement of sale unless specifically authorized in writing by the owner. 11. A real estate broker, who has lands placed with him for sale, has no authority to collect or receive money on the purchase price of such lands; and if a purchaser, without demanding the

written authority of the agent, pays the agent money to be applied on the purchase price of land, he makes the broker his own agent for the purpose of receiving the money for the owner, and makes such payment at his own risk.

⁶⁰ Thomson v. Poor, *supra*. The opinion of Andrews, C. J., in this case deals clearly with the conflicting decisions to which attention has been drawn, and is of itself a useful *vade-mecum* to the student.

⁶¹ Packer v. Steward, 34 Vt. 127.

⁶² Neil v. Cheves, 1 Bail. (S. C.) 537.

⁶³ Price v. Dyer, 17 Ves. 356, 34 Eng. Reprint, 137; Stoutenburgh v. Tompkins, 9 N. J. Eq. 332.

decree a specific performance of the original contract.⁶⁴ There is also ample authority for the proposition that where the offered parol evidence is to *confirm* a written agreement which has been attacked, it is admissible. For example, where a bill charged the invalidity of certain instruments which the defendant was required to sustain, and it was necessary for him to prove that they were not procured by undue influence, parol evidence was admissible of any fact showing the independent action of the person executing them.⁶⁵ So parol evidence is admitted to show a consent to alterations made in a written instrument.⁶⁶ But where an instrument is void on its face as showing a statutory invalidity, it cannot be validated by parol evidence contradicting the inherent flaw.⁶⁷ Where an instrument in the form of a warranty deed of certain land stated that it was given "as security for money owing" the mortgagee, "and upon my notes," and that the land should be reconveyed "upon payment of my liability" to the mortgagee, and at the date of the instrument the mortgagor owed the mortgagee fifteen hundred dollars, but eleven days later, when the instrument was delivered, the indebtedness amounted to five thousand seven hundred and fifty dollars, oral evidence was

⁶⁴ Robinson v. Page, 3 Russ. 114, 38 Eng. Reprint, 519.

⁶⁵ Hobart's Admr. v. Vail, 80 Vt. 152. 66 Atl. 820. See, also, Nixon v. McCallmont, 6 Watts & S. (Pa.) 159; Southern Mut. Ins. Co. v. Trear, 29 Gratt. (Va.) 255; Muir v. Westcott, 34 Wash. 463, 75 Pac. 1107; Brown v. Meserve, 91 Fed. 229, 33 C. C. A. 472. Numerous other miscellaneous decisions in support of the text are: Alabama Life Ins. etc. Co. v. Pettway, 24 Ala. 544; Gunn v. Jones, 67 Ga. 398; Kidder v. Vander-sloot, 114 Ill. 133, 28 N. E. 460; Rundell v. La Fleur, 6 Allen (Mass.), 480; Potter v. Everitt, 42 N. C. 152; Cain v. Mack, 33 Tex. 135; Mc-

Donald v. Eggleston, 26 Vt. 154, 60 Am. Dec. 303; Alexandria Mechanics' Bank v. Columbia Bank, 5 Wheat. (U. S.) 326, 5 L. Ed. 100.

⁶⁶ State v. Baird, 13 Idaho, 126, 89 Pac. 298.

⁶⁷ Walker v. Moore, 2 Dill. 256, Fed. Cas. No. 17,080. This does not include a case of mistake such as the insertion of a usurious rate of interest in error: Griffin v. New Jersey Oil Co., 11 N. J. Eq. 49; nor where an instrument dated on Sunday was in fact delivered on another day of the week: State v. Young, 23 Minn. 551; Schwab v. Rigby, 38 Minn. 395, 38 N. W. 101.

admissible to show that the parties intended that the instrument should secure the latter sum, but such evidence was not admissible to show that the instrument was intended to secure future advances made after its delivery.⁶⁸

§ 446 (451). **To show that instruments apparently absolute are only securities.**—It has long been the settled rule that in courts exercising equitable jurisdiction it is admissible to prove by parol that instruments in writing apparently transferring the absolute title are in fact only given as security. The doctrine is thus stated by Mr. Field: “It is an established doctrine that a court of equity will treat a deed, absolute in form, as a mortgage, when it is executed as security for loan of money. That court looks beyond the terms of the instrument to the real transaction; and when that is shown to be one of security and not of sale, it will give effect to the actual contract of the parties. As the equity, upon which the court acts in such cases, arises from the real character of the transaction, any evidence, written or oral, tending to show this is admissible. The rule which excludes parol testimony to contradict or vary a written instrument has reference to the *language* used by the parties. That cannot be qualified or varied from its natural import, but must speak for itself. The rule does not forbid an inquiry into the *object* of the parties in executing and receiving the instrument.”⁶⁹ Although in some of the earlier cases this evidence was received only on the grounds of fraud or mistake,⁷⁰ yet in

⁶⁸ Swedish-American Nat. Bank v. Germania Bank, 76 Minn. 409, 79 N. W. 399.

⁶⁹ Peugh v. Davis, 96 U. S. 332, 24 L. Ed. 775; Brick v. Brick, 98 U. S. 514, 25 L. Ed. 256; Swart v. Service, 21 Wend. (N. Y.) 36, 34 Am. Dec. 211, and note; Trogdon v. Trogdon, 164 Ill. 144, 45 N. E. 575; Kelso v. Kelso, 16 Ind. App. 615, 44 N. E. 1013, 45 N. E. 1065; Watkins v. Williams, 123 N. C. 170, 31 S. E. 388;

Weiseham v. Hocker, 7 Okl. 250, 54 Pac. 464; Schierl v. Newburg, 102 Wis. 552, 78 N. W. 761. On this general subject, see, also, notes to Thompson v. Patton, 15 Am. Dec. 47; Turnipseed v. Cunningham, 50 Am. Dec. 195; Chase's Case, 17 Am. Dec. 300-306.

⁷⁰ Patchin v. Pierce, 12 Wend. (N. Y.) 61; Swart v. Service, 21 Wend. (N. Y.) 36, 34 Am. Dec. 211; Strong v. Stewart, 4 Johns. Ch. (N. Y.) 167;

later cases it was deemed sufficient evidence of fraud for the grantee to treat the conveyance as absolute, when in fact it was not,⁷¹ and the *tendency of the modern decisions* is that such evidence may be received to show the real nature and object of the transaction, although no fraud or mistake of any kind is alleged or proved.⁷² It is held that "the agreement for the defeasance, whether written or unwritten, is no more than one of the conditions upon which the deed was given, and therefore constitutes a part of the consideration for the conveyance. . . . Where the deed does not contain the defeasance, the presumption arises that the conveyance is absolute, and, in making proof that a defeasance was intended by the parties, and was in fact a part of the consideration upon which the conveyance was made, this presumption must be removed by testimony before the debtor can use the evidence showing his right to defeat the

Marks v. Pell, 1 Johns. Ch. (N. Y.) 594; Webb v. Rice, 6 Hill (N. Y.), 219; Richard Brothers v. Harrill, 2 Jones Eq. (N. C.) 209; Chaires v. Brady, 10 Fla. 133; McDonald v. McLeod, 1 Ired. Eq. (N. C.) 221.

⁷¹ Strong v. Stewart, 4 Johns. Ch. (N. Y.) 167.

⁷² Anthony v. Anthony, 23 Ark. 479; Washburn v. Merrills, 1 Day (Conn.), 139, 2 Am. Dec. 59; Florida Cent. etc. R. Co. v. Usina, 111 Ga. 697, 36 S. E. 928; German Ins. Co. v. Gibe, 162 Ill. 251, 44 N. E. 490; Ruckman v. Alwood, 71 Ill. 155; Johnson v. Smith, 39 Iowa, 549; Heath v. Williams, 30 Ind. 495; Robinson v. Blood, 10 Kan. App. 576, 62 Pac. 677; Edrington v. Harper, 3 J. J. Marsh. (Ky.) 353, 20 Am. Dec. 145; Summers v. United States Ins. etc. Co., 13 La. Ann. 504; Libby v. Clark, 88 Me. 32, 33 Atl. 657; Price v. Gover, 40 Md. 102; Pond v. Eddy, 113 Mass. 149; Reeve v. Dennett, 137 Mass. 315; Hyler v. Nolan, 45 Mich. 357, 7 N. W. 910; Davis v. Crookston Waterworks etc. Co., 57

Minn. 402, 47 Am. St. Rep. 622, 59 N. W. 482; Klein v. McNamara, 54 Miss. 90; Ittner v. Hughes, 154 Mo. 55, 55 S. W. 267; Scharman v. Scharman, 38 Neb. 39, 56 N. W. 704; Schade v. Bessinger, 3 Neb. 140; Sweet v. Parker, 22 N. J. Eq. 453; Ensign v. Ensign, 120 N. Y. 655, 24 N. E. 942; Cotterell v. Long, 20 Ohio, 464; Stith v. Peckham, 4 Okl. 254, 46 Pac. 664; Sweetzer's Appeal, 71 Pa. 264; Nichols v. Cabe, 3 Head (Tenn.), 92; Snively v. Pickle, 29 Gratt. (Va.) 27; Ross v. Norvell, 1 Wash. (Va.) 14, 1 Am. Dec. 422; Sayre v. King, 17 W. Va. 562; Matthews v. Capital F. Ins. Co., 115 Wis. 272, 91 N. W. 675; Schierl v. Newburg, 102 Wis. 552, 78 N. W. 761. In Canada there appear to have been conflicting decisions: See Howland v. Stewart, 2 Gr. 61; Le Targe v. De Tuyl, 1 Gr. 277. The trend of the Canadian decisions, however, is toward the admissibility of parol evidence in such cases: See Best on Evidence, 11th ed., by Phipson, p. 264.

absolute character of the conveyance. . . . It comes finally to a question of what was the understanding and the intention of the parties at the time the instrument was made; and this, like any other fact, depends for its support upon what was said and done by the parties at the time, together with all the other circumstances bearing upon the question."⁷³

§ 447 (452). **Same—Real intention of the parties to be ascertained.**—In applying the exception under discussion, the extrinsic evidence will not be received because of any particular form of language which the parties may have adopted. As we have shown in the preceding section, the *intention* of the parties *must govern*; and it matters not what peculiar form the transaction may have taken. The inquiry always is, Was a security for the loan of money or other property intended?⁷⁴ But where the deed and accompanying papers *on their face constitute a mortgage*, parol evidence is not competent to show the contrary.⁷⁵ In solving the question upon the facts, a few things are absolutely necessary to be found to exist before the deed can be construed a mortgage. A debt owing to the mortgagee, or a liability incurred for the grantor, either pre-existing or created at the time the deed is made, is essential to give the deed the character of a mortgage. The relation of debtor and creditor must appear. The existence of the debt is one of the tests.⁷⁶ The amount of the debt, as well as its continuance, should also be made to appear where a foreclosure is asked in the same suit wherein it is

⁷³ *McMillan v. Bissell*, 63 Mich. 66, 29 N. W. 737.

⁷⁴ *Dunham v. Dey*, 15 Johns. (N. Y.) 555, 8 Am. Dec. 282; *Klock v. Walter*, 70 Ill. 416; *Marshall v. Stewart*, 17 Ohio, 356; *Colwell v. Woods*, 3 Watts (Pa.), 188, 27 Am. Dec. 345; *Brinkman v. Jones*, 44 Wis. 498; *Campbell v. Dearborn*, 109 Mass. 130, 12 Am. Rep. 671; *Knowlton v.*

Walker, 13 Wis. 264; *Kerr v. Gilmore*, 6 Watts (Pa.), 405.

⁷⁵ *Snyder v. Griswold*, 37 Ill. 216; *Haines v. Thomson*, 70 Pa. 434.

⁷⁶ *McNamara v. Culver*, 22 Kan. 661; 1 *Jones Mtg.*, § 265; *Crane v. Buchanan*, 29 Ind. 570; *People v. Irwin*, 14 Cal. 428, 18 Cal. 117; *Snively v. Pickle*, 29 Gratt. (Va.) 27; *Montgomery v. Spect*, 55 Cal. 352.

sought to establish the character of the instrument. It is also of importance to know precisely when the character claimed for the instrument was fixed. In construing the deed to be a mortgage, its character as such must have existed from its very inception,—created at the time the conveyance was made. The character of the transaction is precisely what the intention of the parties at the time made it. It will therefore be discovered that the testimony of those who were present at the time the instrument was made, and especially of those who participated in the transaction, becomes most important.⁷⁷ In arriving at the real intent of the parties, their statements and acts at the time of the transaction,⁷⁸ the inadequacy of the consideration named in the deed,⁷⁹ the prior existence of a debt,⁸⁰ and the recognition of its continuance, as by the payment of interest or other acts,⁸¹ are all facts to be considered, and are relevant to the issue. But although parol evidence is received in such cases to show the real nature of the transaction,⁸² the presumption is that the instrument is what

⁷⁷ *McMillan v. Bissell*, 63 Mich. 66, 29 N. W. 737.

⁷⁸ *Russell v. Southard*, 12 How. (U. S.) 139, 13 L. Ed. 927; *Crane v. Bonnell*, 2 N. J. Eq. 264; *Freeman v. Wilson*, 51 Miss. 329; *Montgomery v. Spect*, 55 Cal. 352; *Tibeau v. Tibeau*, 22 Mo. 77; *Reigard v. McNeil*, 38 Ill. 400; *Eiland v. Radford*, 7 Ala. 724, 42 Am. Dec. 610; *Carter v. Carter*, 5 Tex. 93; *Ingalls v. Atwood*, 53 Iowa, 283, 5 N. W. 160; *Staples v. Edwards etc. Lumber Co.*, 56 Minn. 16, 57 N. W. 220; *Thomas v. Barnes*, 156 Mass. 581, 31 N. E. 683; *Work v. Beach*, 129 N. Y. 651, 29 N. E. 1028; *Edwards Lumber Co. v. Baker*, 2 N. D. 289, 50 N. W. 718; *Stahelin v. Sowle*, 87 Mich. 124, 49 N. W. 529.

⁷⁹ *Crews v. Threadgill*, 35 Ala. 334; *Gibbs v. Penny*, 43 Tex. 560; *Klein v. McNamara*, 54 Miss. 90; *Davis v. Stonestreet*, 4 Ind. 101.

⁸⁰ *Ford v. Irwin*, 14 Cal. 428, 18 Cal. 117; *Snively v. Pickle*, 29 Gratt. (Va.) 27; *Montgomery v. Spect*, 55 Cal. 352.

⁸¹ *Ruffier v. Womack*, 30 Tex. 332; *Eaton v. Green*, 22 Pick. (Mass.) 526; *Westlake v. Horton*, 85 Ill. 228; *Klein v. McNamara*, 54 Miss. 90; *Budd v. Van Orden*, 33 N. J. Eq. 143; *Montgomery v. Spect*, 55 Cal. 352; *Lawrence v. DuBois*, 16 W. Va. 443.

⁸² *Nolan v. Nolan*, 155 Cal. 476, 132 Am. St. Rep. 99, 17 Ann. Cas. 1056, 101 Pac. 520; *Schindler v. Muhlheiser*, 45 Conn. 153; *Goette v. Sutton*, 128 Ga. 179, 57 S. E. 308; *Hughes v. Stanley*, 45 Iowa, 622; *Brook v. Latimer*, 44 Kan. 431, 21 Am. St. Rep. 292, 11 L. R. A. 805, 24 Pac. 946; *Cain v. Bauman*, 118 La. 82, 42 South. 654; *Smith v. Vose & Sons Piano Co.*, 194 Mass. 193, 120 Am. St. Rep. 539, 9 L. R. A., N. S., 966,

it purports to be; and before a deed absolute in form can be shown to be a mortgage, the *proof* should be *clear and convincing*.⁸³ The burden rests upon the moving party of overcoming the strong presumption arising from the terms of a written instrument. If the proofs are doubtful and unsatisfactory, if there is a failure to overcome this presumption by testimony entirely plain and convincing beyond reasonable controversy, the writing will be held to express correctly the intention of the parties. A judgment of the court, a deliberate deed or writing, are of too much solemnity to be brushed away by loose and inconclusive evidence.⁸⁴ Proof tending to show that no transfer of title was contemplated does not fall within the condemnation of the rule prohibiting oral evidence to vary the terms of a written instrument.⁸⁵ As the rule has often been stated, "to convert a deed absolute into a mortgage, the evidence should be so clear as to leave no substantial doubt that the real intention of the parties was to execute a mortgage."⁸⁶

80 N. E. 527; *Cutler v. Steele*, 93 Mich. 204, 53 N. W. 521; *Klein v. McNamara*, 54 Miss. 90; *McElvain v. St. Louis etc. R. Co.*, 151 Mo. App. 126, 131 S. W. 736; *Cortelyou v. Hiatt*, 36 Neb. 584, 54 N. W. 964; *Blanchard v. Putnam*, 16 N. H. 48; *Hamlin v. Hamlin*, 117 App. Div. 493, 102 N. Y. Supp. 571; *Vestal v. Wicker*, 108 N. C. 21, 12 S. E. 1037; *Davies v. Coffield*, 1 Ohio Dec. 267, 6 West L. J. 318; *Walker v. First Nat. Bank*, 43 Or. 102, 72 Pac. 635; *Light v. Heilman*, 1 Pears. (Pa.) 537; *Smith v. Ballou*, 1 R. I. 496; *Osborne v. Stringham*, 4 S. D. 593, 57 N. W. 776; *Garner v. Taylor* (Tenn. Ch. App.), 58 S. W. 758; *Schwantkowsky v. Dykowsky* (Tex. Civ. App.), 132 S. W. 373; *Dooley v. Baynes*, 86 Va. 644, 10 S. E. 974; *Sayre v. King*, 17 W. Va. 562; *Kipp v. Laun*, 146 Wis. 591, 131 N. W. 418; *Brick v. Brick*, 98 U. S. 514, 25 L. Ed. 256.

83 *Howland v. Blake*, 97 U. S. 624, 24 L. Ed. 1027; *Bingham v. Thompson*, 4 Nev. 224; *Williams v. Stratton*, 18 Miss. 418; *Moore v. Ivey*, 8 Ired. Eq. (N. C.) 192; *Williams v. Cheatham*, 19 Ark. 278; *Butler v. Butler*, 46 Wis. 430, 1 N. W. 70; *Johnson v. Van Velsor*, 43 Mich. 208, 5 N. W. 265; *Maher v. Farwell*, 97 Ill. 56; *Ahern v. McCarthy*, 107 Cal. 382, 40 Pac. 482; *Beebe v. Wisconsin Mtg. Loan Assn.*, 117 Wis. 328, 93 N. W. 1103.

84 *Howland v. Blake*, *supra*; *Harter v. Christoph*, 32 Wis. 245; 1 Story, Eq. Jur., § 152.

85 *Higgins v. Ridgway*, 153 N. Y. 130, 47 N. E. 32; *Persons v. Hawkins*, 41 App. Div. 171, 58 N. Y. Supp. 831.

86 *Becker v. Howard*, 75 Wis. 415, 44 N. W. 755. As to admissibility of parol evidence to prove intention of parties to written contract, see

§ 448 (453). **Not limited to deeds and mortgages.**—As we have shown, it is an established doctrine that equity will treat a deed, absolute in form, as a mortgage under certain circumstances. Although evidence to show that an instrument, absolute in form, is not such in fact, is most frequently used to show that such a deed is a mortgage, it is not limited to this class of cases.⁸⁷ A court of equity looks beyond the terms of the instrument to the real transaction; and when that is shown to be one of security and not of sale, it will give effect to the actual contract of the parties. As the equity, upon which the court acts in such cases, arises from the real character of the transaction, any evidence, written or oral, tending to show this is admissible. “The rule which excludes parol testimony to contradict or vary a written instrument has reference to the language used by the parties. That cannot be qualified or varied from its natural import, but must speak for itself. The rule does not forbid an inquiry into the object of the parties in executing and receiving the instrument.”⁸⁸ Thus it may be shown that a deed was made to defraud creditors, or to give a preference, or to secure a loan, or for any other object not apparent on its face. The

note to *Durkin v. Cobleigh*, 17 L. R. A. 273.

⁸⁷ *Transfer of stock*: *Reeve v. Dennett*, 137 Mass. 315; *Burgess v. Seligman*, 107 U. S. 20, 27 L. Ed. 359, 2 Sup. Ct. Rep. 10; *Butman v. Howell*, 144 Mass. 66, 10 N. E. 504; *Brick v. Brick*, 98 U. S. 514, 25 L. Ed. 256; *Riley v. Hampshire County Nat. Bank*, 164 Mass. 482, 41 N. E. 679; *deed*: *Coffman v. Coffman*, 79 Va. 504; *bill of sale*: *Seavey v. Walker*, 108 Ind. 78, 9 N. E. 347; *Booth v. Robinson*, 55 Md. 419; *Votaw v. Diehl*, 62 Iowa, 676, 13 N. W. 757, 18 N. W. 305; *Howard v. Odell*, 1 Allen (Mass.), 85; *Blanchard v. Fearing*, 4 Allen (Mass.), 118; *Hazard v. Loring*, 10 Cush. (Mass.) 267; *Caswell v. Keith*,

12 Gray (Mass.), 351; *Manufacturers' Bank v. Rugee*, 59 Wis. 221, 18 N. W. 251; *assignment*: *Hazard v. Loring*, 10 Cush. (Mass.) 267; *Caswell v. Keith*, 12 Gray (Mass.), 351; *Booth v. Robinson*, 55 Md. 419; *Marsh v. McNair*, 99 N. Y. 174, 1 N. E. 660; *Gettleman v. Commercial Union Assur. Co.*, 97 Wis. 237, 72 N. W. 627; *Hieronymus v. Glass*, 120 Ala. 46, 23 South. 674; *Trogdon v. Trogdon*, 164 Ill. 144, 45 N. E. 575; *note*: *Clark v. Ducheneau*, 26 Utah, 97, 72 Pac. 331; *insurance policy*: *Dixon v. National Life Ins. Co.*, 168 Mass. 48, 46 N. E. 430.

⁸⁸ *Peugh v. Davis*, 96 U. S. 332, 24 L. Ed. 775.

object of parties in such cases will be considered by a court of equity; it constitutes a ground for the exercise of its jurisdiction, which will always be asserted to prevent fraud or oppression and to promote justice.⁸⁹ The rule that deeds and other instruments, absolute in terms, can be thus transformed into instruments for the security of money is purely an *equitable doctrine*; and it has sometimes been held that in actions at law evidence for this purpose is not admissible.⁹⁰ But in some states such evidence has been held proper in legal actions as well as in those of an equitable nature;⁹¹ and as the differences between legal and equitable procedure become less marked, there will doubtless be a tendency toward the adoption of the same rule of evidence both in legal and in equitable proceedings. We have discussed under another head the mode of proving trusts,⁹² and the rule applies in some jurisdictions that an instrument absolute on its face may have a parol trust, or terms and conditions not expressed therein, ingrafted upon it by verbal testimony so long as the trust is shown with clearness and certainty, but the weight of authority is against it, founded mainly on the statutory enactments that express trusts must be created by writing. This is, of course, irrespective of fraud, accident or mistake.⁹³

⁸⁹ Hughes v. Edwards, 9 Wheat. (U. S.) 489, 6 L. Ed. 142; Russel v. Southard, 12 How. (U. S.) 139, 13 L. Ed. 927; Taylor v. Luther, 2 Sumn. 228, Fed. Cas. No. 13,796; Pierce v. Robinson, 13 Cal. 116.

⁹⁰ Bryant v. Crosby, 36 Me. 562, 58 Am. Dec. 767; Stinchfield v. Milliken, 71 Me. 567; Benton v. Jones, 8 Conn. 186; Reading v. Weston, 8 Conn. 117, 20 Am. Dec. 97; Farley v. Goocher, 11 Iowa, 570; Webb v. Rice, 6 Hill (N. Y.), 219; Bragg v. Massie, 38 Ala. 89, 79 Am. Dec. 82; Belote v. Morrison, 8 Minn. 87; Moore v. Wade, 8 Kan. 380.

⁹¹ Tillson v. Moulton, 23 Ill. 648;

Kent v. Agard, 24 Wis. 378; Emery v. Fugina, 68 Wis. 505, 32 N. W. 236; Odenbaugh v. Bradford, 67 Pa. 96; Moreland v. Barnhart, 44 Tex. 275; Ruffier v. Womack, 30 Tex. 332; Reeve v. Dennett, 137 Mass. 315.

⁹² See § 418 et seq., *ante*.

⁹³ In the following cases parol evidence of the trust was held admissible: Brown v. Isbell, 11 Ala. 1009; Brison v. Brison, 75 Cal. 525, 7 Am. St. Rep. 189, 17 Pac. 689; Smith v. Hope, 51 Fla. 541, 41 South. 69; Rion v. Reeves, 122 La. 650, 48 South. 138; Soggins v. Heard, 31 Miss. 426; Robinson v. McManus, 4 Lans. (N. Y.) 380; Hughes v. Pritchard, 122 N.

§ 449 (454). Rule as to parol evidence not applicable to strangers to the instrument.—We have now to consider the effect of the exclusion of parol evidence with regard to others than the immediate parties. The general rule under discussion does not apply as against strangers to the instrument. Greenleaf thus states the law on the subject: “The rule under consideration is applied only (in suits) between the parties to the instrument, as they alone are to blame if the writing contains what was not intended or omits that which it should have contained. It cannot affect third persons who, if it were otherwise, might be prejudiced by things recited in the writings contrary to the truth through the ignorance, carelessness or fraud of the parties; and who, therefore, ought not to be precluded from proving the truth, however contradictory to the written statements of others.”⁹⁴ Strangers have not assented

C. 59, 29 S. E. 93; *Martin v. Martin*, 43 Or. 119, 72 Pac. 639; *Church v. Ruland*, 64 Pa. 432; *McTeer v. Sheppard*, 1 Bay (S. C.), 461; *Pritchard v. Wallace*, 4 Sneed (Tenn.), 405, 70 Am. Dec. 254; *Whitfield v. Diffie* (Tex. Civ. App.), 105 S. W. 324; *Coffman v. Coffman*, 79 Va. 504; *Rochefoucauld v. Boustead*, 1 Ch. 196, 66 L. J. Ch. 74, 75 L. T., N. S., 502, 45 Wkly. Rep. 272. Now, however, the later decisions in most states hold that parol evidence is inadmissible in such cases: *Smith v. Smith*, 153 Ala. 504, 45 South. 168; *McDonald v. Hooker*, 57 Ark. 632, 22 S. W. 655, 23 S. W. 678; *Kinley v. Kinley*, 37 Colo. 35, 119 Am. St. Rep. 261, 86 Pac. 105; *Verzier v. Convard*, 75 Conn. 1, 52 Atl. 255; *Louisville etc. R. Co. v. Ramsay*, 134 Ga. 107, 67 S. E. 652; *Ryder v. Ryder*, 244 Ill. 297, 91 N. E. 451; *Shaw v. Jones*, 156 Ind. 60, 59 N. E. 166; *Hays v. Marsh*, 123 Iowa, 81, 98 N. W. 604; *Morrall v. Waterson*, 7 Kan. 199; *Holtheide v. Smith*, 24 Ky. Law Rep. 2535, 74 S.

W. 689; *Gerry v. Stimson*, 60 Me. 186; *Clagett v. Hall*, 9 Gill & J. (Md.) 80; *Pillsbury-Washburn Flour Mills Co. v. Kistler*, 53 Minn. 123, 54 N. W. 1063; *Horne v. Higgins*, 76 Miss. 813, 25 South. 489; *Bartlett v. Tinsley*, 175 Mo. 319, 75 S. W. 143; *Hall v. Congdon*, 55 N. H. 104; *Baker v. Baker*, 75 N. J. Eq. 305, 72 Atl. 1000; *Nevius v. Nevius*, 117 App. Div. 236, 101 N. Y. Supp. 1091; *Porter v. Mayfield*, 21 Pa. 263; *Rogers v. Rogers*, 52 S. C. 388, 29 S. E. 812; *Salisbury v. Clarke*, 61 Vt. 453, 17 Atl. 135; *Handlan v. Handlan*, 42 W. Va. 309, 26 S. E. 179; *Whiting v. Gould*, 2 Wis. 552; *Jones v. Van Doren*, 18 Fed. 619.

⁹⁴ *British etc. Mtg. Co. v. Cody*, 135 Ala. 622, 33 South. 832; *Talbot v. Wilkins*, 31 Ark. 411; *Dunn v. Price*, 112 Cal. 46, 44 Pac. 354; *Johnson v. Blackman*, 11 Conn. 342; *Dickey v. Grice*, 110 Ga. 315, 35 S. E. 291; *Needles v. Hanifan*, 11 Ill. App. 303; *Burns v. Thompson*, 91 Ind. 146; *Central Coal etc. Co. v. Good*, 4 Ind.

to the compact, nor can they be heard in a proceeding to set aside or reform it. Hence they are at liberty to show that the written instrument does not disclose the true character of the transaction.⁹⁵ The exception in favor of strangers is to prevent a fraudulent operation of the instrument upon their rights.⁹⁶ Therefore, creditors of one of the parties may introduce parol evidence for the purpose of showing the fraudulent intent which accompanied and characterized the giving of the instrument.⁹⁷ Similarly a person who is suing one of the parties to a sealed instrument upon a cause of action not arising out of the

Ter. 74, 64 S. W. 677; Aultman Engine etc. Co. v. Greenlee, 134 Iowa, 368, 111 N. W. 1007; Livingston v. Heck, 122 Iowa, 74, 94 N. W. 1098; Bank of Horton v. Brooks, 10 Kan. App. 576, 62 Pac. 675; Marks v. Hardy, 117 Ky. 663, 4 Ann. Cas. 814, 73 S. W. 864, 1105; Lyons v. Lawrence, 118 La. 461, 43 South. 51; Lawson v. Mullinix, 104 Md. 156, 64 Atl. 938; Walker Ice Co. v. American Steel etc. Co., 185 Mass. 463, 70 N. E. 937; Kellogg v. Thompson, 142 Mass. 76, 6 N. E. 860; Highstone v. Burdette, 61 Mich. 54, 27 N. W. 852; Current v. Muir, 99 Minn. 1, 108 N. W. 870; National Car Co. v. Cyclone Co., 49 Minn. 125, 51 N. W. 657; Whitney v. Cowan, 55 Miss. 626; Denison v. Aldrich, 114 Mo. App. 700, 91 S. W. 1024; First Nat. Bank v. Tolerton, 5 Neb. (Unof.) 43, 97 N. W. 248; Bank of California v. White, 14 Nev. 373; French v. Westgate, 71 N. H. 510, 53 Atl. 310; Edgerly v. Emerson, 23 N. H. 555, 55 Am. Dec. 207; Shreve v. Crosby, 72 N. J. L. 491, 63 Atl. 333; Folinsbee v. Sawyer, 157 N. Y. 196, 51 N. E. 994; Brown v. Thurber, 77 N. Y. 613; Carden v. McConnell, 116 N. C. 875, 21 S. E. 923; Luther v. Hunter, 7 N. D. 544, 75 N. W. 916; Clapp v. Huron County

Banking Co., 50 Ohio St. 528, 35 N. E. 308; Pacific Biscuit Co. v. Dugger, 42 Or. 513, 70 Pac. 523; Selser's Estate, 141 Pa. 529, 21 Atl. 777; Myers v. Taylor, 107 Tenn. 364, 64 S. W. 719; Randolph v. Junker, 1 Tex. Civ. App. 517, 21 S. W. 55; International etc. R. Co. v. Jones, 41 Tex. Civ. App. 327, 91 S. W. 611; Olmstead v. Oregon Short Line R. Co., 27 Utah, 515, 76 Pac. 557; Fonda v. Burton, 63 Vt. 355, 22 Atl. 594; Bruce v. John L. Roper Lumber Co., 87 Va. 381, 24 Am. St. Rep. 657, 13 S. E. 153; Corbin v. Oriental Trading Co., 32 Wash. 668, 73 Pac. 781; Johnston v. Charles Abresch Co., 123 Wis. 130, 107 Am. St. Rep. 995, 63 L. R. A. 934, 101 N. W. 395; Signa Iron Co. v. Greene, 88 Fed. 207, 59 U. S. App. 555, 31 C. C. A. 477; Central Coke & Coal Co. v. Geo. S. Good & Co., 120 Fed. 793; Wilson v. Hart, 7 Taunt. 295, 2 E. C. L. 295, 129 Eng. Reprint. 118; 1 Greenl. Ev., § 279.

⁹⁵ Clapp v. Huron County Banking Co., 50 Ohio St. 528, 35 N. E. 308.

⁹⁶ Taylor v. Baldwin, 10 Barb. (N. Y.) 582.

⁹⁷ Potts v. Hart, 92 N. Y. 168, 1 N. E. 605.

instrument may show that the instrument was in fact a mere device concocted to mislead outsiders dealing with one or the other of the parties to it, and that it did not truly represent the relations between those parties.⁹⁸ And when the debt secured by a mortgage is incorrectly described or the relation of the parties incorrectly stated, these facts are admissible against a stranger to the instrument.⁹⁹ So it has been held admissible, as between those not parties to the instrument, to show a mistake in the language of the instrument,¹⁰⁰ or that lands described in a conveyance as in one parish were in fact situated in another.¹ On this principle, in an action on an insurance policy the plaintiff was allowed to show that another policy which came in question did not cover the property insured, although so purporting on its face.² There are many other cases which hold that in a controversy between a party to an instrument and a stranger to it, either party may show that the instrument does not speak the truth, and that the general rule does not apply as it does in cases where the controversy arises between the parties to an instrument which they have made the written memorial of their agreement.³ The relation of sureties among them-

⁹⁸ *Sigafus v. Porter*, 84 Fed. 430, 51 U. S. App. 693, 28 C. C. A. 443. For other illustrative cases, see note on "Application of Parol Evidence Rule to Strangers to Contract," to *Allen v. Ruland*, 8 Ann. Cas. 347, in which we have found much useful and well-arranged matter.

⁹⁹ *Bruce v. Roper Lumber Co.*, 87 Va. 381, 24 Am. St. Rep. 657, 13 S. E. 153; *Lee v. Adsit*, 37 N. Y. 78; *Powell v. Young*, 51 Ala. 518.

¹⁰⁰ *Fuller v. Acker*, 1 Hill (N. Y.), 473.

¹ *Rex v. Cheadle*, 3 Barn. & Ad. 833, 110 Eng. Reprint, 306.

² *Lowell Mfg. Co. v. Safeguard Fire Ins. Co.*, 88 N. Y. 591.

³ *Venable v. Thompson*, 11 Ala. 147; *Powell v. Young*, 51 Ala. 518;

Gates v. Steele, 48 Ark. 539, 4 S. W. 53; *Talbot v. Wilkins*, 31 Ark. 411; *Bickerdike v. State*, 144 Cal. 681, 78 Pac. 270; *Hussman v. Wilke*, 50 Cal. 250; *Chicago etc. R. Co. v. Beach*, 29 Ill. App. 157; *Northern Assur. Co. v. Chicago Mut. Bldg. Assn.*, 198 Ill. 474, 64 N. E. 979; *Burns v. Thompson*, 91 Ind. 146; *Marks v. Hardy*, 117 Ky. 663, 4 Ann. Cas. 814, 72 S. W. 864, 1105; *Strader v. Lambeth*, 7 B. Mon. (Ky.) 589; *Horn v. Hanson*, 56 Minn. 43, 22 L. R. A. 617, 57 N. W. 315; *Cottle v. Sydnor*, 10 Mo. 763; *Crockett v. Miller*, 2 Neb. (Unof.) 292, 96 N. W. 491; *Bank of California v. White*, 14 Nev. 373; *Libby v. Mt. Monadnock etc. Co.*, 67 N. H. 587, 32 Atl. 772; *Furbush v. Goodwin*, 25 N. H. 425; *Shreve v.*

selves and to the principal obligors may be established by parol, inasmuch as the purpose of the written instrument is not to show the contract of its signers among themselves, but is merely to show their liability to the holder of the instrument.⁴ It is to be observed, however, that the *right of a stranger to vary a written contract by parol is limited to rights which are independent of the instrument.*⁵ So that where one, although not a party to the instrument, bases his claim upon it, and seeks to render it effective in his favor as against the other party to the action, by enforcing a right originating in the relation established by it, or which is founded upon it, the parol evidence rule applies.⁶ Even in respect to strangers, the writing itself is the best evidence *of its contents*, and must, if possible, be produced.⁷

§ 450 (455). Parol evidence to identify and apply the subject matter.—It is a doctrine which, perhaps, has its most frequent application in respect to wills, but which is by no means confined to such instruments, that parties have the right to claim that the court in construing written instruments shall, if necessary, *place itself in the situation of the parties to the instrument* by means of extrinsic evidence in order that the true meaning of the language may

Crosby, 72 N. J. L. 491, 63 Atl. 333; McMaster v. President etc. of Ins. Co., 55 N. Y. 222, 14 Am. Rep. 239; Folinsbee v. Sawyer, 157 N. Y. 196, 51 N. E. 994; Reynolds v. Magness, 24 N. C. 26; Pacific Biscuit Co. v. Dugger, 42 Or. 513, 70 Pac. 523; Carmack v. Drum, 32 Wash. 236, 73 Pac. 377, 785; Signa Iron Co. v. Greene, 88 Fed. 207, 31 C. C. A. 477.
⁴ Mansfield v. Edwards, 136 Mass. 15, 49 Am. Rep. 1, and cases collected in note to Allen v. Ruland, 8 Ann. Cas. 349.

⁵ Wodock v. Robinson, 148 Pa. 503, 24 Atl. 73; Browne, Parol Ev., § 28.

⁶ Schultz v. Plankinton Bank, 141 Ill. 116, 33 Am. St. Rep. 290, 30 N. E. 346; Sayre v. Burdick, 47 Minn. 367, 50 N. W. 245; Minneapolis etc. R. Co. v. Home Ins. Co., 55 Minn. 242, 22 L. R. A. 390, 56 N. W. 815; Current v. Muir, 99 Minn. 1, 108 N. W. 870; Schneider v. Kirkpatrick, 80 Mo. App. 145; Selchow v. Stymus, 26 Hun (N. Y.), 145; Hankinson v. Riker, 10 Misc. Rep. 185, 30 N. Y. Supp. 1040; Wodock v. Robinson, 148 Pa. 503, 24 Atl. 73.

⁷ Clow v. Brown, 134 Ind. 287, 33 N. E. 1126; Browne, Parol Ev., § 29.

be ascertained.⁸ Extrinsic evidence may be necessary for this purpose to *identify the subject matter* to which the instrument refers; and in such case the admission of parol evidence is not forbidden by the general rule under discussion.⁹ To use the familiar illustration, if an estate is

⁸ *Guy v. Sharp*, 1 Mylne & K. 602, 39 Eng. Reprint, 804; *Brown v. Thorndike*, 15 Pick. (Mass.) 388; *Sargent v. Towne*, 10 Mass. 303; *Doe v. Provoost*, 4 Johns. (N. Y.) 61, 4 Am. Dec. 249; *Webster v. Atkinson*, 4 N. H. 21; *Ely v. Adams*, 19 Johns. (N. Y.) 313; *Etting v. United States Bank of United States*, 11 Wheat. (U. S.) 59, 6 L. Ed. 419; *Bagley v. Saranac Co.*, 135 N. Y. 626, 32 N. E. 132; *Kretschmer v. Hard*, 18 Colo. 223, 32 Pac. 418. See § 475 et seq., *post*.

⁹ *Chattahoochie R. Co. v. Pilcher*, 163 Ala. 401, 51 South. 11; *Edwards v. Bender*, 121 Ala. 77, 25 South. 1010; *R. H. Burmister etc. Co. v. Empire etc. Co.*, 8 Ariz. 158, 71 Pac. 961; *Paragould v. Lawson*, 88 Ark. 478, 115 S. W. 379; *House v. McMullen*, 9 Cal. App. 664, 100 Pac. 344; *Ontario Deciduous Fruit Growers Assn. v. Cutting Fruit Packing Co.*, 134 Cal. 21, 86 Am. St. Rep. 231, 53 L. R. A. 681, 66 Pac. 28; *Murray v. Hobson*, 10 Colo. 66, 13 Pac. 921; *Hildreth v. Hartford etc. Tramway Co.*, 73 Conn. 631, 48 Atl. 963; *Mason v. Spalding*, 18 D. C. (7 Mackey) 115; *Davis v. Horne*, 54 Fla. 563, 127 Am. St. Rep. 151, 45 South. 476; *Hartwell Grocery Co. v. Mountain City Mill Co.*, 8 Ga. App. 727, 70 S. E. 48; *Johnson v. McKay*, 121 Ga. 763, 49 S. E. 757; *Kelly v. Leachman*, 3 Idaho, 672, 34 Pac. 813, 3 Idaho, 629, 33 Pac. 44; *Gage v. Cameron*, 212 Ill. 146, 72 N. E. 204; *Webster v. Fleming*, 178 Ill. 140, 52 N. E. 975; *Bulkley v. Devine*, 127 Ill. 406, 20 N. E. 16; *Burke v.*

Mead, 159 Ind. 252, 64 N. E. 880; *Turner v. Gonzales*, 3 Ind. Ter. 649, 64 S. W. 565; *Wolf v. Wolf* (Iowa), 131 N. W. 882; *Van Husen v. Omaha B. & T. R. Co.*, 118 Iowa, 366, 92 N. W. 47; *Cummins v. Riordan*, 84 Kan. 791, 115 Pac. 568; *Wood v. Lee*, 5 T. B. Mon. (Ky.) 50; *Bradley v. Davis*, 128 La. 686, 55 South. 17; *Bagley v. Rose Hill Sugar Co.*, 111 La. 249, 35 South. 539; *Haskell v. Tukesbury*, 92 Me. 551; 69 Am. St. Rep. 529, 43 Atl. 500; *Dronenburg v. Harris*, 108 Md. 597, 71 Atl. 81; *McManus v. Donohue*, 175 Mass. 308, 56 N. E. 291; *Ensley v. Coolbaugh*, 160 Mich. 299, 125 N. W. 279; *Ham v. Johnson*, 55 Minn. 115, 56 N. W. 584; *Cole v. Cole*, 99 Miss. 335, 54 South. 953; *Skinker v. Haagsma*, 99 Mo. 208, 12 S. W. 659; *Amonett v. Montague*, 63 Mo. 201; *Woods v. Hart*, 50 Neb. 497, 70 N. W. 53; *Gill v. Ferrin*, 71 N. H. 421, 52 Atl. 558; *New Jersey Produce Co. v. Gluck*, 79 N. J. L. 115, 74 Atl. 443; *Crossen v. Carr*, 70 N. J. L. 393, 57 Atl. 158; *Studwell v. Bush Co.*, 126 App. Div. 818, 111 N. Y. Supp. 293; *Petrie v. Trustees*, 158 N. Y. 458, 53 N. E. 216; *Harris v. Allen*, 104 N. C. 86, 10 S. E. 127; *Robbins v. Klein*, 60 Ohio St. 199, 54 N. E. 94; *Ferguson v. Blackwell*, 8 Okl. 489, 58 Pac. 647; *Reinstein v. Roberts*, 34 Or. 87, 75 Am. St. Rep. 564, 55 Pac. 90; *King v. New York & C. Gas Coal Co.*, 204 Pa. 628, 54 Atl. 477, 22 Morr. Min. Rep. 515; *Lee v. Stone*, 21 R. I. 123, 42 Atl. 717; *Kennedy v. Gramling*, 33 S. C. 367, 26 Am. St. Rep.

correctly described as "Blackacre," extrinsic evidence is necessary to identify the land intended by that description. The same rule has been adopted in this country as to any similar phrase of description.¹⁰ For example, in a Massachusetts case certain land was described in a contract as a certain parcel of real estate known as the "Aldrich farm," and described in another certain deed. The court held that the evidence as to the subject matter, the situation of the parties and the circumstances under which the agreement was made were admissible to make plain the meaning of the parties.¹¹ And parol evidence is admissible not

676, 11 S. E. 1081; *Turner v. Jackson* (Tenn. Ch. App.), 63 S. W. 511; *Dorris v. King* (Tenn.), 54 S. W. 683; *Cockrell v. Egger* (Tex. Civ. App.), 99 S. W. 568; *Tate v. Rose*, 35 Utah, 229, 99 Pac. 1003; *Rugg v. Hale*, 40 Vt. 138; *South etc. R. Co. v. Mann*, 108 Va. 557, 62 S. E. 354; *Newman v. Buzard*, 24 Wash. 225, 64 Pac. 139; *Moses Land Scrip etc. Co. v. Lumber Co.*, 56 Wash. 529, 106 Pac. 207; *Excelsior Wrapper Co. v. Messinger*, 116 Wis. 549, 93 N. W. 459; *Wussow v. Hase*, 108 Wis. 382, 84 N. W. 433; *United States v. Peck*, 102 U. S. 64, 26 L. Ed. 46; *Doolan v. Carr*, 125 U. S. 618, 31 L. Ed. 844, 8 Sup. Ct. Rep. 1228; *New Zealand Bank v. Simpson*, App. Cas. 182, 69 L. J. P. C. 22, 82 L. T., N. S., 102, 48 Wkly. Rep. 591; *Page v. Green*, 3 Ont. W. R. 494; *Pugsley v. Gillespie*, 14 N. Brunsw. 195. See § 475 et seq., *post*. See the late cases: *Mills v. Jackson*, 19 Cal. App. 695, 127 Pac. 655; *Southern Bell etc. Co. v. Covington* (Ga.), 77 S. E. 382; *Temple v. Benson* (Mass.), 100 N. E. 63; *Holden v. Crolly*, 153 App. Div. 254, 138 N. Y. Supp. 23; *State Board v. Remick* (N. C.), 76 S. E. 627; *Zarate v. Villareal* (Tex. Civ. App.), 155 S. W. 328; *Veve y Diaz v. Sanchez*, 226 U. S. 234, 57

L. Ed. —, 33 Sup. Ct. Rep. 86; *In re Raney*, 202 Fed. 1000.

¹⁰ *Doe ex dem. Preedy v. Holtom*, 4 Ad. & E. 76, 81, 111 Eng. Reprint, 716; *Doe ex dem. Gore v. Langton*, 2 Barn & Ad. 680, 109 Eng. Reprint, 1296; *Doolittle v. Blakesley*, 4 Day (Conn.), 265, 4 Am. Dec. 218; *Venable v. McDonald*, 4 Dana (Ky.), 336; *Whitaker v. Sumner*, 9 Pick. (Mass.) 308; *Jackson ex dem. Van Vechten v. Sill*, 11 Johns. (N. Y.) 201, 6 Am. Dec. 363; *Peart v. Brice*, 152 Pa. 277, 25 Atl. 537; *Vejar v. Mound City Co.*, 97 Cal. 659, 32 Pac. 713; *Baker v. Hall*, 158 Mass. 361, 33 N. E. 612.

¹¹ *Aldrich v. Aldrich*, 135 Mass. 153. This rule has been applied to *identify a mill* and its appurtenances where it is conveyed by general description: *Scheible v. Slagle*, 89 Ind. 323; *Hall v. Benner*, 1 Penr. & W. (Pa.) 402, 21 Am. Dec. 394; the Presbyterian church intended in a grant of conveyance when there were two Presbyterian churches in the city: *Wyandotte County Com. v. Wyandotte Presbyterian Church*, 30 Kan. 620, 1 Pac. 109; to show that two different descriptions refer to the same land: *Stewart v. Chadwick*, 8 Iowa, 463; *McGregor v. Brown*, 5

only to identify the subject matter, but to give effect to a written instrument by *applying* it to its proper subject matter, and for that purpose extrinsic evidence may be admitted to prove the circumstances under which it was made, whenever, without the aid of such evidence, such application could not be made in the particular case.¹² As

Pick. (Mass.) 170; Webster v. Blount, 39 Mo. 500; New Jersey Produce Co. v. Gluck, 79 N. J. L. 115, 74 Atl. 443; to identify land described in an instrument by metes and bounds: Robertson v. McNeil, 12 Wend. (N. Y.) 578; Scott v. Sheakly, 3 Watts (Pa.), 50; to identify a monument named in a deed: McAfferty v. Conover's Lessee, 7 Ohio St. 99, 70 Am. Dec. 57; to locate a highway referred to in a deed: Rich v. Rich, 16 Wend. (N. Y.) 663; to show what is included by the term "farm" used in a deed: Madden v. Tucker, 46 Me. 367; to show what buildings are included in a building described in a policy of insurance as "D's car factory": Blake v. Exchange Mutual Ins. Co., 12 Gray (Mass.), 265; and generally the meaning of general terms in an instrument: Doe v. Martin, 4 Barn. & Ad. 785, 110 Eng. Reprint, 646; Doe v. Burt, 1 Term Rep. 704, 99 Eng. Reprint, 1330; Castle v. Fox, L. R. 11 Eq. 542; Ropps v. Barker, 4 Pick. (Mass.) 239; Farrar v. Stackpole, 6 Greenl. (Me.) 154, 19 Am. Dec. 201; to identify the particular animals or other personal property sold under a written contract of sale: Marshall v. Gridley, 46 Ill. 247; Rugg v. Hale, 40 Vt. 138; Haller v. Parrott, 82 Iowa, 42, 47 N. W. 396; Clark v. Crawfordville Co., 125 Ind. 277, 25 N. E. 288; Edwards v. Wisconsin Investment Co., 124 Wis. 315, 102 N. W. 575; to identify particular wood covered by a chattel mortgage: Sargeant v. Sol-

berg, 22 Wis. 132; to identify piano included in chattel mortgage: Swayne v. Tillotson, 148 Iowa, 501, 127 N. W. 667; to identify extent of land described as "Hot springs district": Arkansas Retail etc. Assn. v. Lester (Ark.), 126 S. W. 712; as "Morrell Ranch": Morrell v. San Tomas etc. Packing Co., 13 Cal. App. 305, 109 Pac. 632; as "my farm containing 40 acres": Burns v. Witter, 56 Or. 368, 108 Pac. 129 (in the last-named case are to be found many other useful illustrations, as "in yard"); Messenger v. German Am. Ins. Co., 47 Colo. 448, 107 Pac. 643.

¹² Bradley v. The Washington etc. Packet Co., 13 Pet. (U. S.) 89, 10 L. Ed. 72. See, also, the following illustrative cases: Guilmartin v. Wood, 76 Ala. 204; Colonial etc. Mtg. Co. v. Lee, 95 Ark. 253, 129 S. W. 84; Chapman v. Zoberlein, 152 Cal. 216, 92 Pac. 188; Robbins v. Wolcott, 28 Conn. 396; Whelan v. McCullough, 4 App. Cas. (D. C.) 58; State Historical Assn. v. Silverman, 6 Ga. App. 560, 65 S. E. 293; Allen v. Kitchen, 16 Idaho, 133, 18 Ann. Cas. 914, 100 Pac. 1052; Kamphouse v. Gaffner, 73 Ill. 453, 2 Morr. Min. Rep. 25; Stockwell v. Whitehead, 47 Ind. App. 423, 94 N. E. 736; Mori v. Howard, 143 Ky. 480, 136 S. W. 904; Baker v. Windham, 13 Me. 74; Bigelow v. Capen, 145 Mass. 270, 13 N. E. 896; Tuthill v. Katz, 163 Mich. 618, 128 N. W. 757; Cannon v. Moody, 78 Minn. 68, 80 N. W. 842; Shivers v. Farmers' etc. Ins. Co., 99 Miss. 744,

a general rule, parol evidence is always admissible to ascertain the value and qualities of the subject to which an instrument refers;¹³ and if any of the essential terms of the contract, when applied to the transaction concerning which the parties dealt, becomes ambiguous, oral evidence is relevant and admissible, not to construct a new agreement, but to ascertain what they understood by the one already made.¹⁴ It must always be remembered, however, that such parol evidence to explain or identify is admissible only when something in the contract forms the foundation to which the explanation is to refer. The parol evidence cannot be admitted to create an essential part of the contract which in turn would call for parol explanation. The test of the admissibility of evidence *dehors* the deed is involved in the question whether it tends to so explain some descriptive word or expression contained in it as to show that such phraseology, otherwise of doubtful import, contains in itself, with such explanation, an identification of the land conveyed. The rule is founded on the maxim, "*Id certum est quod certum reddi potest.*"¹⁵ Thus a deed that contains no descriptive word or phrase sufficient, with the aid of competent extrinsic testimony, to identify and determine all of its boundary lines, will not pass any estate to the bargainee therein named.¹⁶ It sometimes happens that the extrinsic matter may be contained

55 South. 965; *Caldwell v. Sisson*, 150 Mo. App. 547, 131 S. W. 140; *Dinsmore v. Winegar*, 57 N. H. 382; *Fuller v. Carr*, 33 N. J. L. 157; *Almgren v. Dutilh*, 5 N. Y. 28; *Morgan v. Spangler*, 14 Ohio St. 102; *Wilson v. Sale*, 41 Pa. Sup. Ct. 566; *Snodgrass v. Ward*, 3 Hayw. (Tenn.) 40; *Ellis v. Cochran*, 8 Tex. Civ. App. 510, 28 S. W. 243; *Adams v. Janes*, 83 Vt. 334, 75 Atl. 799; *Edmunds v. Barrow*, 112 Va. 330, 71 S. E. 544; *Snooks v. Wingfield*, 52 W. Va. 441, 44 S. E. 277; *Klueter v. Joseph Schlitz Brewing Co.*, 143 Wis. 347, 128 N. W. 43; *Reed v. Merrimac*

River Locks etc., 8 How. (U. S.) 274, 12 L. Ed. 1077.

¹³ *Greenl. Ev.*, § 286.

¹⁴ *Smith v. Vose etc. Piano Co.*, 194 Mass. 193, 120 Am. St. Rep. 539, 9 L. R. A., N. S., 966, 80 N. E. 527. See, also, *Cary v. Thompson*, 1 Daly (N. Y.), 35; *American Copying Co. v. Thompson* (Tex. Civ. App.), 110 S. W. 777.

¹⁵ *Blow v. Vaughan*, 105 N. C. 198, 10 S. E. 891.

¹⁶ *Blow v. Vaughan*, *supra*. See, also, *Harrelson v. Harper*, 170 Ala. 119, 54 South. 517; *Reeves v. Allgood & Co.*, 133 Ga. 835, 67 S. E. 82;

in another writing—for example, one referred to in the main instrument—and that discrepancies are found between the two documents, as where a different description is found in a petition for partition and the judgment on which it is founded, or a difference between such a petition and the deeds. In such cases parol evidence is admissible to reconcile the different descriptions if they are shown to relate to the same thing.¹⁷ And in applying the description to the subject matter, if it appears that the description is not in all respects accurate, it may to a certain extent be rejected, and what remains alone regarded, if that be sufficient to identify it.¹⁸

§ 451 (456). Same—Use of property—Identifying parties.—It is under the same rule that evidence is sometimes admitted to show how property has been formerly used or where it has been kept, as these circumstances may throw light upon the meaning of the instrument. For example, if the question arises whether a bequest of stock is specific or pecuniary, the court will not only look to the context of the will and the terms of the gift, but will ascertain by extrinsic evidence as well, the state of the testator's funded property.¹⁹ Stephen thus states in very general terms the rule which governs in respect to the subjects discussed in this and the following section: "In order to ascertain

Haller v. Parrott, 82 Iowa, 42, 47 N. W. 996; Kernan v. Baham, 45 La. Ann. 799, 13 South. 155; Ham v. Johnson, 51 Minn. 105, 52 N. W. 1080; Crawford v. McLaurin, 83 Miss. 265, 35 South. 209, 949; Tucker v. Field, 51 Miss. 191; Grimes v. Bryan, 149 N. C. 248, 63 S. E. 106; Lowe v. Harris, 112 N. C. 472, 22 L. R. A. 379, 13 S. E. 539; Conkling v. Shelley, 28 N. Y. 360, 84 Am. Dec. 348; Ferguson v. Blackwell, 8 Okl. 489, 58 Pac. 647; Peart v. Brice, 152 Pa. 277, 25 Atl. 537; Mitchell v. Robinson (Tex. Civ. App.), 136 S. W. 501;

Tate v. Rose, 35 Utah, 229, 99 Pac. 1003; Meade v. Gilfoyle, 64 Wis. 18, 24 N. W. 413.

¹⁷ Stewart v. Chadwick, 8 Iowa, 463; Wood v. Le Baron, 8 Cush. (Mass.) 471; Miller v. Miller, 89 N. C. 402; Couch v. Texas etc. R. Co., 99 Tex. 464, 90 S. W. 860.

¹⁸ Bigelow v. Capen, 145 Mass. 270, 13 N. E. 896; Dodge v. Potter, 18 Barb. (N. Y.) 193.

¹⁹ Colpoys v. Colpoys, Jac. 451; Attorney General v. Grote, 2 Russ. & M. 699.

the relation of the words of a document to facts, every fact may be proved to which it refers, or may probably have been intended to refer, or which identifies any person or thing mentioned in it."²⁰ The court will sometimes even call in aid the acts done by the parties to the instrument as affording a clue to their intentions;²¹ and will regard the practical construction placed upon a contract by the parties.²² On the same principle parol evidence is admissible to identify the parties. It has long been well settled that, if the description of the person intended is applicable to more than one person, extrinsic evidence may be introduced for the purpose of explaining the real meaning of the instrument, and of applying the same to the person intended. Thus, an administration, which *prima facie* would be deemed to be granted on the estate of the father may be shown to be granted on that of the son, where their names are alike;²³ and if a deed is made to the son having the same name as the father, it may be shown by parol which one was intended.²⁴ And when a name in a writing is not the correct one, parol evidence is often received to show that it was the result of some unintentional act, omission or error and to identify the person actually intended.²⁵ Such evidence *does not con-*

²⁰ Reynold's Steph. Ev., art. 91; *Scrags v. Hill*, 37 W. Va. 706, 17 S. E. 185. Other parties same name: *Newbury v. Railway Co.*, 133 N. C. 45, 45 S. E. 356.

²¹ *Crislip v. Cain*, 19 W. Va. 438.

²² See § 453, *post*.

²³ *Moseley v. Mastin*, 37 Ala. 216. See § 476 et seq., *post*.

²⁴ *Coit v. Starkweather*, 8 Conn. 289. Where a fund was deposited in a bank in the name of the depositor, "in trust for Sarah," the beneficiary may be identified by parol: *Bartlett v. Remington*, 59 N. H. 364. It may be shown that a *certificate of deposit* made by a guardian in his own name was for the benefit of his ward: *Beas-*

ley v. Watson, 41 Ala. 234; that the plaintiff is the person named in a deed delivered to him, although there is an *inaccuracy* in the name in such deed: *Mobberly v. Mobberly*, 60 Md. 376. Where a deed was made to "an association of persons" without naming all of them, the court may ascertain by parol evidence what persons compose the association: *Pratt v. California Mining Co.*, 24 Fed. 869.

²⁵ *Henderson v. Hackney*, 23 Ga. 383, 68 Am. Dec. 529; *Wolff v. Elliott*, 68 Ark. 326, 57 S. W. 1111; *Williams v. Carpenter*, 42 Mo. 327; *Scanlan v. Wright*, 13 Pick. (Mass.) 523, 25 Am. Dec. 344; *Beauvais v. Wall*, 14 La. Ann. 199; *Peabody v.*

tradict the instrument, *but only explains* the transaction.²⁶ The addition of the *official character* of the person to the name signed to a contract is such an indication of the representative character of such signer as will warrant a resort to parol evidence to prove extrinsic circumstances, such as to whom the consideration passed, and to whom credit was given, the *agent's authority* and similar facts by which the respective liability of the principal and agent may be determined.²⁷ The misnomer of a corporation in a grant or obligation does not destroy or defeat the grant or obligation, nor prevent a recovery upon it in the true name, provided the corporation designed and intended by the parties to the instrument be shown by proper and apt averments and proof.²⁸

Brown, 10 Gray (Mass.), 45; Coit v. Starkweather, 8 Conn. 289; Wakefield v. Brown, 38 Minn. 361, 8 Am. St. Rep. 671, 37 N. W. 788; Salmer v. Lathrop, 10 S. D. 216, 72 N. W. 570; Stokes v. Riley, 29 Tex. Civ. App. 373, 68 S. W. 703; Cleveland v. Burnham, 64 Wis. 347, 25 N. W. 407. See § 485 et seq., *post*. See excellent note on "*Idem sonans*": Thornily v. Prentice, 100 Am. St. Rep. 322. See, also, as to misnomer, the Canadian case of Polushie v. Zacklinski, 37 S. C. R. 177.

²⁶ Lamar v. Minter, 13 Ala. 31; Lafferty v. Lafferty, 10 Ark. 268; Taylor v. McCowen, 154 Cal. 798, 99 Pac. 351; Riley v. Gourley, 9 Conn. 154; Hicks v. Ivey, 99 Ga. 648, 26 S. E. 68; Malleable Iron Range Co. v. Pusey, 148 Ill. App. 344; Simons v. Marshall, 3 G. Greene (Iowa), 502; Robert v. Boulat, 9 La. Ann. 29; Andrews v. Dyer, 81 Me. 104, 16 Atl. 405; Mobberly v. Mobberly, 60 Md. 376; Milford v. Uxbridge, 130 Mass. 107; Reed v. Gage, 33 Mich. 179; Skinker v. Haagsma, 99 Mo. 208, 12 S. W. 659; Hubatka v. Meyerhofer, 79 N. J. L. 264, 75 Atl. 454; Me-

Arthur v. Soule, 5 Hun (N. Y.), 63; La Vie v. Tooze, 43 Or. 590, 74 Pac. 210; Baldwin v. Bank of Newbury, 1 Wall. (U. S.) 234, 17 L. Ed. 534; Salmer v. Lathrop, 10 S. D. 216, 72 N. W. 570; White v. Simonton, 34 Tex. Civ. App. 464, 79 S. W. 621; Michigan State Bank v. Peck, 28 Vt. 200, 65 Am. Dec. 234; Cleveland v. Burnham, 64 Wis. 347, 25 N. W. 407. See the Canadian cases: Brown v. Howland, 9 Ont. R. 48; Kitchen v. Dolan, 9 Ont. R. 432. See the late cases: Pacific Improvement Co. v. Jones, 164 Cal. 260, 128 Pac. 404; Kenner v. Decatur etc. Assn., 87 Kan. 293, 123 Pac. 739; Thomas Gordon Malting Co. v. Bartels Brewing Co., 206 N. Y. 528, 100 N. E. 457, 461; Abney v. Citizens' Nat. Bank (Tex. Civ. App.), 152 S. W. 734; Child v. Gillis Const. Co. (Utah), 129 Pac. 356; Clark v. Talbott (W. Va.), 77 S. E. 523.

²⁷ Smith v. Alexander, 31 Mo. 193; Michigan State Bank v. Peck, 28 Vt. 200, 65 Am. Dec. 234.

²⁸ Upper Alloways Inhabitants v. String, 5 Halst. (10 N. J. L.) 323, citing many illustrative cases; Malle-

§ 452 (457). Same—Further illustrations—General rule.

On the same general principle, parol evidence is often received to show the *capacity* in which a person acts, the *real relation of parties* to a writing, and that persons not named therein are in fact interested, so that the terms of the instrument are not otherwise varied.²⁹ Any doubt or ambiguity on the face of the instrument as to the capacity in which one signing intended to bind himself, if at all, may be resolved by parol evidence as to the circumstances surrounding his signature. Thus where a contract did not contain in the body of it the name of the person charged under it, but beneath the acceptance appeared the letters "O.K.," followed by his signature, parol evidence was admitted to explain the capacity in which he signed it.³⁰ But where there is nothing in the agreement showing any consideration affecting such a party, or inducing him to become a party, or showing such relations to either of the

able Iron Range Co. v. Pusey, 244 Ill. 184, 91 N. E. 51, where parol proof was admitted to show that the "Beaver Dam Malleable Iron Range Co." was identical with the plaintiff.

²⁹ Curran v. Holland, 141 Cal. 437, 75 Pac. 46; Howard v. Adkins, 167 Ind. 184, 78 N. E. 665; Baldwin v. Hill, 97 Iowa, 586, 66 N. W. 889; Ragsdale v. Ragsdale, 105 La. 405, 29 South. 906; Morrison v. Baechtold, 93 Md. 319, 48 Atl. 926; Herrick v. Edwards, 106 Mo. App. 633, 81 S. W. 466; Slade v. Squier, 133 App. Div. 666, 118 N. Y. Supp. 278; Threlkeld v. Steward, 24 Okl. 403, 138 Am. St. Rep. 888, 103 Pac. 630; First Nat. Bank v. Rusk Pure Ice Co. (Tex. Civ. App.), 136 S. W. 89; Moore v. Williams, 26 Tex. Civ. App. 142, 62 S. W. 997. Extrinsic evidence is admissible to identify the parties to an instrument or record: Garwood v. Garwood, 29 Cal. 514; Shirley v. Fearn, 33 Miss. 653, 69 Am. Dec. 375; Sawyer v. Boyle, 21 Tex. 28; Walker v. Wells,

25 Ga. 141, 71 Am. Dec. 164; Simons v. Marshall, 3 G. Greene (Iowa), 502; Tuggle v. McMath, 38 Ga. 648; that other defendants are interested in the contract: Woodhouse v. Duncan, 106 N. Y. 527, 13 N. E. 334 (but the contrary was held where the contract was under seal: Briggs v. Partridge, 64 N. Y. 357, 21 Am. Rep. 617); that goods sold at auction were actually bid off by two persons, although the memorandum mentions but one: Scott v. McKinney, 98 Mass. 344; that a party to an instrument or record acted in *fiduciary capacity*: Johnson v. Callan, 19 Colo. 168, 41 Am. St. Rep. 224, 34 Pac. 905; Graham v. Troth, 69 Kan. 861, 77 Pac. 92; Marek v. Minneapolis Trust Co., 74 Minn. 538, 77 N. W. 428; Schmittler v. Simon, 114 N. Y. 176, 11 Am. St. Rep. 621, 21 N. E. 162.

³⁰ Electric Carriage etc. Co. v. Herman, 67 Misc. Rep. 394, 123 N. Y. Supp. 231.

actual parties as would lead to the inference that he intended to become surety for, or joint promisor with, one rather than the other, he is *prima facie* not bound. Nor may parol evidence be resorted to to furnish the basis of an inference one way or the other.³¹ Where a third person merely annexes his name to a contract which in the body of it does not mention him, and which is in itself a complete contract between other parties who sign it and are mentioned in it, such third person does not thereby become a party to the efficient and operative parts of the contract. His signature in such case can only be regarded as an expression of his assent to the act of the parties in making the contract, and may perhaps operate as an estoppel against his assertion in the future of an adverse interest in the subject matter of the agreement.³² The doctrine, however, does not go the length of admitting parol evidence to show that one executing a contract under seal made directly with him was in reality the agent of another not named nor referred to in the contract.³³ A deed made to a firm by the firm name, instead of the individual members of the firm, is not for that reason void. It is a latent ambiguity which may be explained and supplied by parol testimony.³⁴ Although the grantees in a deed are de-

³¹ *Blackmer v. Davis*, 128 Mass. 538.

³² *Lancaster v. Roberts*, 144 Ill. 213, 33 N. E. 27; *Henry O. Shepard Co. v. Freeman*, 40 Mont. 144, 105 Pac. 484. A party may, under certain circumstances, bind himself to the performance of the obligations of a contract, even though he may not be mentioned in it. For illustration: Where a party, though not mentioned in an agreement to deliver property, signed it as such, it was held that he intended to bind himself jointly with the actual party: *Clark v. Rawson*, 2 Denio (N. Y.), 135. One who signed an appeal bond was held to manifest his intention to be bound,

though he was not mentioned in the body of the instrument: *Ex parte Fulton*, 7 Cow. (N. Y.) 484. This rule has been recognized and applied by other courts: *Williams v. Greer's Admrs.*, 4 Hayw. (Tenn.) 235; *Ahrend v. Odiorne*, 125 Mass. 50, 28 Am. Rep. 199; *Danker v. Atwood*, 119 Mass. 146.

³³ *Furculi v. Bittner*, 69 Misc. Rep. 112, 125 N. Y. Supp. 36.

³⁴ *La Fayette Land Co. v. Caswell*, 59 Fla. 544, 138 Am. St. Rep. 166, 52 South. 140. So although a deed made to A. & Co. vests the legal title in A., the individual members of the firm may be identified by extrinsic evidence: See *Ketchum v. Barber*, 2 Cal.

scribed therein as husband and wife, it may be shown by parol evidence that such is not the fact; and where a woman is named in a deed with the surname of a man not her husband, the deed operates as a conveyance to her and parol evidence of her identity is admissible. It was the name she adopted for the purpose of the deed, and the evidence is permissible to show the facts.³⁵ So in matters of *agency*, the contract of the agent is the contract of the principal, and he may sue or be sued thereon, though not named therein; and notwithstanding the rule of law that an agreement reduced to writing may not be contradicted or varied by parol, it is well settled that the principal may show that the agent who made the contract in his own name was acting for him. This proof does not contradict the writing; it only explains the transaction. But the agent, who binds himself, will not be allowed to contradict the writing by proving that he was contracting only as agent, while the same evidence will be admitted to charge the principal.³⁶ In order to charge the real principal, it is always competent, in whatever form a parol or written contract is executed by an agent, to ascertain by evidence *dehors* the instrument who is the principal; whether it purports to be the contract of an agent or is made in the name of the agent as principal.³⁷ So that, while if one signs an agreement without indicating in any way that he acts as *agent for a principal*, he cannot, in order to escape liability, prove by parol

Unrep. 698, 12 Pac. 251; Percifull v. Platt, 36 Ark. 456; and generally on the subject, Jones on Real Property, § 244.

³⁵ Hubatka v. Meyerhofer, 79 N. J. L. 264, 75 Atl. 454; Scanlan v. Wright, 13 Pick. (Mass.) 523, 25 Am. Dec. 344; David v. Williamsburg City Fire Ins. Co., 83 N. Y. 265, 38 Am. Rep. 418. The last-mentioned case was that of the assumption of a fictitious name.

³⁶ Ford v. Williams, 21 How. (U. S.) 287, 16 L. Ed. 36. "Such evi-

dence," says Baron Parke, "does not deny that the contract binds those whom on its face it purports to bind; but shows that it also binds another, by reason that the act of the agent is the act of the principal": See Higgins v. Senior, 8 Mees. & W. 843, 11 L. J. Ex. 190.

³⁷ Exchange Bank v. Hubbard, 62 Fed. 112, 10 C. C. A. 295; Byington v. Simpson, 134 Mass. 169, 45 Am. Rep. 314; Briggs v. Partridge, 64 N. Y. 357, 21 Am. Rep. 617.

that he was merely acting for another,³⁸ yet such agency may be proved for the purpose of binding the principal, or for the purpose of giving the principal the benefit of the contract.³⁹ In the one case such testimony is rejected because it clearly contradicts the written instrument; in the other it is received because the testimony does not change the written instrument, but merely identifies the person who is charged or benefited thereby. In a Massachusetts case it was held admissible, where a contract was signed "B by C," to show by parol that B was only an agent of A, and thus to charge A as principal, although there was no intimation of such agency in the contract.⁴⁰ Where notes were signed by the individual members of a firm, each with his own name, instead of the firm's signature, parol evidence was admitted to show that they were partnership notes and executed for a debt of the firm.⁴¹ In matters of *suretyship* the capacity may be equally disclosed by parol. Where a charter-party had been signed by a corporation not named in it, it was held that there was a presumption that the signature of the corporation was for some purpose, and that as it would hardly be as a witness, it was a signature either as principal or surety.⁴² One who signs un-

³⁸ Higgins v. Senior, 8 Mees. & W. 834, 11 L. J. Ex. 190; Sowerby v. Butcher, 2 Car. & M. 371, 4 Tyr. 320, 3 L. J. Ex. 80; Stackpole v. Arnold, 11 Mass. 27, 6 Am. Dec. 150; Shankland v. Washington, 5 Pet. (U. S.) 390, 8 L. Ed. 166; Osgood v. Bauder, 82 Iowa, 171, 47 N. W. 1001.

³⁹ Paterson v. Gandasequi, 15 East, 62, 104 Eng. Reprint, 768; Calder v. Dobell, L. J. 40 C. P. 224, L. R. 6 C. P. 486, 25 L. T. 129; Higgins v. Senior, 8 Mees. & W. 834, 11 L. J. Ex. 190; Garrett v. Handley, 4 Barn. & C. 664, 7 D. & R. 144, 1 Car. & P. 483; Bateman v. Phillips, 15 East, 272, 104 Eng. Reprint, 847; Weston v. McMillan, 42 Wis. 567; Northern Bank v. Lewis, 78 Wis. 475, 47 N. W. 834; Curran v. Holland, 141 Cal. 437,

75 Pac. 46. As to parol evidence that one of the persons who signed an instrument relating to real property was agent for undisclosed principal, see note to Walker v. Hafer, 24 L. R. A., N. S., 315. See, also, note to Mertz v. Hubbard, 8 L. R. A., N. S., 733, on same subject, where instrument shows signatory acting for undisclosed principal.

⁴⁰ Lerner v. Johns, 9 Allen (Mass.), 419.

⁴¹ Mock v. Stoddard, 177 Fed. 611, 101 C. C. A. 237. As to parol evidence in action by indorsee on indorsement made merely to transfer title, see First Nat. Bank v. Reinman, 93 Ark. 376, 125 S. W. 443.

⁴² Downs v. Wall, 176 Fed. 657, 100 C. C. A. 209.

der seal a promissory note, apparently as maker, can, when sued thereon by the payee, show by parol that he is surety only, and that at the time the note was executed the payee had knowledge of this fact.⁴³ It will be seen that most of the cases cited in this and the foregoing section are examples of the principle which has been stated in the following language: "If the language of the instrument be alike applicable to each of several persons, parcels of land, species of goods, monuments, boundaries, writings or circumstances, or if the terms be vague and general, or have divers meanings, parol evidence will always be admissible of any *extrinsic circumstances* tending to show what person or persons or what things were intended by the party, or to ascertain his meaning in any other respect."⁴⁴

§ 453 (458, 459). **Proof of surrounding facts.**—Courts, in the construction of contracts, look to the language employed, the subject matter and the surrounding circumstances. They are never shut out from the same light which the parties enjoyed when the contract was executed, and, in that view, they are entitled to place themselves in the same situation as the parties who made the contract, so as to view the circumstances as they viewed them, and so to judge of the meaning of the words and of the correct application of the language to the things described.⁴⁵

⁴³ Hardy v. Boyer, 7 Ga. App. 742, 67 S. E. 205. In the same court, in James v. Calder, 7 Ga. App. 707, 67 S. E. 1125, it was held that where several parties are sued on a check, one as maker and the others as indorsers, the payee can show by parol that those signing apparently as indorsers are in fact sureties. If it appears that those defendants, who apparently signed as indorsers, did so, not for the purpose of transferring the title for value, but merely for the purpose of strengthening the credit of

the drawer of the check, they would be liable as sureties, and would not be entitled to notice of nonpayment and protest to make them liable. To the same effect is Vandeventer v. Davis, 92 Ark. 604, 123 S. W. 766.

⁴⁴ Tayl. Ev., 10th ed., § 1195; First National Bank v. North, 2 S. D. 480, 51 N. W. 96; Neal v. Reams, 88 Ga. 298, 14 S. E. 617.

⁴⁵ Add. Cont. 846; Merriman v. United States, 107 U. S. 437, 27 L. Ed. 530, 2 Sup. Ct. Rep. 536; Nash v. Towne, 5 Wall. (72 U. S.) 689, 18 L.

Hence it is frequently necessary, in order to construe written instruments, to receive evidence of other accompanying facts than those which serve to apply the instrument to the subject matter or the persons intended. There is a class of cases which has carried the rule somewhat further than is indicated in the last three sections. These cases hold that under some circumstances, not only the situation and relation of the parties, but their *acts, negotiations and statements*, may be proved as part of the surrounding facts which throw light on the transaction. It would be impossible to prescribe by general rule the precise limits within which, under the ever-varying facts, such testimony may be admitted. The circumstances under which such testimony is admissible will be best understood from instances of adjudicated cases. Thus, in construing a memorandum of sale, the Massachusetts court held that, although parol evidence is not admissible to prove that other terms than those expressed are agreed to or that the parties have other intentions than those to be inferred from it, yet that it is competent to prove not only the relations of the parties and the nature and conditions of the property, but also the acts of the parties at and subsequent to the date of the contract as a means of showing their own understanding of its terms. The same rule has been adopted by other courts in the interpretation of written instruments.⁴⁶ A

Ed. 527; *Barreda v. Silsbee*, 21 How. (62 U. S.) 146, 16 L. Ed. 86; *Atlantic Terra Cotta Co. v. Masons' Supply Co.*, 180 Fed. 332, 103 C. C. A. 462; *Shore v. Wilson*, 9 Clark & F. 569, 8 Eng. Reprint, 450.

⁴⁶ *Knight v. New England Worsted Co.*, 2 Cush. (Mass.) 271; *Block v. Columbian Ins. Co.*, 42 N. Y. 393; *Watson v. Kirby*, 112 Ala. 436, 20 South. 624; *Excelsior Needle Co. v. Smith*, 61 Conn. 56, 23 Atl. 693; *Case Mfg. Co. v. Soxman*, 138 U. S. 431, 34 L. Ed. 1019, 11 Sup. Ct. Rep. 360; *Birch v. Depeyster*, 1 Stark. 167; *Bradley v. Washington Packet Co.*, 13

Pet. (U. S.) 89, 10 L. Ed. 72; *Bainbridge v. Wade*, L. J. 20 Q. B. 7, 16 Q. B. 89, 117 Eng. Reprint, 808. Evidence of surrounding circumstances has been held admissible to show what was meant by the expression "five hundred dollars in an order" on *W. & T.: Hinnemann v. Rosenback*, 39 N. Y. 98; by the expression "\$50 for inserting a business card on 200 copies of his advertising chart": *Stoops v. Smith*, 100 Mass. 63, 97 Am. Dec. 76, 1 Am. Rep. 85; by the expression "to be paid out of the last payment": *Proctor v. Hartigan*, 139 Mass. 554, 2 N. E. 99; that a note payable in

recent South Dakota case is also illustrative of this proposition.^{46a} The contract in that case provided for the construction of a flowing well, but failed to, in any manner, specify the amount of water to be discharged from said well. For the purpose of understanding what the term "flowing well" was intended to mean in the contract, it was clearly proper for the defendant to allege and prove the representations of the plaintiff, and the circumstances under which the contract was made, and the matter to which it related for the purpose of explaining what was meant by the term "flowing well." The court held that

"dollars" executed in Alabama during the Civil War while the Confederate currency was in use, should in fact be paid in such currency: *Thorington v. Smith*, 8 Wall. (U. S.) 1, 19 L. Ed. 361; *Confederate Note Case*, 19 Wall. (U. S.) 548, 22 L. Ed. 196; *Donley v. Tindall*, 32 Tex. 43, 5 Am. Rep. 234; *Austin v. Kinsman*, 13 Rich. Eq. (S. C.) 259; *Craig v. Pervis*, 14 Rich. Eq. (S. C.) 150; *Hightower v. Maull*, 50 Ala. 495. Other late illustrative cases are: *Chattahoochie R. Co. v. Pilcher*, 163 Ala. 401, 51 South. 11; *Weil v. Lester*, 94 Ark. 195, 126 S. W. 712; *Hale v. Milliken*, 5 Cal. App. 344, 90 Pac. 365; *Messenger v. German-American Ins. Co.*, 47 Colo. 448, 107 Pac. 643; *Watters v. Rome & N. R. Co.*, 133 Ga. 641, 66 S. E. 884; *Sponberg v. Bank*, 15 Idaho, 671, 99 Pac. 712; *Fuchs & Lang Mfg. Co. v. Kittredge & Co.*, 146 Ill. App. 350; *Driscoll v. Penrod (Ind.)*, 95 N. E. 313; *Maxwell v. McCall*, 145 Iowa, 687, 124 N. W. 760; *Heskett v. Border Queen Mill & Elevator Co.*, 81 Kan. 356, 105 Pac. 432; *Jennings v. Puffer*, 203 Mass. 534, 89 N. E. 1036; *Kessler v. Clays (Mo. App.)*, 125 S. W. 799; *Burns v. Witter*, 56 Or. 368, 103 Pac. 129; *Cook v. Hensler*, 57 Wash. 392, 107 Pac. 178; *Harstad v. Olson*, 57 Wash. 264, 106 Pac. 741; *Hancox*

v. Appleton, 49 Misc. Rep. 110, 96 N. Y. Supp. 1029; *Nichols v. New York etc. Tel. etc. Co.*, 126 App. Div. 184, 110 N. Y. Supp. 325; *Winfree v. Winfree (Tex. Civ. App.)*, 139 S. W. 36; *Klueter v. Schlitz Brew. Co.*, 143 Wis. 347, 128 N. W. 43; *Barkhausen v. Chicago etc. R. Co.*, 142 Wis. 292, 124 N. W. 649, 125 N. W. 680; *Tweedie Trading Co. v. Laguna Co.*, 178 Fed. 368; *Lilienthal v. Cartwright*, 173 Fed. 580, 97 C. C. A. 530; *United States v. Bethlehem Steel Co.*, 205 U. S. 105, 51 L. Ed. 731, 27 Sup. Ct. Rep. 450. In England, similar evidence has been admitted to show that a guaranty was intended to be a continuing one: *Heffield v. Meadows*, L. R. 4 C. P. 596, 20 L. T. 746; to show occupancy of premises at the time of making the lease as affecting the question as to whether they were wholly or partly included in the lease: *Doe v. Burt*, 1 Term Rep. 701, 99 Eng. Reprint, 1330; to show the acts, dealings and situation of parties to an instrument in determining whether a given instrument created a joint tenancy or a tenancy in common: *Harrison v. Barton*, 30 L. J. Ch. 213, 1 J. & H. 287, 7 Jur., N. S., 19.

^{46a} *De Pue v. McIntosh*, 26 S. D. 42, 127 N. W. 532.

since the object of the defendant, which was known to the plaintiff, was to secure a supply of water sufficient for a large band of cattle and horses running upon his ranch, it was perfectly proper and necessary for the defendant to bring before the jury all the circumstances connected with the transaction for the purpose of informing them as to the meaning of the term "flowing well" as used in the contract, and clearly where the plaintiff understood fully the purposes for which the well was to be drilled, his representations that he would complete a well that would produce sufficient water to supply such cattle and horses was admissible. It is a familiar rule that where the language of the written instrument is ambiguous or indefinite, *the practical interpretation of the parties* may be proved, and is often entitled to great weight. Practical construction placed by the parties in interest upon doubtful or ambiguous terms in a contract will exercise a great, and sometimes a controlling, influence in determining the construction to be placed thereon by the courts.⁴⁷ Thus where a business of flour and feed dealers was sold, the vendors contracted not to enter into or engage in a similar business "at Lake Geneva or vicinity," and subsequently engaged in such business in small towns, which they urged were not in the vicinity of Lake Geneva. They carried on business without complaint by the purchaser who, under the impression, and apprehending from their course of business, that they were about to engage in the business indirectly

⁴⁷ *Burton v. Douglass*, 141 Wis. 110, 18 Ann. Cas. 734, 123 N. W. 631; *Ganson v. Madigan*, 15 Wis. 144, 82 Am. Dec. 659; *Dent v. North American S. S. Co.*, 49 N. Y. 390; *Ellmaker v. Franklin Fire Ins. Co.*, 5 Pa. 183; *Bedford v. Flowers*, 11 Humph. (Tenn.) 242; *Consolidated Dental Mfg. Co. v. Holliday*, 131 Fed. 384; *Bray v. Loomer*, 61 Conn. 456, 23 Atl. 831; *Wilson v. Carrico*, 140 Ind. 533, 40 N. E. 50, 49 Am. St. Rep. 213; *Dodd v. Witt*, 139 Mass.

63, 52 Am. Rep. 700, 29 N. E. 475; *Gregory v. Lake Linden*, 130 Mich. 368, 90 N. W. 29; *Phetteplace v. British etc. Ins. Co.*, 23 R. I. 26, 49 Atl. 33; *Wussow v. Hase*, 108 Wis. 382, 84 N. W. 433. A vague and general conversation, not admissible: *Ingraham v. Mariner*, 194 Ill. 269, 62 N. E. 609. See, also, the Canadian cases: *Christie v. Burnett*, 10 Ont. R. 609; *Gregoire v. St. Charles etc. Commrs.*, Q. R. 29 S. C. 215.

at Lake Geneva itself, remonstrated thereat, but without impugning their right to carry on business at the other small towns referred to. The court held that a practical construction had been put upon the contract, and especially the word "vicinity" in it, by the parties, and the course of conduct pursued by them was consistent with the view that each construed the word "vicinity" as not precluding the establishment of the businesses in the small towns referred to.⁴⁸ Where a question arose under a lease as to whether a building erected thereon belonged to the lessor or lessee, parol evidence of the subsequent dealings of the parties was competent.⁴⁹ The purpose for which such evidence is received must always be borne in mind—to elucidate the meaning of the words used and not to import into the writing an unexpressed intention; and in its admission, the line, which separates evidence which aids the interpretation of what is in the instrument from direct evidence of intention independent of the instrument, must be kept steadily in view,—the duty of the court being to declare the meaning of what is written in the instrument, not of what was intended to be written.⁵⁰

§ 454 (460). Such evidence only received when the language is of doubtful import.—From the preceding sections it will have been gathered that the discussion has been concerning the interpretation of contracts and other instruments in those cases only where the contents of the documents are not inherently sufficiently plain and clear. Extrinsic evidence is not admissible for the direct purpose of creating ambiguity in the language of a written contract which is plain, viewed exclusively, but that does not militate against the rule that extrinsic evidence is proper to

⁴⁸ *Burton v. Douglass, supra.*

⁴⁹ *Searle v. Roman Catholic Bishop*, 203 Mass. 493, 25 L. R. A., N. S., 992, 17 Ann. Cas. 340, 89 N. E. 809.

⁵⁰ 2 Phill. Ev., ed. of 1849, 277, 281, 293, 294; 4 Phill. Ev. 495, 528-534, 551, 571; Greenl. Ev., 277,

288; Wigram, 59, 138; 1 Spence Eq. Jur. 555-557. See, also, *Doe d. Hughes v. Wilkinson*, 35 Ala. 453; *Tucker v. Seaman's Aid Society*, 7 Met. (Mass.) 188; *Rosborough v. Hemphill*, 5 Rich. Eq. (S. C.) 95.

apply a contract, plain in its literal sense, to the subject with which it deals, and, if the effect is to disclose ambiguity, like evidence to show the circumstances characterizing the making of the contract.⁵¹ The rule has frequently been laid down in the adjudicated cases that no evidence of the language employed by the parties in making the contract can be given in evidence except that which is furnished by the writing itself.⁵² It has been seen, however, from the examples already given that in numerous cases much greater latitude has been given to the introduction of parol evidence than is implied in the statement just given. It will be found that nearly all, if not all, the illustrations given in the last section recognize the general rule that the written contract must govern, and that proof of the acts, situation and statements of the parties can have no other effect than to ascertain the meaning of the parties *as expressed in the writing*.⁵³ It will also be found that in the cases where evidence of the declarations of parties has been received the language of the writing *admitted of more than one construction*, either upon its face or as explained by the parol evidence concerning the surrounding facts or identifying the subject matter or the parties. Where the language of the writing does thus admit of more than one construction, whether its faultiness is attributable to want of punctuation,⁵⁴ abbreviated or elliptical phrases or sentences,⁵⁵ or otherwise subject to abnormal construction,⁵⁶ there is considerable authority for the view that such language may be construed by the court in the light of the statements and acts of the parties contempo-

⁵¹ *Klueter v. Joseph Schlitz Brewing Co.*, 143 Wis. 347, 128 N. W. 43.

⁵² *Dent v. North American Steamship Co.*, 49 N. Y. 390; *Ellmaker v. Franklin Fire Insurance Co.*, 5 Pa. 183; *Bedford v. Flowers*, 11 Humph. (Tenn.) 242.

⁵³ See articles, 9 Alb. Law Jour. 117, 281.

⁵⁴ *Graham v. Hamilton*, 27 N. C. 428.

⁵⁵ *Boykin v. Bank of Mobile*, 72 Ala. 262, 47 Am. Rep. 408; *Murphy v. Schwaner*, 84 Conn. 420, 80 Atl. 295; *McEnery v. McEnery*, 110 Iowa, 718, 80 N. W. 1071; *Head v. Miller*, 45 Minn. 446, 48 N. W. 192; *Wingate v. Mechanics' Bank*, 10 Pa. 104.

⁵⁶ *Brown v. Markland*, 16 Utah, 360, 67 Am. St. Rep. 629, 52 Pac. 597.

aneous with and subsequent to the contract; in other words, that such language and statement of the parties may be used *to explain the ambiguity*.⁵⁷ Ambiguity in a written contract calling for construction may arise as well from words plain in themselves, but uncertain when applied to the subject matter of the contract, as from words which are uncertain in their literal sense;⁵⁸ and it may be discovered on cross-examination without precluding its explanation,⁵⁹ but it must relate to a subject treated of in the paper, and must arise out of words used in treating that subject. Such an ambiguity never arises out of what was not written at all, but only out of what was written so blindly and imperfectly that its meaning is doubtful.⁶⁰ But

⁵⁷ Cassells' Mills v. Strater Bros. Grain Co., 166 Ala. 274; 51 South. 969; Payne v. Neuval, 155 Cal. 46, 99 Pac. 476; Hardwick v. McClurg, 16 Colo. App. 354, 65 Pac. 405, 21 Morr. Min. Rep. 412; Adams v. Turner, 73 Conn. 38, 46 Atl. 247; Whelan v. McCullough, 4 App. Cas. (D. C.) 58; Atlanta etc. R. Co. v. Thomas, 60 Fla. 412, 53 South. 510; Forsyth Mfg. Co. v. Castlen, 112 Ga. 199, 81 Am. St. Rep. 28, 37 S. E. 485; Chicago Auditorium Assn. v. Corporation etc. Bldg., 244 Ill. 532, 18 Ann. Cas. 253, 91 N. E. 665; Steele v. Michigan Buggy Co. (Ind. App.), 95 N. E. 435; Wilts v. Mulhall, 102 Iowa, 458, 71 N. W. 418; Peters v. McVey, 59 Kan. 775, 52 Pac. 896; Patterson v. Garret, 7 J. J. Marsh. (Ky.) 112; McLeroy v. Duckworth, 13 La. Ann. 410; Ladd v. Dillingham, 34 Me. 316; Parks v. Parks, 19 Md. 323; Yorston v. Brown, 178 Mass. 103, 59 N. E. 654; Tut-hill v. Katz, 163 Mich. 618, 128 N. W. 757; King v. Merriman, 38 Minn. 47, 35 N. W. 570; Wheless v. Meyer-Schmidt Grocery Co., 140 Mo. App. 572, 120 S. W. 708; Fidelity Mut. F. Ins. Co. v. Murphy, 4 Neb. (Unof.) 578, 95 N. W. 702; Sullivan

v. Visconti, 69 N. J. L. 452, 55 Atl. 1133; Southampton v. Jessup, 173 N. Y. 84, 65 N. E. 949; Colgate v. Latta, 115 N. C. 127, 26 L. R. A. 321, 20 S. E. 388; Boyes v. Masters, 17 Okl. 460, 89 Pac. 198; Ruhnke v. Aubert, 58 Or. 6, 113 Pac. 38; Foster v. McGraw, 64 Pa. 464; Thomas Mach. Co. v. Voelker, 23 R. I. 441, 50 Atl. 838; Welborn v. Dixon, 70 S. C. 108, 3 Ann. Cas. 407, 49 S. E. 232; Taylor v. Neblett, 4 Heisk. (Tenn.) 491; Hueske v. Broussard, 55 Tex. 201; Halverson v. Walker, 38 Utah, 264, 112 Pac. 804; Young v. Young, 59 Vt. 342, 10 Atl. 528; Richardson v. Planters' Bank, 94 Va. 130, 26 S. E. 413; Allenberg v. Wainwright, 62 Wash. 234, 113 Pac. 585; Newman v. Kay, 57 W. Va. 98, 4 Ann. Cas. 39, 68 L. R. A. 908, 49 S. E. 926; Chicago etc. R. Co. v. Chicago etc. R. Co., 113 Wis. 161, 87 N. W. 1085, 89 N. W. 180; Crittenden v. Cobb, 156 Fed. 535.

⁵⁸ Klueter v. Joseph Schlitz Brewing Co., *supra*.

⁵⁹ Rodger v. Toilettes Co., 37 Misc. Rep. 779, 76 N. Y. Supp. 940.

⁶⁰ Trustees etc. of Southampton v. Jessup, 173 N. Y. 84, 65 N. E. 949.

it must be borne in mind that, although declarations of the parties may in some cases be received to explain contracts or words of doubtful meaning, yet *no other words can be added* to or substituted for those of the writing. The courts are not at liberty to speculate as to the general intention of the parties, but are charged with the duty of ascertaining the meaning of the written language. It is no doubt true that, with the aid of the proper extrinsic evidence, instruments are construed and made effective which could not otherwise be construed to have any effect at all; and in these cases a very different construction is given from that which would follow from the bare inspection of the writing. But the court cannot give effect to any intention which is not expressed by the language of the instrument, when examined in the light of facts that are properly before the court.⁶¹ For still stronger reason such evidence *cannot be received to contradict* the clear and settled meaning of the contract.⁶² It is only, therefore, in the exceptional cases referred to that the statement at the time of execution of the contract and prior negotiations between the parties will be received. These exceptions have been dealt with at length under their appropriate headings.

§ 455 (461, 462). Proof of meaning of words.—A distinction is often made between that testimony which is offered to contradict a written instrument and that which is offered merely to explain or to assist in construing the document. It is a familiar principle that the court may

⁶¹ Farmers' Loan & Trust Co. v. Commercial Bank of Racine, 15 Wis. 424, 82 Am. Dec. 689; Jones v. Swearingen, 42 S. C. 58, 19 S. E. 947; Naughton v. Elliott, 68 N. J. Eq. 259, 59 Atl. 869; McAfferty v. Conover, 7 Ohio St. 99, 70 Am. Dec. 57; Griffin v. Hall, 115 Ala. 482, 22 South. 162. Matters which appear in the writing, not to be excluded by parol evidence: Lawrence v. Com-

stock, 124 Mich. 120, 82 N. W. 808; King v. New York & Cleveland Gas Coal Co., 204 Pa. 628, 54 Atl. 477, 22 Morr. Min. Rep. 515.

⁶² The Delaware, 14 Wall. (U. S.) 579, 20 L. Ed. 779; Gilbert v. Moline Plough Co., 119 U. S. 491, 30 L. Ed. 476, 7 Sup. Ct. Rep. 305; Corse v. Peck, 102 N. Y. 513, 7 N. E. 810; Elofrson v. Lindsay, 90 Wis. 203, 63 N. W. 89.

ascertain the situation of the parties to a contract and all the surrounding circumstances; whenever this may be necessary to interpret or construe the writing in question or to apply the contract to the proper subject matter. It has long been settled that if the language of the writing is such that the court does not understand it, evidence may be received to ascertain the real meaning. For example, if the writing is in a foreign language,⁶³ if technical words are used or if there are any expressions which at the time of the contract had gained a definite meaning generally or by local usage, extrinsic evidence may be received to enable the court to understand such meaning.⁶⁴ It is on this principle that, in a great variety of cases in England and in this country, the courts have received testimony as to the meaning of words and phrases in written instruments; and that such testimony has not been held repugnant to the general rule under discussion. It will be seen in some of the cases that the words used were of a technical character, or that they were words having a local meaning; and in other cases, while the words had a common or popular meaning, they also had a limited meaning as used in some locality or some branch of business.⁶⁵ In many of the

⁶³ *Linney v. Wood*, 66 Tex. 22, 17 S. W. 244; *Erusha v. Tomash*, 98 Iowa, 510, 67 N. W. 390; *Commonwealth Title Ins. etc. Co. v. Coleman*, 205 Pa. 535, 55 Atl. 320.

⁶⁴ *Shore v. Wilson*, 9 Clark & F. 355; *Birch v. Depeyster*, 1 Stark. 210, 4 Camp. 385; *Sheldon v. Benham*, 4 Hill (N. Y.), 129, 40 Am. Dec. 271; *Commonwealth v. Morgan*, 107 Mass. 199; *City of Atlanta v. Schmeltzer*, 83 Ga. 609, 10 S. E. 543; *Scott v. Neeves*, 77 Wis. 305, 45 N. W. 421; *Clay v. Field*, 138 U. S. 464, 34 L. Ed. 1044, 11 Sup. Ct. Rep. 419; *Converse v. Wead*, 142 Ill. 132, 31 N. E. 314 (meaning of abbreviations used in the record). See notes, *Willmering v. McGaughey*, 6 Am.

Rep. 678-682; *Sweeney v. Thomason*, 42 Am. Rep. 679; *Ferguson v. Rafferty*, 6 L. R. A. 42.

⁶⁵ Parol evidence has been allowed to show the commercial meaning of the terms "cotton in bales": *Taylor v. Briggs*, 2 Car. & P. 525, M. & M. 28; "in the month of October": *Chaurand v. Angersteine*, Peake, 43; "two next months": *Bissell v. Beard*, 28 L. T. 740; "duly honored": *Lucas v. Groning*, 7 Taunt. 164, 129 Eng. Reprint, 66; "Baltic sea": *Uhde v. Warlters*, 3 Camp. 16, 13 R. R. 737; "bale": *Gorrissen v. Perrin*, 2 Com. B., N. S., 681, 27 L. J. C. P. 29, 3 Jur., N. S., 867; "depart with convoy": *Lethulier's Case*, 2 Salk. 443, 91 Eng. Reprint, 384; "loading off-

cases cited the claim was made that the meaning of the words was so plain that there could be but one conclusion as to the intention, but in such cases it was held that where the evidence showed an ambiguity in the meaning, the court might receive evidence to remove the doubt. The authority for the reception of such evidence is undoubted. With

shore" in a marine policy: *Johnson v. Northwestern Nat. Ins. Co.*, 39 Wis. 87; "assist" as used in making up trains: *Memphis Ry. Co. v. Graham*, 94 Ala. 545, 10 South. 283; "at and from" in an insurance policy: *Vallance v. Dewar*, 1 Camp. 503, 10 R. R. 738; "British weight," in a charter-party: *Goddard v. Bulow*, 1 Nott & McC. (S. C.) 45, 9 Am. Dec. 663; "Bankers" and "Mod" in sculptor's will: *Goblet v. Beechey*, 3 Sim. 24, 57 Eng. Reprint, 910; "thousand": *Smith v. Wilson*, 3 Barn. & Ad. 728, 110 Eng. Reprint, 266; "good custom cowhide": *Wait v. Fairbanks*, *Brayt.* (Vt.) 77; "weeks" as used in a theatrical contract: *Grant v. Maddox*, 15 Mees. & W. 737, 16 L. J. Ex. 227; "farm" and "homestead farm": *Locke v. Rowell*, 47 N. H. 46; "coppered ship," in a policy of insurance: *Hazard v. Marine Ins. Co.*, 1 Sum. (U. S.) 218, Fed. Cas. No. 6282; "per foot": *Ford v. Tirrell*, 9 Gray (Mass.), 401, 69 Am. Dec. 297; "per square yard": *Walls v. Bailey*, 49 N. Y. 464, 10 Am. Rep. 407 (as used in plastering); "Canada money": *Thompson v. Sloan*, 23 Wend. (N. Y.) 71, 35 Am. Dec. 546; "cargo": *Allegre v. Maryland Ins. Co.*, 2 Gill & J. (Md.) 136, 20 Am. Dec. 424; "north" as used in a deed: *Jenny Lind Co. v. Bower*, 11 Cal. 194, 5 Morr. Min. Rep. 589; "team": *Ganson v. Madigan*, 15 Wis. 144, 82 Am. Dec. 659; "dollars": *Thorington v. Smith*, 8 Wall. (U. S.) 1, 19 L. Ed. 361; Con-

federate Note Case, 19 Wall. (U. S.) 548, 22 L. Ed. 196; *Austin v. Kinsman*, 13 Rich. Eq. (S. C.) 259; *Craig v. Pervis*, 14 Rich. Eq. (S. C.) 150; *Hightower v. Maull*, 50 Ala. 495; *Donley v. Tindall*, 32 Tex. 43, 5 Am. Rep. 234; "months": *Jolly v. Young*, 1 Esp. 186; "freight": *Peisch v. Dickson*, Fed. Cas. No. 10,911, 1 Mason (U. S.), 9; *Lewis v. Marshall*, 7 Man. & G. 729, 135 Eng. Reprint, 293; "barrels," in a contract for petroleum: *Miller v. Stevens*, 100 Mass. 518, 97 Am. Dec. 123, 1 Am. Rep. 139; "product of hogs": *Stewart v. Smith*, 28 Ill. 397; "hard-pan": *Blair v. Corby*, 37 Mo. 313; "cost": *Gray v. Harper*, Fed. Cas. No. 5716, 1 Story, 574; "your account": *Walrath v. Thompson*, 4 Hill (N. Y.), 200; "winter-strained lamp oil": *Hart v. Hammett*, 18 Vt. 127; that "horn chains" were made partly of hoof horn: *Swett v. Shumway*, 102 Mass. 365, 3 Am. Rep. 471; "to be discharged in fourteen days": *Cochran v. Retberg*, 3 Esp. 121; that sarsaparilla was not a "root" within the meaning of a policy of insurance: *Coit v. Commercial Ins. Co.*, 7 Johns. (N. Y.) 385, 5 Am. Dec. 282; that by the understanding of the trade, "furs" were not included in the phrase "skins and hides": *Astor v. Union Ins. Co.*, 7 Cow. (N. Y.) 202; that in a contract for the sale of goods the phrase "with all faults" has a specific meaning: *Whitney v. Boardman*, 118 Mass. 242; that the phrases "satisfaction

regard to *technical* terms, where a term of art is employed, or a word connected with some department of the natural world, which has become technical and popular in its use among scientific men and men of letters, a court, when called upon to give a construction to such words, may avail itself of parol testimony to ascertain the technical and popular use of the word.⁶⁶ When *local terms or phrases*

due from man to man" and authorizing a friend to make "necessary arrangements" contained in a letter meant a challenge to a duel: Commonwealth v. Pope, 3 Dana (Ky.), 418; "accepted": Colgate v. Latta, 115 N. C. 127, 26 L. R. A. 321, 20 S. E. 388; "account": Waldheim v. Miller, 97 Wis. 300, 72 N. W. 869; "artesian": Hattiesburg Plumb. Co. v. Carmichael, 80 Miss. 66, 31 South. 536; "duebill": Andrews v. Robertson, 111 Wis. 334, 87 N. W. 190, 87 Am. St. Rep. 870, 54 L. R. A. 673; "due diligence": Bartley v. Phillips, 165 Pa. 325, 30 Atl. 842, 18 Morr. Min. Rep. 145; "inch of water": Jackson Mill Co. v. Chandos, 82 Wis. 437, 52 N. W. 759; "necessary signals and switchmen": Louisville & N. R. Co. v. Illinois C. R. Co., 174 Ill. 448, 51 N. E. 824; "to work a street": In re Curtis-Castle Arbitration, 64 Conn. 501, 42 Am. St. Rep. 200, 30 Atl. 769; "subject to strikes": Hesser-Milton-Renalian Coal Co. v. La Crosse Fuel Co., 114 Wis. 654, 90 N. W. 1094; "warehouse": Fireman's Fund Ins. Co. v. Ins. Co., 2 Cal. App. 690, 84 Pac. 253; "dangers of the river": McClure v. Cox, 32 Ala. 617, 70 Am. Dec. 552; "spitting of blood": Singleton v. St. Louis Mut. Ins. Co., 66 Mo. 63, 27 Am. Rep. 321; "shipping instructions": Higgins Mill etc. Co. v. Gossett (Tex. Civ. App.), 125 S. W. 927; "traveling expenses": Wilcox v. Baer, 85 Mo. App. 587.

⁶⁶ Mouton v. Louisville etc. R. Co., 128 Ala. 537, 29 South. 602; Gardiner v. McDonogh, 147 Cal. 313, 81 Pac. 964; Harlow v. Parsons Lumber etc. Co., 81 Conn. 572, 71 Atl. 734; Hinotte v. Brigman, 44 Fla. 589, 33 South. 303; Louisville etc. R. Co. v. Southern Flour etc. Co., 136 Ga. 538, 71 S. E. 884; Steidtmann v. Lay Co., 234 Ill. 84, 84 N. E. 640; Grasmier v. Wolf (Iowa), 90 N. W. 813; Aetna Indemnity Co. v. Waters, 110 Md. 673, 73 Atl. 712; Hebb v. Welsh, 185 Mass. 335, 70 N. E. 440; MacKinnon Boiler etc. Co. v. Central Mich. Land Co., 156 Mich. 11, 120 N. W. 26; Winona v. Thompson, 24 Minn. 199; Moran Bolt etc. Mfg. Co. v. St. Louis Car Co., 210 Mo. 715, 109 S. W. 47; Cambers v. Lowry, 21 Mont. 478, 54 Pac. 816, 19 Morr. Min. Rep. 539; Hartwell v. Camman, 10 N. J. Eq. 128, 64 Am. Dec. 448; Moore Stave Co. v. Mosson Co., 126 N. Y. Supp. 79; Willis v. Jarrett Constr. Co., 152 N. C. 100, 67 S. E. 265; Barnes v. Leidigh, 46 Or. 43, 79 Pac. 51; Pub. Co. v. Stetson, 41 Pa. Sup. Ct. 560; Forbes & Co. v. Pearson, 87 S. C. 67, 68 S. E. 964; Fry v. Provident Sav. L. Assur. Soc. (Tenn. Ch. App.), 38 S. W. 116; St. Martin v. Thrasher, 40 Vt. 460; Chicago etc. R. Co. v. Chicago etc. R. Co., 113 Wis. 161, 87 N. W. 1085, 89 N. W. 180; Vandevort v. Thompson-Starrrett Co., 182 Fed. 875.

are employed where they are in use, the presumption is, that the parties understood their meaning, and employed them according to their local signification. And to give effect to the agreement, the court must know the sense in which they were employed.⁶⁷ The rule applies to abbreviations and the unusual use of letters, signs, and characters, and to peculiar combinations of letters and figures, where used with reference to some particular business in relation to which the contract is made.⁶⁸ If a contract is in cipher, parol evidence is admissible to explain the meaning and give the words their signification.⁶⁹

§ 456 (463). **Same—Intention—Meaning of words and phrases.**—Although some of the cases, which have been referred to as illustrations of the rule that the surrounding facts and circumstances may be proved in evidence, may be deemed to have trenched unduly upon the ancient rule, it will be found that even those decisions recognized that written contracts cannot in general be varied by parol. The real difficulty arises in determining in each case whether the language of the instrument is ambiguous as shown, either by the context or by the circumstances attending the making of the same. If *no such ambiguity exists, no extrinsic evidence can be received* to show the secret intention of the parties or that any other than the natural and primary meaning of the language used was intended.⁷⁰

⁶⁷ Myers v. Walker, 24 Ill. 133; Steyer v. Dwyer, 31 Iowa, 20; Kneisley Lumber Co. v. Edward B. Stoddard Co., 113 Mo. App. 306, 88 S. W. 774; Abraham v. Oregon etc. R. Co., 37 Or. 495, 82 Am. St. Rep. 779, 64 L. R. A. 391, 60 Pac. 899; Lovering v. Miller, 218 Pa. 212, 67 Atl. 209.

⁶⁸ 1 Greenl. Ev., 13th ed., § 282; Cole v. Leach, 47 Ind. App. 341, 94 N. E. 577; Jaqua v. Witham, 106 Ind. 545, 7 N. E. 314; Mouton v. Louisville etc. R. Co., 128 Ala. 537,

29 South. 602; Reeves & Co. v. Cress, 80 Minn. 466, 83 N. W. 443; Dages v. Brake, 125 Mich. 64, 84 Am. St. Rep. 556, 83 N. W. 1039; White v. McMillan, 114 N. C. 349, 19 S. E. 234; Penn Tobacco Co. v. Leman, 109 Ga. 428, 34 S. E. 679.

⁶⁹ Wingate v. Mechanics' Bank, 10 Pa. 104; Wilson v. Frisbie, 57 Ga. 269; De Blois v. Reiss, 32 La. Ann. 586.

⁷⁰ Shore v. Wilson, 9 Clark & F. 525, 8 Eng. Reprint, 517; American Bible Society v. Pratt, 9 Allen

This view is not inconsistent with the admission of proof of usage to explain the writing; nor is it at all inconsistent with the well-settled rule that parol evidence may be given of the meaning of illegible or not commonly intelligible characters, of foreign, obsolete, technical, local and provincial expressions, of abbreviations and of common words which, from the context, appear to have been used in a peculiar sense.⁷¹ "The principle upon which words are to

(Mass.), 109; *Best v. Hammond*, 55 Pa. 409; *Drew v. Swift*, 46 N. Y. 204; *Jackson v. Sill*, 11 Johns. (N. Y.) 201, 6 Am. Dec. 363; *Cotton v. Smithwick*, 66 Me. 360; *Sherwood v. Sherwood*, 45 Wis. 357, 30 Am. Rep. 757; *Fitzpatrick v. Fitzpatrick*, 36 Iowa, 674, 14 Am. Rep. 538; *Kurtz v. Hibner*, 55 Ill. 514, 8 Am. Rep. 665; *King v. Merriman*, 38 Minn. 47, 35 N. W. 570; *Hill v. Priestley*, 52 N. Y. 635; *Morss v. Salisbury*, 48 N. Y. 636; *Yates v. Pym*, 6 Taunt. 446. *Evidence excluded* to explain meaning of "guarantee": *Phelps v. Gamewell Fire Alarm Tel. Co.*, 72 Hun, 26, 25 N. Y. Supp. 654; "delivered": *Lippert v. Saginaw Mill Co.*, 108 Wis. 512, 84 N. W. 831; "help": *Hooker v. Hyde*, 61 Wis. 204, 21 N. W. 52; "assume": *Wright v. United States Mtg. Co. (Tex. Civ. App.)*, 42 S. W. 789; "suitable and usual sawlogs": *Johnson v. Hamilton*, 24 Or. 320, 33 Pac. 571; "deal": *First Nat. Bank v. Coffin*, 162 Mass. 180, 38 N. E. 444; "incompatible": *Gray v. Shepard*, 147 N. Y. 177, 41 N. E. 500; "lumber": *Williams v. Stevens Point Lumber Co.*, 72 Wis. 487, 40 N. W. 154; "thermostat": *Murphey v. Weil*, 92 Wis. 467, 66 N. W. 532; "legitimate railroad purposes": *Abraham v. Oregon & C. R. Co.*, 37 Or. 495, 60 Pac. 899, 82 Am. St. Rep. 779, 64 L. R. A. 391. See the late cases: *Napier v. Elliott*

(Ala.), 58 South. 435; *Hearin v. Union Sawmill Co. (Ark.)*, 151 S. W. 1007; *J. F. Hall-Martin Co. v. Hughes*, 18 Cal. App. 513, 123 Pac. 617; *Read v. Gould (Ga.)*, 77 S. E. 642; *McManus v. Chicago etc. R. Co. (Iowa)*, 136 N. W. 769; *Succession of Andrus*, 137 La. 940, 60 South. 623; *Palmer v. Welch (Mo. App.)*, 154 S. W. 433; *Manhattan Wrecking etc. Co. v. Eidlitz*, 78 Misc. Rep. 396, 138 N. Y. Supp. 308; *Dunlap v. Lewis (Or.)*, 130 Pac. 973; *First Nat. Bank v. Burney*, 91 Neb. 269, 136 N. W. 37; *Stephens v. Midyette (N. C.)*, 77 S. E. 243; *Richardson v. Chatfield (Okl.)*, 129 Pac. 728; *Scarborough v. Blount (Tex. Civ. App.)*, 154 S. W. 312; *Garton Toy Co. v. Buswell Lumber Mfg. Co.*, 150 Wis. 341, 136 N. W. 147.

⁷¹ *Nelson v. Sun Mut. Ins. Co.*, 71 N. Y. 453; *Loom Co. v. Higgins*, 105 U. S. 580, 26 L. Ed. 1177; *Houghton v. Watertown Fire Ins. Co.*, 131 Mass. 300; *Mercer Min. etc. Co. v. McKee's Admr.*, 77 Pa. 170, 5 Morr. Min. Rep. 531; *Hatch v. Douglas*, 48 Conn. 116, 40 Am. Rep. 154; *Walrath v. Whittekind*, 26 Kan. 482. See the late cases: *Whitney v. Aronson (Cal. App.)*, 130 Pac. 700; *Smith v. David B. Crockett Co.*, 85 Conn. 282, 39 L. R. A. N. S., 1148, 82 Atl. 569; *Kirby etc. Co. v. Hughes*, 11 Ga. App. 645, 75 S. E. 1059; *Tennant Land Co. v. Nordeman*, 148

be construed in instruments is very plain—when there is a popular and common word used in an instrument, that word must be construed *prima facie* in its popular and common sense. If it is a word of technical or legal character, it must be construed according to its technical or legal meaning. If it is a word which is of technical and scientific character, then it must be construed according to that which is its primary meaning, namely, its technical and scientific meaning. But before you can give evidence of the secondary meaning of a word, you must satisfy the court, from the instrument itself or from the circumstances of the case, that the word ought to be construed, not in its popular and primary signification, but according to its secondary intention.”⁷² The intention of the parties to a contract is, of course, always to be sought, and if the language used, though technical, is applicable to the then condition of the parties, so that by giving it its technical meaning the contract may be given force, parol evidence cannot be received to show a different intention on the part of the makers thereof. But where, by giving a word its strict technical legal meaning, a contract will be rendered entirely meaningless, it is competent to show by parol the sense in which it was used, if it is used by laymen in a different sense, or has a popular or common meaning, if by doing so the contract may be given force and effect.⁷³ “If the document has one distinct meaning in reference to the circumstances of the case, it must be construed accordingly, and evidence to show that the author intended

Ky. 361, 146 S. W. 756; Jenkins v. Springfield etc. Chemical Co. (Mo. App.), 154 S. W. 832; Mills Power Co. v. Mohawk Hydro-Electric Co., 140 N. Y. Supp. 655; Layton v. Elba Mfg. Co. (N. C.), 77 S. E. 677; Robinson v. Taylor, 68 Wash. 351, 123 Pac. 444; Meyer v. Everett Pulp etc. Co., 193 Fed. 857, 113 C. C. A. 643.

⁷² Holt v. Collyer, 44 L. T., N. S., 214, L. R. 16 Ch. Div. 718.

⁷³ Kohl v. Frederick, 115 Iowa,

517, 88 N. W. 1055; Greenl. Ev., 13th ed., § 295. Reynolds' Steph. Ev., art. 91 (5), puts it as follows: “If the words of a document have a proper legal meaning, and also a less proper meaning, they must be deemed to have their proper legal meaning, unless such a construction would be unmeaning in reference to the circumstances of the case, in which case they may be interpreted according to their less proper meaning.”

to express some other meaning is not admissible.”⁷⁴ In all these cases the court is simply ascertaining the *meaning* of the *written language* and the intention of the parties, not their secret or unexpressed intention, but the intention as stated in the writing. Words are to be understood in their ordinary and popular sense, unless they have acquired a particular sense in respect to the subject matter, distinct from the popular sense.⁷⁵ In the same way if the handwriting is obscure or blurred, defaced or for any reason difficult to be read, the testimony of experts may be received to ascertain the real language.⁷⁶

§ 457 (464). Usages of trade.—The true and appropriate office of a usage or custom is to interpret the otherwise indeterminate intention of the parties, and to ascertain the nature and extent of their contracts, arising not from express stipulations, but from mere implications and presumptions, and acts of a doubtful or equivocal character.⁷⁷ Hence it is that in respect to contracts, parol evidence is often received on the ground that the parties have not

⁷⁴ Reynolds’ Steph. Ev., art. 91. Thus, in an action on a stock subscription note, parol evidence is not admissible to show that the subscription was conditional, and the condition had not been performed: Collins v. Southern Brick Co., 92 Ark. 504, 135 Am. St. Rep. 197, 19 Ann. Cas. 882, 123 S. W. 652, with useful note appended. Of course, if the contract is not complete on its face, the explanatory parol evidence, as we have shown, is admissible: Hendrix v. Academy of Music, 73 Ga. 437.

⁷⁵ Robertson v. French, 4 East, 135, 102 Eng. Reprint, 779; Taylor v. Briggs, 2 Car. & P. 525, M. & M. 28; Smith v. Wilson, 3 Barn. & Ad. 728, 110 Eng. Reprint, 266; Clayton v. Gregson, 4 Nev. & M. 602, 5 Ad. & E. 302, 111 Eng. Reprint, 1180; United States v. Peck, 102 U. S. 64, 26 L. Ed. 46; Emery v. Webster, 42

Me. 204, 66 Am. Dec. 274; French v. Hayes, 43 N. H. 30, 80 Am. Dec. 127; Cornwell v. Cornwell, 91 Ill. 414; Nelson v. Morse, 52 Wis. 240, 9 N. W. 1. Parol evidence to show that the parties to a written contract which merely names a class or species contemplated a particular quality or kind, see note to Smith v. Vose & Sons Piano Co., 9 L. R. A., N. S., 967.

⁷⁶ Masters v. Masters, 1 P. Wms. 425, 24 Eng. Reprint, 454; Norman v. Morrell, 4 Ves. 769, 31 Eng. Reprint, 398; Goblet v. Beechey, 3 Sim. 24, 57 Eng. Reprint, 910; Armstrong v. Burrows, 6 Watts (Pa.), 266; Fenderson v. Owen, 54 Me. 372, 92 Am. Dec. 551; Paine v. Ringold, 43 Mich. 341, 5 N. W. 421; County of Des Moines v. Hinkley, 62 Iowa, 637, 17 N. W. 915.

⁷⁷ The Reeside, 2 Sum. 567, Fed. Cas. No. 11,657.

stated the contract in all its details, but only those which were necessary to be stated by specific agreement; and that there has been left to implication those incidents which a uniform usage would annex, and according to which the parties must be understood to contract, unless they expressly exclude them. It is on this principle that, in a great number and variety of cases in England and in this country, parol evidence has been admitted of local or general *usages of trade* and commence to ascertain the true meaning of written contracts.⁷⁸ Customary rights and in-

⁷⁸ Southwell v. Bowditch, 1 C. P. Div. 374, 45 L. J. C. P. 630, 35 L. T. 196; Fleet v. Murton, L. R. 7 Q. B. 126, 41 L. J. Q. B. 49; Humphrey v. Dale, 7 El. & B. 266, 26 L. J. Q. B. 137, 119 Eng. Reprint, 1246; Imperial Bank v. London Docks Co., 5 Ch. Div. 195, 46 L. J. Ch. 335; Smith v. Wilson, 3 Barn. & Ad. 728, 110 Eng. Reprint, 266; Brown v. Byrne, 3 El. & B. 702, 77 E. C. L. 702, 118 Eng. Reprint, 1304; Wood v. Allen, 111 Iowa, 97, 82 N. W. 451; Petrie v. Phoenix Ins. Co., 132 N. Y. 137, 30 N. E. 380; Rastetter v. Reynolds, 160 Ind. 133, 66 N. E. 612; Kalamazoo Corset Co. v. Simon, 129 Fed. 144; Lamb v. Klaus, 30 Wis. 94; The Venezuela, 173 Fed. 834; Hanson v. Wittenberg, 205 Mass. 319, 91 N. E. 383; Wm. N. Flynt Granite Co. v. Darling, 178 Fed. 163, 101 C. C. A. 483; Houston & T. C. R. Co. v. Hill (Tex. Civ. App.), 128 S. W. 445; Livingston v. Maryland Ins. Co., 7 Cranch (U. S.), 506, 3 L. Ed. 421. See, also, Sweeney v. Thomason, 9 Lea (Tenn.), 359, 42 Am. Rep. 676, and note. On this general subject see exhaustive note to 1 Smith's Lead. Cas. 934-965; also notes to Willmering v. McGaughey, 6 Am. Rep. 678-682; McCulsky v. Klosterman, 10 L. R. A. 786. Evidence has been held admissible in an action on a contract for sale and

delivery of a large quantity of barley to show that in the absence of special agreement the *custom of trade is to deliver grain in sacks*: Robinson v. United States, 13 Wall. (U. S.) 363, 20 L. Ed. 653; that by the usage in the trade the phrase "*crop of flax*" included the amount of the current year's production which the party had on hand whether purchased or produced by him: Goodrich v. Stevens, 5 Lans. (N. Y.) 230; that in the *lumber trade* a general usage prevailed by which two packs of shingles of given denominations were estimated as a thousand: Soutier v. Kellerman, 18 Mo. 509; the general usage as to the mode of *estimating*, weighing or measuring the *quantity of goods* sold or materials furnished: Merick v. McNally, 26 Mich. 374; Heald v. Cooper, 8 Me. 32; Newhall v. Appleton, 114 N. Y. 140, 3 L. R. A. 859, 21 N. E. 105; Humphreysville Copper Co. v. Vermont Copper Min. Co., 33 Vt. 92; Patterson v. Crowther, 70 Md. 124, 16 Atl. 531; Breen v. Moran, 51 Minn. 525, 53 N. W. 755; Jones v. Hoey, 128 Mass. 585; Merchant v. Howell, 53 Minn. 295, 55 N. W. 131; Destrehan v. Louisiana Cypress Lumber Co., 45 La. Ann. 920, 40 Am. St. Rep. 265; Thompson v. Brannin, 94 Ky. 490, 21 S. W. 1057; that a person whose name appears at the head of an in-

cidents, universally attaching to the subject matter of the contract in the place where it was made, are impliedly annexed to the language and terms of the contract, unless

voice as vendor is not the contracting party: *Holding v. Elliott*, 5 Hurl. & N. 117, 29 L. J. Ex. 134, 1 L. T. 381; that by the custom of trade sales of a given article are *by sample* although the memorandum of sale is silent on the subject: *Syers v. Jonas*, 2 Ex. 111; *Boorman v. Jenkins*, 12 Wend. (N. Y.) 556, 27 Am. Dec. 158; *Oneida Mfg. Co. v. Lawrence*, 4 Cow. (N. Y.) 440; that usage of trade allows one month for warehouse rent: *Fawkes v. Lamb*, 8 Jur., N. S., 385, 31 L. J. Q. B. 98; that a contract which on its face would be otherwise construed as a *bailment* or other contract is *in fact a sale*: *Dawson v. Kittle*, 4 Hill (N. Y.), 107; *Goodyear v. Ogden*, 4 Hill (N. Y.), 104; *Erwin v. Clark*, 13 Mich. 10; *Chase v. Washburn*, 1 Ohio St. 244, 59 Am. Dec. 623; *Carlisle v. Wallace*, 12 Ind. 252, 74 Am. Dec. 207; *Hughes v. Stanley*, 45 Iowa, 622; and of the usage as to *payment of commissions*: *Garfield v. Peerless Motor Car Co.*, 189 Mass. 395, 75 N. E. 695. Proof of custom is not admissible to show that an absolute written contract to furnish all coal needed between certain dates was not to be binding *in case of a strike*: *Covington v. Kanawha Coal & Coke Co.*, 121 Ky. 681, 123 Am. St. Rep. 219, 12 Ann. Cas. 311, 3 L. R. A., N. S., 248, 89 S. W. 1126, and note from which the following illustrations are extracted: Evidence of custom or usage is inadmissible to show that in times of overflow of lands about certain demised premises one-third of the crop should be accepted *in lieu of the rent*: *Mayer v. Lawrence*, 58 Ill. App. 194. *Liability for brokerage* upon a contract for the sale of a certain quan-

tity of a commodity, "the seller paying brokerage at ten cents per ton," cannot be reduced by proof of a custom to pay brokerage only on the amount actually delivered: *Fairly v. Wappoo Mills*, 44 S. C. 227, 29 L. R. A. 215, 22 S. E. 108. Where a contract of sale is of a stated quantity of *coffee "to arrive,"* evidence of a custom that the delivery of the amount actually arriving is a compliance on the part of the seller with his contract is inadmissible to show that the tender of a smaller quantity was good: *O'Donohue v. Leggett*, 29 N. Y. St. Rep. 983, 8 N. Y. Supp. 426. And evidence of a custom of the cement trade by which barrels of *less than the weight* specified in contracts were accepted as good delivery is inadmissible to show that the tender made was a good one: *Richard v. Haebler*, 36 App. Div. 94, 55 N. Y. Supp. 583. Evidence of custom to *send a blank form* for proof of loss to the insured when the company is notified of the fire is not admissible to excuse the failure to make such proof: *Borusweski v. Middlesex Mut. Assur. Co.*, 186 Mass. 589, 72 N. E. 250. Evidence of a custom in the neighborhood *not to grub ravines* is inadmissible to show compliance with a contract to clear, grub, and pile the brush on "all" of a described piece of land through which was a ravine: *Holmes v. Stummel*, 15 Ill. 412. Evidence of a custom of grain dealers that *title to grain* purchased f. o. b. does not pass until inspected and weighed at the point to which it is consigned is inadmissible: *McKee v. Wild*, 52 Neb. 9, 71 N. W. 958. The following illustrations are taken from 15 Current Law, p. 1218: That con-

the question is particularly and expressly excluded. Parol evidence of custom, consequently, is generally admissible to enable the court to arrive at the real meaning of the parties, who are naturally presumed to have contracted in conformity with the known and established usage.⁷⁹ Where parties enter into a contract with reference to a particular business or trade, they are presumed to have contracted with reference to the generally known usages of that business or trade, and their contracts are to be interpreted consistently with such usage. Peculiar expressions or terms are to be given the meaning which they have acquired in such business by common usage, unless, by the express terms of the contract, such usage is excluded, or is inconsistent with the contract. Where a custom is general and of universal prevalence, it becomes a part of the existing law, and is to be considered without proof; but where the usage is local, or of limited application, it is a question of fact, to be proved by the evidence, not to change or modify the contract, but to give effect to its provisions, by thus making clear and intelligible that which is ambiguous in the absence of such proof.⁸⁰ But parol evidence of custom

tract is governed by *local exchange rules and arbitration*: Postal Telegraph Cable Co. v. Louisville Cotton Oil Co., 136 Ky. 843, 122 S. W. 852, 125 S. W. 266. Obligation on part of drawee to *accept assignment* may be implied from custom of trade: Smith v. Penn American Plate Glass Co., 111 Md. 696, 77 Atl. 264. The custom of using a *particular scale for measuring logs*: Dunlevie v. Spangenburg, 66 Misc. Rep. 354, 121 N. Y. Supp. 299. *Time of delivery, or of credit, or of payment*, may be shown by universal course of dealing of the trade: Barrie v. Quinby, 206 Mass. 259, 92 N. E. 451. In sale on credit, custom that delivery of goods was to be *concurrent with payment* may be shown: Barrie v. Quinby, *supra*. Where two editions of author are to

be issued by same publisher, of which price of one is to be more than other, *interval between publications* is allowed, in order that more costly edition may be disposed of before cheaper edition is put upon the market: Barrie v. Quinby, *supra*. See the late cases: Taylor v. Union Sawmill Co. (Ark.), 152 S. W. 150; Howell v. Clements (Ga.), 77 S. E. 564; Ireland v. Clark (Me.), 83 Atl. 667; Rosenstein v. McCutcheon, 155 App. Div. 278, 140 N. Y. Supp. 315; Louisville etc. R. Co. v. United States etc. Guaranty Co. (Tenn.), 148 S. W. 671.

⁷⁹ Bhiven v. New England Screw Co., 64 U. S. 420, 16 L. Ed. 510. See, also, note to Adams v. Otterback, 56 U. S. 539, 14 L. Ed. 805.

⁸⁰ Todd v. Howell, 47 Ind. App. 665, 95 N. E. 279.

and usage is not admitted to contradict or vary express stipulations or provisions restricting or enlarging the exercise and enjoyment of the customary right. Omissions may be supplied, in some cases, by the introduction of the custom, but the custom cannot prevail over or nullify the express provisions and stipulations of the contract.⁸¹ Proof of usage, says Greenleaf, is admitted either to interpret the meaning of the language of the contracts, or to ascertain the nature and extent of the contract, in the absence of express stipulations, and where the meaning is equivocal or obscure.⁸²

§ 458 (465). **Same—Principal and agent.**—It has frequently been found necessary to prove some usage which added to the contract of principal and agent some incident or term not expressed therein. Contracts by agents for their principals are frequently mere memoranda in which only a few of the details are expressed. In such cases the usages or customs governing the trade must necessarily be proved by parol. It has been held competent to show that, by a custom of trade, where a broker purchases without disclosing the name of his principal, he is liable as principal.⁸³ Evidence of usage has been held admissible that

⁸¹ 2 Add. on Cont. 970.

⁸² 1 Greenl. Ev., § 292.

⁸³ Dale v. Humfrey, El. Bl. & El. 1004, 120 Eng. Reprint, 783; Hutchinson v. Tathane, L. R. 8 C. P. 482. Truman v. Loder, 11 Ad. & E. 589, 113 Eng. Reprint, 539, is not in conflict, as it was a case of exclusive agency where the agent operated only for one principal. The *customs of market* in which deals are made are admissible: Sutton v. Tatham, 10 Ad. & E. 27, 113 Eng. Reprint, 11; Bayliffe v. Butterworth, 1 Ex. 425; see extended notes to 1 Smith's Lead. Cas. 934-965; Governor v. Withers, 50 Am. Dec. 103-105; as between *principal and broker* a usage in London as to annulment of

contract if not satisfactory admitted: Hodgson v. Davies, 2 Camp. 536, 11 R. R. 789. Usage *not admissible* to prove that a broker has the right to disregard the positive written instructions of the principal: Barksdale v. Brown, 1 Nott & McC. (S. C.) 517, 9 Am. Dec. 720; Hall v. Storrs, 7 Wis. 253; Bliss v. Arnold, 8 Vt. 252, 30 Am. Dec. 467; Hutchings v. Ladd, 16 Mich. 493; Leland v. Douglass, 1 Wend. (N. Y.) 490; Catlin v. Smith, 24 Vt. 85; Day v. Holmes, 103 Mass. 306; Parsons v. Martin, 11 Gray (Mass.), 111; or when directed to sell for cash, he may properly sell in some other manner: Catlin v. Smith, 24 Vt. 85; Hall v. Storrs, 7 Wis. 253; Bliss

an exclusive agent appointed to sell in a certain district is entitled to commissions where sales were made by others in such district, the contract being silent on that point.⁸⁴ "When the rights, duties and liabilities as between an acknowledged agent and his principal are in question, or when the authority of an acknowledged agent to do a particular act or make a particular contract is in question, an established custom or usage in the particular business or place may be proved and taken into consideration, either for the purpose of construing the contract of agency as between the parties, or for the purpose of determining the extent of the agent's authority."⁸⁵ One of the strongest cases on record with regard to proof of usage comes from Alabama.⁸⁶ In that case it was held that a deposit of cotton in a street along the side of the platform of a railroad depot, or in the railroad cotton-yard, for shipment, in pursuance of a custom or usage adopted or sanctioned by the depot agent, may amount to a delivery to the railroad company, although no receipt is given by the agent to the shipper, and such usage or custom is contrary to the established regulations of the company, known to the shipper, and no notice thereof is traced to the superintendent or managing agent of the company. "Proof of the custom and usage in a particular business cannot be sufficient, without anything more, to show that the relation of principal and agent exists; but such proof may be material, when the fact of agency is otherwise proved, or admitted, to show what the contract of agency was, and to show the extent of the agent's authority."⁸⁷ But where the contract is clearly expressed and discloses no ambiguity calling for interpretation, the evidence of the usage is inadmissible. For example, when a contract gave an agent authority to

v. Arnold, 8 Vt. 252, 30 Am. Dec. 467;
Barksdale v. Brown, 1 Nott & McC.
(S. C.) 517, 9 Am. Dec. 720.

⁸⁴ Garfield v. Peerless Motor Car
Co., 189 Mass. 395, 75 N. E. 695.

⁸⁵ Clark & Skyles, Agency, § 69.

⁸⁶ Montgomery etc. Ry. Co. v. Kolb,
73 Ala. 396, 49 Am. Rep. 54.

⁸⁷ Clark & Skyles, Agency, § 69.
See, also, R. K. Hopkins & Co. v.
Armour & Co., 8 Ga. App. 442, 69
S. E. 580.

sell or lease pianos, and specified the terms, it was held that there was nothing in it to justify the inference that the pianos should be disposed of in any other way; nor could the contract be enlarged by proof of a custom on the part of piano dealers in general to exchange pianos.⁸⁸

§ 459 (466). Proof of usage—Bills of lading—Insurance.—Evidence of usage is often admitted to show the real intention of the parties in shipping contracts. Thus in a New York case, it was held admissible to prove that in transportation contracts the words “quantity guaranteed,” used in a bill of lading, meant according to the custom of the business, that the bill was conclusive evidence of the amount of grain to be delivered by the carrier; and, that if it fell short, the carrier was to pay for the shortage, and if it overrun he was to have the benefit of the excess.⁸⁹ And where a railroad company gave a bill of lading for goods to the terminus of its line, it was held admissible to prove a usage to deliver to the next common carrier, when the goods were billed to a point beyond such terminus.⁹⁰ In an English case it was held that where the bill of lading was silent on the subject, it was admissible to prove the custom of Liverpool whereby the ship owner was entitled to a deduction of three months’ discount from the freight.⁹¹ In like manner usage was proved to show that an agreement for the carriage of a “full and complete cargo of sugar and molasses” meant such cargo packed in the way in which such merchandise is generally packed to be carried.⁹² And where in the bill of lading the term “carload” was used, evidence of the custom to reckon a given number of pounds as a carload was admitted.⁹³ Evidence of a

⁸⁸ *Starr Piano Co. v. Morrison*, 159 Mich. 583, 124 N. W. 562. See, also, *Mechem on Agency*, § 352; *Stagg v. Connecticut Mut. L. Ins. Co.*, 10 Wall. (U. S.) 589, 19 L. Ed. 1038; *Lombardo v. Case*, 45 Barb. (N. Y.) 95.

⁸⁹ *Bissel v. Campbell*, 54 N. Y. 353.

⁹⁰ *Hooper v. Chicago & N. W. Ry.* Co., 27 Wis. 81, 9 Am. Rep. 439.

⁹¹ *Brown v. Byrne*, 3 El. & B. 705, 18 Jur. 700, 118 Eng. Reprint, 1304.

⁹² *Cuthbert v. Cumming*, 10 Ex. 809, 11 Ex. 405, 24 L. J. Ex. 310, 1 Jur., N. S., 686.

⁹³ *Goode v. Chicago etc. R. Co.*, 92 Iowa, 371, 60 N. W. 631.

usage to carry a particular kind of goods, such as lumber, on deck, is admissible if the bill of lading is silent on the subject.⁹⁴ Parol evidence is admissible to explain a recital in a bill of lading under which cotton was shipped on a steamboat, that it was the custom for steamboats to carry barges in tow, and to store freight at their option, either on the boat or the barge.⁹⁵ But *where the law has attached a fixed and certain meaning to words used in a bill of lading, evidence of a usage to change this meaning is not proper.* A familiar case illustrating this rule is that in which Justice Story refused to admit evidence offered to prove that the exception of dangers of the sea extended to all losses, except those arising from the carrier's neglect.⁹⁶ The object of the asserted usage in that case was to show that, notwithstanding there was a written contract (the bill of lading), by which the owners had agreed to deliver the goods, shipped in good order and condition, at Boston, the danger of the seas only excepted, yet the owners were not to be held bound to deliver them in good order and condition, although the danger of the seas had not caused or occasioned their being in bad condition, but causes wholly foreign to such a peril. "In short," says

⁹⁴ Sproat v. Donnell, 26 Me. 185, 45 Am. Dec. 103.

⁹⁵ Aiken v. Eager, 35 La. Ann. 567; Barker v. Borzone, 48 Md. 474; Bonham v. Charlotte etc. R. Co., 13 S. C. 267; Connecticut etc. R. R. Co. v. Baxter, 32 Vt. 805; Hooper v. Chicago etc. Ry. Co., 27 Wis. 81, 9 Am. Rep. 439; Broadwell v. Butler, Fed. Cas. No. 1910, 6 McLean, 296; Higgins v. United States Mail Steamship Co., Fed. Cas. No. 6469, 3 Blatchf. 282; Sorensen v. Keyser, 51 Fed. 30, 2 C. C. A. 92; Ogden v. Parsons, 23 How. (U. S.) 167, 16 L. Ed. 410.

⁹⁶ The Reeside, 2 Sum. (U. S.) 567, Fed. Cas. No. 11,657. The old case of Sampson v. Gazzam, 6 Port. (Ala.) 123, 30 Am. Dec. 578, which held that such evidence was admissi-

ble to show that the words "danger of the river" by usage and custom include dangers by fire, while almost in conflict with "The Reeside," *supra* (both decided in 1837), has been allowed to stand in Alabama as limited by Boon v. The Belfast, 40 Ala. 184, 88 Am. Dec. 761; in the last-named case the court, referring to it, said: "This decision has been so often recognized and followed by this court, in cases involving the identical question, that the principle established by it must now be regarded as the settled law of the state, in its application only to cases of the particular class to which it specially relates; we are not willing to extend its application beyond this limit: See Hibler v. McCartney, 31 Ala. 501."

the learned judge, "the object is, to substitute for the express terms of the bill of lading an implied agreement on the part of the owners, that they shall not be bound to deliver the goods in good order or condition; but that they shall be liable only for damage done to the goods occasioned by their own neglect. It appears to me, that this is to supersede the positive agreement of the parties; and not to construe it." In numerous cases there has been proof of usage to explain the meaning of *insurance contracts*. Many of the cases cited in a foregoing section were illustrations of this character, where proof of the meaning of words and phrases was held necessary and competent. The general doctrine is that in such contracts, where the meaning of the words appears from the face of the contract to be ambiguous, or where it is made so by proof of extrinsic circumstances, parol evidence is admissible to explain the usage.⁹⁷ Thus, when the policy stipulated, "a watchman kept on the premises," it was held admissible to prove a usage among similar establishments to keep a watchman only during certain hours each day.⁹⁸ And when a policy on a factory provided for the keeping of water on each floor, together with a watchman at night, it was held proper to show that, by the usage of trade, the attic and the basement were not considered floors.⁹⁹ And where a fire insurance policy on a sawmill contained a provision that it should be void if the mill ceased to be operated for ten days except during the winter season, the contract was held to have been made with the cognizance of the parties that according to the usage, "winter season" designated the period between the time the mill closed in the fall until after logs arrived in the spring. Proof of the usage of the term in that sense was sufficient proof of

⁹⁷ Coit v. Commercial Ins. Co., 7 Johns. (N. Y.) 385, 5 Am. Dec. 282; Sleght v. Rhinelander, 1 Johns. (N. Y.) 192, 2 Johns. (N. Y.) 531; Astor v. Union Ins. Co., 7 Cow. (N. Y.) 202; Phenix Ins. Co. v. Wilcox & Gibbs

Guano Co., 65 Fed. 724, 13 C. C. A. 88. See § 455 et seq., *ante*.

⁹⁸ Crocker v. People's Mut. Fire Ins. Co., 8 Cush. (Mass.) 79.

⁹⁹ New York Belting etc. Co. v. Washington Ins. Co., 10 Bosw. (N. Y.) 428.

the fact.¹⁰⁰ In policies of marine insurance the same rule holds. It is necessary, however, to discriminate between the interpretation of terms according to usage or to their technicality. This is well marked by Folger, J., in a New York case.¹ In that case a policy of insurance had written across it, "Port-risk in the port of New York." The learned judge considered the compound word a technical term. There does not appear to have been any authoritative judicial interpretation of it. Separately, the words could be interpreted; together, no full and exact sense is conveyed by them to the mind of one who has not a knowledge of the vocabulary of marine insurance. "They have a meaning and bearing upon the true interpretation of the contract; and it seems, as we have already said, a restrictive bearing. Unable, from any natural and ordinary sense of the words, to say exactly what that bearing is, we have to admit that they are used by marine underwriters as a technical term—a term of usage, so far as the continuous employment of technical words may be called a usage. I should rather, however, deem that to be a usage, which has taken words, which in common use, singly or together, have a meaning and intelligibility to all eyes and ears, and which has, by putting them in a particular use, as in some trade or handicraft, attached to them a meaning and effect not consonant with their public or general meaning. . . . Plainly, the inquiries were to find out the meaning of a technical phrase, and not to establish a usage." Parol evidence to prove the existence of the general practice or course in which the trade or voyage has been pursued is admissible, when such practice would not be embraced by the terms of the policy in their ordinary interpretation.² Usages of trade are admissible in evidence to explain the meaning of expressions contained in policies of insurance, charter-parties or instruments of like nature.³ Thus, in a policy of insur-

100 *Barker v. Citizens' etc. Ins. Co.*,
136 Mich. 626, 99 N. W. 866.

1 *Nelson v. Sun Mut. Ins. Co.*, 71
N. Y. 453.

2 1 Duer. Ins. 195, § 42.

3 *Allegre v. Maryland Ins. Co.*, 6
Har. & J. (Md.) 408, 14 Am. Dec.
289.

ance "*on a whaling voyage*," the insured were permitted to prove that a whaling voyage, as understood and practiced in commerce at the date of the policy, included the taking of sea elephants on the beaches of islands and coasts, as well as whales wherever found.⁴

§ 460 (467). **Same—Contracts for services.**—The rule under discussion has been frequently applied in contracts for furnishing materials, or erecting buildings, and in other similar contracts. Where the parties enter into a contract with reference to a particular business or trade, they are presumed to have contracted with reference to the generally known usages of that business or trade, and their contracts are to be interpreted consistently with such usage. Peculiar expressions or terms are to be given the meaning which they have acquired in such business by common usage, unless by the express terms of the contract such usage is excluded, or is inconsistent with the contract. Thus, where, in an ordinary building contract the owner was to furnish the material, and the contract was silent as to whether such material was to be new or second-hand and a certain window-sash was to be made according to the specifications, for which, however, old material was furnished, evidence was admissible showing that it was the

⁴ Child v. Sun Mut. Ins. Co., 3 Sand. (N. Y.) 26. Among the illustrations of this principle, which are quite analogous to the proof offered in this case, will be found the instances of "India voyage," a "China voyage," a "voyage to Africa," and a "fishing voyage." Evidence of other usages in whaling voyages has been sanctioned; as in Fennings v. Lord Grenville, 1 Taunt. 241, 127 Eng. Reprint, 825, where it was proved to be the custom that he who strikes a whale with a loose harpoon is entitled to receive half the produce from him who kills it; and in Baxter v. Rodman, 3 Pick. (Mass.) 435, where a

usage to mate whaling vessels was proved. Other illustrative cases are Johnson v. Northwestern Nat. Ins. Co., 39 Wis. 87 ("loading off shore prohibited"); Macy v. Whaling Ins. Co., 9 Met. (Mass.) 354 ("outfit" of a whaler covering one-fourth of catchings); Allegre v. Maryland Ins. Co., 2 Gill. & J. (Md.) 136, 20 Am. Dec. 424, 6 Har. & J. (Md.) 408, 14 Am. Dec. 289 ("cargo"); Sleight v. Rhineland, 1 Johns. (N. Y.) 192, 2 Johns. (N. Y.) 531 ("sea-letter"); Gracie v. Marine Ins. Co., 8 Cranch (U. S.), 75, 3 L. Ed. 492 ("a landing in safety at Leghorn").

common usage in that vicinity, under similar specifications, to furnish new material and mill-made sash, where not otherwise specified.⁵ Under a written contract to work for a year and to lose no time, it was held admissible to prove a custom of the trade whereby the workmen were in the habit of taking certain holidays and of being absent without the master's permission.⁶ So under a contract wherein the plaintiff engaged as an actor for three years at a given salary per week, the defendant was allowed to prove the usage that, under an agreement in that business to continue for one or more years, actors were only paid during the theatrical season.⁷ In cases where the written agreement does not specifically state the nature of the services to be rendered or the mode or place, evidence of the usages of the trade is admissible to show the true meaning of the contract.⁸ But evidence is

⁵ Todd v. Howell, 47 Ind. App. 665, 95 N. E. 279.

⁶ Rex v. Stoke-upon-Trent, 5 Q. B. 303, 114 Eng. Reprint, 1263.

⁷ Grant v. Maddox, 15 Mees. & W. 737, 16 L. J. Ex. 227.

⁸ Hagan v. Domestic Sewing Machine Co., 9 Hun (N. Y.), 73; Price v. Mouat, 11 Com. B., N. S., 509; Mumford v. Gething, 7 Com. B., N. S., 305, 20 L. J. C. P. 105, 6 Jur., N. S., 428; Baron v. Placide, 7 La. Ann. 229. Parol proof allowed of custom of the trade as to the *mode of estimating* the number of brick in a pavement or wall: Lowe v. Lehman, 15 Ohio St. 179 (Sweeney v. Thomson, 9 Lea (Tenn.), 359, 42 Am. Rep. 676, is a contrary decision, but it is against the weight of authority); the custom of making deductions for openings in walls in the estimation of the work of masons or plasterers: Walls v. Bailey, 49 N. Y. 464, 10 Am. Rep. 407; Symonds v. Lloyd, 6 Com. B., N. S., 691 (but see Kendall v. Russell, 5 Dana (Ky.), 501, 30 Am. Dec. 696); the meaning of the ex-

pression, "a frame house filled with brick": Fowler v. Aetna Fire Ins. Co., 7 Wend. (N. Y.) 270; the usage of the trade that ten hours constitute a *day's work*, as well as the right to charge a day and a quarter for each full day of twelve hours and a half: Hinton v. Locke, 5 Hill (N. Y.), 437; the meaning of "order obtained": Newhall v. Appleton, 114 N. Y. 140, 3 L. R. A. 859, 21 N. E. 105; but not of the word "incompatible" as used in a contract: Gray v. Shepard, 147 N. Y. 177, 41 N. E. 500. The admission of parol testimony was sustained in the following cases which further illustrate the principle involved: In Soutier v. Kellerman, 18 Mo. 509, what was meant by a "thousand shingles" in a building contract; in Eldridge v. McDermott, 178 Mass. 256, 59 N. E. 806, the meaning of "a bag of oats" in a contract involving the sale of grain; in Baer v. Glaser, 90 Mo. App. 389, the meaning of the word "pound," as used in the silk trade; in Callahan v. Stanley, 57 Cal. 476, what was meant by

inadmissible of a custom in the neighborhood to justify the discharge of an overseer before the end of the term for which he was hired;⁹ or of a custom relative to the term for which hotel porters were hired, when the contract of employment was clear and explicit as to the terms of service;¹⁰ or of a custom of plasterers to do "drawn work" to show compliance with a contract calling for three-coat plastering.¹¹ Parol testimony is admissible in explanation of the method of measurement to be adopted in determining how many perches of masonry "measured in wall" shall be paid for under a contract in which nothing is said as to the method of measurements, nor how the wall is to be measured, nor, in case of dispute, how the controversy shall be determined.¹²

§ 461 (468). Proof of custom between landlord and tenant—Other contracts.—It will, of course, be recognized that the proof of custom is not limited to any particular class of contract. Those selected for discussion are, however, the most common in use, and therefore the variety of illustration is larger and the opportunity for analogy greater. The relaxation of the general rule in such manner as to allow parol evidence of customs and usage for the purpose of annexing incidents to or explaining the meaning of certain contracts has for a long time been of

"stubble" used in a farm contract; in *Packard v. Van Schoick*, 58 Ill. 79, parol testimony was admitted to explain the meaning of the words "wall measure," used in a contract somewhat similar to the one involved in *Miller v. Wiggins*, note 12, *infra*. Other illustrative cases are: *Brown v. Cole*, 45 Iowa, 601; *Stoops v. Smith*, 100 Mass. 63, 97 Am. Dec. 76, 1 Am. Rep. 85; *Ford v. Tirrell*, 9 Gray (Mass.), 401, 69 Am. Dec. 297; *Hinton v. Locke*, 5 Hill (N. Y.), 437; *James v. Bostwick*, *Wright* (Ohio), 143; *St. Martin v. Thrasher*, 40 Vt.

460; *Laycock v. Parker*, 103 Wis. 161, 79 N. W. 327.

⁹ *Jones v. Jackson*, 22 La. Ann. 112.

¹⁰ *Connell v. Averill*, 8 App. Div. 524, 40 N. Y. Supp. 855.

¹¹ *Cook v. Hawkins*, 54 Ark. 423, 16 S. W. 8. See note to *Covington v. Kanawha Coal etc. Co.*, 3 L. R. A., N. S., 248, where these illustrations are collected.

¹² *Miller v. Wiggins*, 227 Pa. 564, 19 Ann. Cas. 942, 76 Atl. 711; *Welsh v. Huckestein*, 152 Pa. 27, 25 Atl. 138.

frequent occurrence in respect to contract dealings between landlord and tenant. In a well-known case Baron Parke explained that the courts had looked with favor upon evidence of usage and custom in this class of cases, for the reason that the common law had done little to prescribe the relative duties of landlord and tenant; and that justice required proof of those usages which had grown up and become beneficial to the parties.¹³ It was held in the leading English case on this subject that the tenant could have the benefit of a usage allowing the tenant his *way-going crop* after the expiration of his term, if not repugnant to the lease;¹⁴ and in a leading case in this country, the court allowed proof of a local usage for the tenant to *remove fixtures* erected by himself during the term.¹⁵ In each of the cases just cited the lease was a formal written instrument. These decisions rest on the doctrine that, *as to those matters concerning which the lease is silent*, proof of

¹³ Hutton v. Warren, 1 Mees. & W. 474, 2 Gale, 71, 1 Tyr. & G. 646. See, also, note to Bulkley v. Devine, 3 L. R. A. 331.

¹⁴ Wigglesworth v. Dallison, Doug. 201, 99 Eng. Reprint, 132, 1 Smith's Lead. Cas. 928, and extended note; Stultz v. Dickey, 5 Binn. (Pa.) 285, 6 Am. Dec. 411.

¹⁵ Van Ness v. Pacard, 2 Pet. (U. S.) 138, 7 L. Ed. 374. Evidence *admissible* of a custom to receive compensation for *seed and labor*, known as tenant right: Senior v. Armitage, Holt N. P. 197, 17 R. R. 627; that the incoming tenant should pay the outgoing tenant for *straw* left on the farm: Muncey v. Dennis, 1 Hurl. & N. 216, 26 L. J. Ex. 66; whether a *structure* of a given character is *removable* by the tenant: Wade v. Johnson, 25 Ga. 331; Youngblood v. Eubank, 68 Ga. 630; Thomas v. Davis, 76 Mo. 72, 43 Am. Rep. 756; Keogh v. Daniell, 12 Wis. 163; Van Ness v. Pacard, 2 Pet. (U. S.) 138, 7 L. Ed.

374; Davis v. Jones, 2 Barn. & Ald. 166, 106 Eng. Reprint, 327; as to the *time of paying rent*: Doe v. Benson, 4 Barn. & Ald. 588, 106 Eng. Reprint, 1051; Buckley v. Taylor, 2 Term Rep. 600, 100 Eng. Reprint, 423; Slay v. Milton, 64 Tex. 421; that the *way-going tenant* for years may harvest the grain sown the autumn before the termination of the lease: Templeman v. Biddle, 1 Harr. (Del.) 522; Howell v. Schenck, 24 N. J. L. 89; Foster v. Robinson, 6 Ohio St. 90; Biggs v. Brown, 2 Serg. & R. (Pa.) 14; Shaw v. Bowman, 91 Pa. 414; that the owner is to make outside repairs: Shute v. Bills, 191 Mass. 433, 114 Am. St. Rep. 631, 7 L. R. A., N. S., 965, 78 N. E. 96; that taxes for various parts of extensive premises should be divided among the tenants in the proportion of their respective rents, the tax being assessed on the whole of the premises: Amory v. Melvin, 112 Mass. 83.

general usage is competent, for the persons are deemed to contract with reference thereto. Every demise between landlord and tenant, in respect to matters in which the parties are silent, may be fairly open to explanation by the general usage and custom of the country, or of the district where the land lies. Every person, under such circumstances, is supposed to be conversant of the custom, and to contract with a tacit reference to it.¹⁶ Such decisions as there have been in this country follow the cases referred to. Where a contract sued on did not show the length of time for which the premises were leased, it was held in a Texas case¹⁷ that either party could allege and show by parol the agreement as to how long the contract was to continue; if there was such an agreement; and, if there was no express agreement on this subject, evidence as to custom and usage would be admissible under proper allegations. But a usage in conflict with plain, well-established rules of law is not admissible in evidence in any case and must be disregarded.¹⁸ Thus a custom cannot be proved for the purpose of making the lessor pay to the lessee sums which the lessee has expended for repairs, the lease containing no provisions on the subject of repairs;¹⁹ nor to control the express covenant of the landlord to repair;²⁰ nor a covenant against subletting.²¹ In a Georgia case,²² where a tenant held over after the expiration of his written contract and the landlord sought to have him removed, it was held that it was not competent for the defendant to evade the legal right of his landlord, under the written contract, by proving that a certain custom existed between landlords and tenants, that where a tenant rents premises in the city of Savannah for one year, either orally or in

16 *Van Ness v. Pacard*, *supra*; 2 Starkie, Ev., pt. 4, p. 453; Woodfall, Landlord and Tenant, 218.

17 *Brincefield v. Allen*, 25 Tex. Civ. App. 258, 60 S. W. 1010.

18 *Cox v. O'Riley*, 4 Ind. 368, 58 Am. Dec. 633; § 467, *post*.

19 *Biddle v. Reed*, 33 Ind. 529; *Weinsteine v. Harrison*, 66 Tex. 546, 1 S. W. 626.

20 *Stultz v. Locke*, 47 Md. 562.

21 *Spota v. Hayes*, 36 Misc. Rep. 532, 73 N. Y. Supp. 959.

22 *Werner v. Footman*, 54 Ga. 128.

writing, and holds over, after the expiration of the year, for so short a time even as one month, or two weeks, with the knowledge of his landlord, and without any dissent on the part of his landlord, he is tenant again for another year, on the same terms and conditions as before. The custom of miners to remove the pillars in a mine cannot control the stipulation of the parties that the miners were to leave the mine in good working condition at the termination of the lease, when the effect of allowing the custom to prevail would be to render nugatory the express stipulations of such lease.²³ It is obvious from the illustrations given in this and in the preceding sections that very wide latitude has been given for the explanation of written contracts by parol proof of usage. For the purposes of illustration, instances have been selected from those classes of written instruments in which such evidence is most frequently offered, but it need hardly be added that the *same principle applies to other contracts*, and that when the requisite conditions exist, the real meaning of any written contract may in the same manner be affected by proof of usages which must have been relied upon by the parties. In order to ascertain the intention of those who have executed written instruments, the courts have often found it necessary to receive proof of usage not only in respect to informal contracts, but in respect to those more formal and solemn instruments *like deeds and grants*, which are generally assumed to state in detail the full meaning of the parties.²⁴ And when the custom or usage is preserved by statute, as illustrated in the well-known case of the claim to lands in East Florida,²⁵ involving the

²³ Randolph v. Halden, 44 Iowa, 327. See, also, Macomber v. Parker, 13 Pick. (Mass.) 175; Phillips v. Starr, 26 Iowa, 349; 2 Parsons on Contracts, 546.

²⁴ Shore v. Wilson, 9 Clark & F. 355, 8 Eng. Reprint, 450; Doe v. Allen, 12 Ad. & E. 451, 113 Eng. Reprint, 882; American Bible Society

v. Wetmore, 17 Conn. 181; Howard v. American Peace Soc., 49 Me. 288; Button v. American Tract Soc., 23 Vt. 336; Cortelyou v. Van Brundt, 2 Johns. (N. Y.) 357, 3 Am. Dec. 439; Mitchel v. United States, 9 Pet. (U. S.) 711, 9 L. Ed. 283.

²⁵ Mitchel v. United States, *supra*.

usage or custom in the Spanish provinces in relation to grants of land, it has the force of an express statute. The usage of the parties under an ancient deed is admissible to explain equivocal terms therein. Accordingly, where a deed made in 1694 gave the grantee the privilege of taking, from other lands of the grantor, "timber for building," evidence of an immemorial custom, of the grantee and his heirs, of cutting timber for fencing, under this grant, with the knowledge of the grantor and his heirs, was admitted to explain the language of the deed.²⁶

§ 462 (469). General requisites of usages—Must be reasonable.—It is necessary to strictly limit the subject now under discussion to such references only as are borne upon by those rules of evidence which deal with the introduction of usages into written contracts. It would be impracticable to deal at large with so important a subject as customs and usages, and the reader must be referred to the standard works upon the subject for its general treatment.²⁷ In this chapter, therefore, the discussion of the admissibility of evidence to prove usage has been confined to those cases in which the object is to vary or explain written instruments by parol. This is not the place for any detailed treatment of those general rules of evidence which govern when parol contracts are to be affected by proof of custom. There are, however, certain essentials which should be shown to exist before any proof of usage can be given to affect any contract, either written or oral. To these essentials or qualities of usages we will now briefly call attention in this and in the following sections. The appellate court of Illinois states the essentials of a valid custom as follows: "It must be uniform, long established, generally acquiesced in,

²⁶ *Livingston v. Ten Broeck*, 16 Johns. (N. Y.) 14, 8 Am. Dec. 287, cited in *Cambridge v. Lexington*, 17 Pick. (Mass.) 222 (the case of the contribution to the maintenance of "the great bridge" over Charles river,

in which evidence of the usage of the contributing towns was admitted as affecting the statutes passed on the subject).

²⁷ See Lawson's *Usages and Customs*.

reasonable, and so well known as to induce the belief that the parties contracted with reference to it.”²⁸ All the authorities sustain that statement. The rule pertaining to usages of trade or business, that parties are presumed to contract with reference to a uniform, continuous, and well-settled usage, pertaining to the matters as to which they enter into agreement, is limited to such usage as is not in opposition to well-settled principles of law, and is not unreasonable.²⁹ The usage *must be reasonable*, or, rather, taken negatively, *must not be unreasonable*. “Which is not always, as Sir Edward Coke says, to be understood of every unlearned man’s reason, but of artificial and legal reason, warranted by authority of law. Upon which account a custom may be good, though the particular reason of it cannot be assigned; for it sufficeth, if no good legal reason can be assigned against it. Thus, a custom in a parish, that no man shall put his beasts into the common till the third of October, would be good; and yet it would be hard to show the reason why that day in particular is fixed upon, rather than the day before or after. But a custom, that no cattle shall be put in till the lord of the manor has first put in his is unreasonable, and therefore bad; for peradventure the lord will never put in his, and then the tenants will lose all their profits.”³⁰ The view has been suggested that usages of trade which are unreasonable will not gain a permanent foothold, and that if a usage has grown up, this is of itself well-nigh conclusive evidence that the usage is not unreasonable,³¹ but it is, perhaps, a sufficient concession to this line of argument to admit that clear *proof of the existence of a custom raises a presumption in favor of its being a reasonable custom* and one not injurious

²⁸ Sweet v. Leach, 6 Ill. App. 212. See, also, Penland v. Ingle, 138 N. C. 456, 50 S. E. 850.

²⁹ Markham v. Jaudon, 41 N. Y. 235; Bowen v. Newell, 8 N. Y. 190; Groat v. Gile, 51 N. Y. 431; Ollesheimer & Bro. v. Foley, 42 Tex. Civ.

App. 252, 95 S. W. 688; Smythe v. Parsons, 37 Kan. 79, 14 Pac. 444.

³⁰ 1 Blackst. 77.

³¹ McMasters v. Pennsylvania R. Co., 69 Pa. 374, 8 Am. Rep. 264; Barksdale v. Brown, 1 Nott. & McC. (S. C.) 517, 9 Am. Dec. 720.

to the community or to those who acquiesce in it.³² Usages, although clearly proved to exist, do not necessarily have the force of law; and, as appears from the cases cited below, the courts have very generally claimed the right to reject those usages which they have deemed prejudicial to public interests or likely to work injury to the persons whom they affect.³³ The courts are frequently required to hold a cus-

³² *Cox v. Charleston Fire etc. Ins. Co.*, 3 Rich. (S. C.) 331, 45 Am. Dec. 771.

³³ It is not a reasonable custom for an agent to take compensation from both buyer and seller: *Raisin v. Clark*, 41 Md. 158, 20 Am. Rep. 66; to accept checks as payment for the claim of his principal against third parties: *Whitney v. Esson*, 99 Mass. 308, 96 Am. Dec. 762; to cancel all former policies and transfer the insurance to other companies after the termination of the agency: *Merchants' Ins. Co. v. Prince*, 50 Minn. 53, 36 Am. St. Rep. 626, 52 N. W. 131; nor for a mechanic who works up the material of an employer to keep for his own use so much of the material as may remain without the consent of the employer: *Wadley v. Davis*, 63 Barb. (N. Y.) 500; nor to show that a badly constructed building is according to custom: *Anderson v. Whitaker*, 97 Ala. 690, 11 South. 919; *Cook v. Hawkins*, 54 Ark. 423, 16 S. W. 8; nor that a miller's receipt for wheat is intended as a sale, and not *bailment*: *Wadsworth v. Allcott*, 6 N. Y. 64; nor on a sale of sheep, that the wool did not go to the purchaser: *Groat v. Gile*, 51 N. Y. 431; nor to deny days of grace on a bill of exchange: *Woodruff v. Merchants' Bank*, 25 Wend. (N. Y.) 673; nor for a railroad company to require all claims for losses to be made on the delivery of the goods: *Memphis etc. Ry. Co. v. Holoway*, 4 Baxt. (68

Tenn.) 188; nor for a railroad company to leave all turntables unfastened: *Iiwaco Ry. Co. v. Hedrick*, 1 Wash. 446, 22 Am. St. Rep. 169, 25 Pac. 335; that no title should pass on sale and delivery of cotton without payment of the consideration within ten days: *Haskins v. Warren*, 115 Mass. 514; that banks should not correct mistakes unless discovered before the customer leaves the room: *Gallatin v. Bradford*, 1 Bibb (Ky.), 209. Courts will not sustain a usage as reasonable which tends to promote dishonesty or unfair dealing: *Paxton v. Courtney*, 2 Fost. & F. 131; see § 467, *post*; or which gives to one class an unfair advantage over another or takes away from any class the right to direct enjoyment of their own labor: *Metcalf v. Weld*, 14 Gray (Mass.), 210; or which clearly tends to promote indecency or immorality: *Seagar v. Sligerland*, 2 Caines (N. Y.), 219; *Holmes v. Johnson*, 42 Pa. 159; or which is in restraint of trade: *Mayor v. Willes*, 11 Mod. 48, 88 Eng. Reprint, 876; nor is it admissible, when negligence is the issue, to justify carelessness by proof of facts showing a custom of negligence: *Colf v. Chicago, St. P., M. & O. Ry. Co.*, 87 Wis. 273, 58 N. W. 408; *Rumpel v. Oregon Co.*, 4 Idaho, 13, 22 L. R. A. 725, 35 Pac. 700; *Congdon v. Howe Scale Co.*, 66 Vt. 255, 29 Atl. 253; *East T. V. & G. Ry. Co. v. Kane*, 92 Ga. 187, 22 L. R. A. 315, 18 S. E. 18, *Kansas City, M. & B. Ry. Co. v. Burton*, 97 Ala. 240,

tom unreasonable and void, notwithstanding strong reasons urged in favor of it as a rule of convenience by the class by

12 South. 88; *Earl v. Crouch*, 61 Hun, 624, 16 N. Y. Supp. 770, affirmed in *Earl v. Crouch*, 131 N. Y. 613, 30 N. E. 864. In *Leuckhart v. Cooper*, 3 Bing. N. C. 99, 132 Eng. Reprint, 347, the usage for public warehousemen in London to have a general lien on all goods from time to time housed with them for and in the name of the merchants or other persons by whom they were employed, for all moneys or balances due from such merchants or persons for expenses incurred about goods consigned from abroad, and irrespective of the ownership of the goods upon which lien was claimed, was held unreasonable. In *Bryant v. Commonwealth Ins. Co.*, 6 Pick. (Mass.) 131, a custom for the master of a vessel stranded to sell the cargo without necessity was held void. In *Bowen v. Stoddard*, 10 Met. (Mass.) 375, a custom among merchants of New Bedford and Fairhaven engaged in the whaling trade, to accept the bills of their masters, drawn for supplies furnished abroad, failed to receive the sanction of the court, on the ground that a usage could not be reasonable which put at hazard the property of the owner at the pleasure of the master. And see *Jordan v. Meredith*, 3 Yeates (Pa.), 318, 2 Am. Dec. 373, and *Spear v. Newell*, an unreported case referred to in *Burton v. Blin*, 23 Vt. 151. It is not an unreasonable custom for *glass bottle-makers* to fix a limit of variation from the uniform weight of bottles: *Whitney v. Hop Bitters Mfg. Co.*, 50 Hun, 601, 2 N. Y. Supp. 438. A custom which gives to the broker five per cent of the purchase price of land for assisting in its sale, irrespective of the amount, value, or character of the services rendered, is unreasonable

and void: *Penland v. Ingle*, 138 N. C. 456, 50 S. E. 850. As is also a custom of stenographers to charge more than twice as much as official stenographers for transcribing testimony: *Eckstein v. Schleimer*, 62 Misc. Rep. 635, 116 N. Y. Supp. 7. The following are further illustrations of usages declared unreasonable: A usage of attorneys to collect claims in depreciated bank bills: *West v. Ball*, 12 Ala. 340; or a usage which exempts carriers by water from liability caused by forcible and illegal seizure of goods, when the bill of lading excepted only "dangers of the river": *The Belfast*, 40 Ala. 184, 88 Am. Dec. 761; or a usage that, when the contract of hiring specified that "the hirer was to lose the negro's lost time," that time "related to time lost by sickness or running away, and not to time lost in consequence of the negro's death": *Barlow v. Lambert*, 28 Ala. 704, 65 Am. Dec. 374; or where a usage among builders considered defective construction as "done in a workmanlike manner": *Anderson v. Whittaker*, 97 Ala. 690, 11 South. 919; or a usage that a bill of lading passed by delivery without indorsement, so as to authorize the delivery of the goods to the holder: *Louisville & N. R. R. Co. v. Barhouse*, 100 Ala. 543, 13 South. 534; or a usage that bank checks payable to a person, "or bearer," should pass to a holder without indorsement: *First Nat. Bank v. Nelson*, 105 Ala. 180, 16 South. 707; or a custom or usage that a tenant should have the hay and stubble on the land which he entered: *Anewalt v. Hummel*, 109 Pa. 271; or a custom or usage that the outgoing tenant shall look exclusively to the incoming tenant, and not to the landlord, for compensation for seeds, acts of husbandry,

whom it has been adopted.³⁴ Tindal, C. J., speaking of what customs are reasonable and what unreasonable, said that a custom is not unreasonable merely because it is contrary to a particular maxim or rule of the common law, as the custom of gavelkind and borough English, which are directly contrary to the law of descent, or, again, the custom of Kent, which is contrary to the law of escheats. Nor is a custom unreasonable because it is prejudicial to the interests of a private man, if it be for the benefit of the commonwealth, as the custom to turn the plow upon the headland of another, in favor of husbandry, or to dry nets on the land of another, in favor of fishing and for the benefit of navigation. But, on the other hand, a custom that is contrary to the public good, or injurious or prejudicial to the many, and beneficial only to some particular person, is repugnant to the law of reason; for it could not have had a reasonable commencement; as a custom set up in a manor, on the part of the lord, that the commoner cannot turn in his cattle until the lord has put in his own, is clearly bad; for it is injurious to the multitude, and beneficial only to the lord. In all these, and many other instances of similar customs which are to be found in the books, the customs themselves are held to be void, on the ground of their having had no reasonable commencement, but as being founded in wrong and usurpation, and not on the voluntary consent of the people to whom they relate.³⁵ One of the tests of the reasonableness of a custom is whether or not it is for the public good, and the English text-books contain many excellent illustrations, such as the custom of obtaining from the nearest point material to repair a way, or to

etc.: *Bradburn v. Foley*, L. R. 3 C. P. 129, 47 L. J. C. P. 331, 38 L. T. 421, 26 W. R. 423. But the rules and customs which govern in the running of *railway trains* are proper subjects of proof in determining the question of negligence: *Kansas City Ry. Co. v. Webb*, 97 Ala. 157, 11 South. 888; *Flanders v. Chicago, St.*

P., M. & O. Ry. Co., 51 Minn. 193, 53 N. W. 544; *O'Mellia v. Kansas City, St. J. & C. B. Ry. Co.*, 115 Mo. 205, 21 S. W. 503.

³⁴ *Strong v. Grand Trunk R. Co.*, 15 Mich. 206, 93 Am. Dec. 184.

³⁵ *Tyson v. Smith*, 9 Ad. & E. 406, 112 Eng. Reprint, 1265.

pull down a building to prevent the spread of a fire and the like.³⁶ Custom or usage is never admissible to justify the doing of an act which is negligent *per se*, such as a custom of carriers to deliver goods to persons other than the consignee, or to whom the consignee has not directed or authorized the delivery.³⁷ A Maine case³⁸ involved a contract for stone sold and delivered on the premises for building a cellar wall. The plaintiff claimed that by reason of a local usage the stones were to be measured as solid wall after they were laid, while the defendant claimed that they should be measured when and where delivered according to the contract. The court rejected the local usage, and said: "The contract fixed the price per cubic yard delivered. That meant cubic yards of stone, not of masonry. That meaning cannot be varied by local usage, unless it be uniform, reasonable, and known to the parties, so they may be presumed to have contracted with reference to it."³⁹ To measure in the wall was over one hundred and two cubic yards, on the dump about fifty-eight. Certainly a usage that might nearly double the quantity of goods sold must be unreasonable. Better have honest measure and fair price." Such a result emphasizes the unreasonableness of the usage.

§ 463 (470). The usage must be an established one.—It was the familiar common-law doctrine that, in order to be binding, a usage must have existed time out of mind, or, to use the old phrase, "so long that the memory of man runneth not to the contrary."⁴⁰ But this rule was greatly

³⁶ Lawson, Usages and Customs, in which much useful information is to be found and many carefully selected cases.

³⁷ *Mobile etc. R. Co. v. Bay Shore Lumber Co.*, 165 Ala. 610, 138 Am. St. Rep. 84, 51 South. 956; *Louisville & N. R. Co. v. Barkhouse*, 100 Ala. 543, 13 South. 534.

³⁸ *Rogers v. Hayden*, 91 Me. 24, 39 Atl. 283. See, also, *Norton v. Univer-*

sity of Maine, 106 Me. 436, 76 Atl. 912.

³⁹ *Marshall v. Perry*, 67 Me. 78; *Schooner Reeside*, 2 Sum. 567, Fed. Cas. No. 11,657.

⁴⁰ *Rex v. Johns, Lofft.* 76, 98 Eng. Reprint, 541; *Rex v. Joliffe*, 2 Barn. & C. 54, 107 Eng. Reprint, 303; *Jenkins v. Harvey*, 1 Crompt., M. & R. 877, 1 Gale, 23, 5 Tyr. 326, 5 L. J. Ex. 17; *Simpson v. Wells*, L. R. 7 Q. B. 214; *Beaufort v. Smith*, 4 Ex. 450, 19 L.

relaxed in England,⁴¹ and has not in this country been deemed applicable to usages of trade. In a New York case the testimony showed that a usage had existed for thirty years. The court held this sufficient, and thus stated the rule: "The true test of a commercial usage is its having existed a *sufficient length of time to have become generally known*, and to warrant a presumption that contracts are made in reference to it."⁴² Substantially the same rule has been declared by the supreme court of the United States.⁴³ If the usage is well established and generally known at the time of the execution of the contract, and the contract is executed with reference to it, it is not necessary to show how long the usage has existed.⁴⁴ It is not sufficient that a few instances of the usage should be furnished. The course of the trade must be uniform and general, to entitle it to be considered. It should be so well settled that persons engaged in the trade must be

J. Ex. 97; *Bailey v. Appleyard*, 3 Nev. & P. 257, 8 Ad. & E. 161, 112 Eng. Reprint, 798; *Scales v. Key*, 11 Ad. & E. 819, 113 Eng. Reprint, 625; *Welcome v. Upton*, 5 Mees. & W. 398.

⁴¹ *Sewell v. Corp*, 1 Car. & P. 392; *Gould v. Oliver*, 4 Bing. N. C. 134, 132 Eng. Reprint, 140; *Noble v. Kennoway*, 1 Doug. 510, 99 Eng. Reprint, 3.

⁴² *Smith v. Wright*, 1 Caines (N. Y.) 43, 2 Am. Dec. 162. See, also, *Merchants' Grocery Co. v. Ladoga Canning Co.*, 89 Ark. 591, 117 S. W. 767; *Arkadelphia Lumber Co. v. Henderson*, 84 Ark. 382, 105 S. W. 882; *Bulkley v. Derby Fishing Co.*, 2 Conn. 252, 7 Am. Dec. 271; *Swern v. Churchill*, 155 Ill. App. 505; *Clark v. Gifford*, 7 La. 524, 26 Am. Dec. 511; *Pennell v. Delta Transp. Co.*, 94 Mich. 247, 53 N. W. 1049; *Schipper v. Milton*, 51 App. Div. 522, 64 N. Y. Supp. 935; *McMasters v. Pennsylvania R. Co.*, 69 Pa. 374, 8 Am. Rep. 264;

Schumacher v. Trent, 18 Tex. Civ. App. 17, 44 S. W. 460; *York v. Wistar*, 30 Fed. Cas. No. 18,141; *Juggomohun Ghose v. Manickchand*, 7 Moore Ind. App. 263, 19 Eng. Reprint, 308.

⁴³ *Adams v. Otterback*, 15 How. (U. S.) 539, 14 L. Ed. 805.

⁴⁴ *Lamb v. Klaus*, 30 Wis. 94. The following are cases in which different periods of time have been held sufficient or insufficient according to circumstances: *Lowe v. Lehman*, 15 Ohio St. 179; *Adams v. Otterback*, 15 How. (U. S.) 539, 14 L. Ed. 805 (seven years); *Smith v. Rice*, 56 Ala. 417 (six years); *Cooper v. Berry*, 21 Ga. 526, 68 Am. Dec. 468 (five years); *Buford v. Tucker*, 44 Ala. 89 (three or four years); *Alabama etc. R. R. Co. v. Kidd*, 35 Ala. 209 (one month); *Wall v. East River Ins. Co.*, 3 Duer (N. Y.), 264 (three weeks); *Carlisle v. Wallace*, 12 Ind. 252, 74 Am. Dec. 207; *Taylor v. Mueller*, 30 Minn. 343, 15 N. W. 413, 44 Am. Rep. 199 (no time mentioned).

considered as contracting with reference to the usage.⁴⁵ But while, as in the case we have referred to, it is not necessary to show the length of time the usage has been accepted, it does become necessary when it is challenged on the ground that a few isolated occurrences are sought to be construed as a custom.⁴⁶ The length of time then becomes a factor in the consideration of the question, and no specific period can be laid down for its existence by reason of the variety of the circumstances to which it is capable of being applied. The cases cited to this section will disclose that each one has had to be viewed from its inherent reference to the compulsory requirement of establishment. It is almost needless to add that when the existence of any custom is in question, every fact is deemed to be relevant which shows how, in particular instances, the custom was understood and acted upon by the parties then interested.⁴⁷

§ 464 (471). **The usage must be known.**—Closely allied to the requisite of long establishment of a usage, that of its being known is of equal and far-reaching importance. As we have already pointed out,⁴⁸ judicial notice is taken of the general customs of the country, and there are certain commercial customs and usages of which every person in the community is deemed to be cognizant, such, for example, as those belonging to the law-merchant. But the usages of *special trades*, and those *local usages* which

⁴⁵ Trott v. Wood, Fed. Cas. No. 14,190, 1 Gall. 443.

⁴⁶ Cleveland etc. R. Co. v. Jenkins, 174 Ill. 398, 66 Am. St. Rep. 296, 62 L. R. A. 922, 51 N. E. 811.

⁴⁷ Reynolds' Steph. Dig., art. 6. The illustration given by Stephen is very pointed. The question was, whether, by the custom of the country, a tenant farmer, not prohibited by his lease from doing so, might pick and sell surface flints, minerals being reserved by his lease. The fact that

under similar provisions in leases of neighboring farms, flints were taken and sold, is deemed to be relevant: Tucker v. Linger, L. R. 21 Ch. Div. 18. See, also, the cases cited by Reynolds thereto: Knowles v. Dow, 22 N. H. (2 Fost.) 387, 55 Am. Dec. 163; Governor v. Withers, 5 Gratt. (Va.) 24, 50 Am. Dec. 95, note; Adams v. Pittsburg Ins. Co., 95 Pa. 348, 40 Am. Rep. 662.

⁴⁸ § 123, *ante*.

may be limited to certain communities cannot, of course, be presumed to be known to all.⁴⁹ These have been called usages, as contradistinguished from the generally recognized customs of business.⁵⁰ In respect to these usages there should be either proof of actual knowledge on the part of the person to be affected, or proof of circumstances from which such knowledge may be fairly implied.⁵¹ Space does not permit the numerous illustrations which the books furnish, but reference to a few should suffice. A purchaser of furniture, with no notice of special regulations of cabinet workers as to the manufacture thereof by day work, was not bound by them, and

⁴⁹ *Sleight v. Hartshorne*, 2 Johns. (N. Y.) 531; *Hutchins v. Webster*, 165 Mass. 439, 43 N. E. 186.

⁵⁰ *Clark v. Baker*, 52 Mass. 186, 45 Am. Dec. 199. As to customs and usages in general, see extended note to 1 Smith's Lead. Cas. 934-965.

⁵¹ *Byrd v. Beall*, 150 Ala. 122, 124 Am. St. Rep. 60, 43 South. 749; *Cage v. Black*, 97 Ark. 613, 134 S. W. 942; *Marlatt v. Clary*, 20 Ark. 251; *Smith v. Phipps*, 65 Conn. 302, 32 Atl. 367; *Bacon Fruit Co. v. Blessing*, 122 Ga. 369, 50 S. E. 139; *Swern v. Churchill*, 155 Ill. App. 505; *Sherwood v. Home Sav. Bank*, 131 Iowa, 528, 109 N. W. 9; *McSherry v. Blanchfield*, 68 Kan. 310, 75 Pac. 121; *Caldwell v. Dawson*, 4 Met. (Ky.) 121; *Corbitt v. Hanson*, 124 La. 108, 49 South. 995; *Norton v. University of Maine*, 106 Me. 436, 76 Atl. 912; *Pierce v. Whitney*, 29 Me. 188; *Denton v. Gill*, 102 Md. 386, 3 L. R. A., N. S., 465, 62 Atl. 627; *Bourbonnais v. West Boylston Mfg. Co.*, 184 Mass. 250, 68 N. E. 232; *Blodgett v. Vogel*, 130 Mich. 479, 90 N. W. 277; *Pennell v. Delta Co.*, 94 Mich. 247, 53 N. W. 1049; *Thompson v. Minneapolis etc. R. Co.*, 35 Minn. 428, 29 N. W. 148; *Manzke v. Goldenberg*, 149 Mo. App. 12, 120 S.

W. 32; *Walsh v. Mississippi Val. Transp. Co.*, 52 Mo. 434; *Fitzgerald v. Hanson*, 16 Mont. 474, 41 Pac. 230; *Bixby v. Bruce*, 69 Neb. 78, 95 N. W. 34; *Smith v. Gibbs*, 44 N. H. 335; *Martin v. Maynard*, 16 N. H. 165; *Weir v. Dwyer*, 62 Misc. Rep. 7, 114 N. Y. Supp. 528; *Miller v. Burke*, 68 N. Y. 615; *Gilmer v. Young*, 122 N. C. 806, 29 S. E. 830; *Talbot v. Mattox etc. Realty Co.*, 26 Okl. 298, 109 Pac. 128; *McBee v. Caesar*, 15 Or. 62, 13 Pac. 652; *Lockney v. Police Beneficiary Assn.*, 217 Pa. 568, 66 Atl. 344; *Martin v. Western Union Tel. Co.*, 81 S. C. 432, 62 S. E. 833; *Dabney v. Campbell*, 9 Humph. (Tenn.) 680; *Standard Paint Co. v. San Antonio Hardware Co. (Tex. Civ. App.)*, 136 S. W. 1150; *Mills v. Ashe*, 16 Tex. 295; *Russell v. Ferguson*, 77 Vt. 433, 60 Atl. 802; *Moritz v. Herskovitz*, 46 Wash. 192, 89 Pac. 560; *Lemke v. Hage*, 142 Wis. 178, 135 Am. St. Rep. 1066, 125 N. W. 440; *Brunnell v. Hudson Sawmills*, 86 Wis. 587, 57 N. W. 364; *Scott v. Whitney*, 41 Wis. 504; *Chilberg v. Lyng*, 128 Fed. 899, 63 C. C. A. 451; *Chateaugay Or. etc. Co. v. Blake*, 144 U. S. 476, 36 L. Ed. 510, 12 Sup. Ct. Rep. 731; *Insurance Co. of North America v. Hibernia Ins.*

evidence of such regulations was inadmissible.⁵² Certain dealers in lampblack sold packages thereof as pound packages though they weighed only eight ounces, and they contended that it was the custom of their trade. Landon, J., in dealing with it said: "The custom for which the defendant contends is one that permits him to sell half a pound as the equivalent of a pound. Such a custom may be well known among traders, but it is one which apparently benefits the trader at the expense of the consumer, and manifestly would not be tolerated by the latter unless attended by advantages which would be compensatory of his actual loss in quantity. To bind the latter by such a custom it ought to appear that he dealt with reference to it."⁵³ If a usage is special, and confined to a particular business, or has reference to a particular place only, there is no such presumption; and it is manifest that it would be unjust to admit it in order to restrict the natural meaning of a written contract, except upon proof that both parties were aware of the particular usage and intended to be governed by it. Even if, as respects a special custom in a particular trade, or between particular places, there is a presumption that parties who are engaged in that trade contract in reference to the particular custom, this presumption is at best but a *prima facie* one, liable to be rebutted by proof that it was unknown to the party against whom it is set up; and, on that being proved, no weight ought to be given to it.⁵⁴ A custom has the force of law, and furnishes a standard for

Co., 140 U. S. 565, 35 L. Ed. 517, 11 Sup. Ct. Rep. 909; National Bank v. Burkhardt, 100 U. S. 686, 25 L. Ed. 766; Hostetter v. Park, 137 U. S. 30, 34 L. Ed. 568, 11 Sup. Ct. Rep. 1; Parsons v. Hart, 30 Can. S. Ct. 473; Moore v. Voughton, 1 Stark. 396; Wilson v. Clark, 38 N. Brunsw. 69. See the late cases: Louisville etc. R. Co. v. United States etc. Guaranty Co., 125 Tenn. 658, 148 S. W. 671;

American Warehouse Co. v. Ray (Tex. Civ. App.), 150 S. W. 763; E. Collingnon & Co. v. Hammond Milling Co., 68 Wash. 626, 123 Pac. 1083.

⁵² Butterworth v. Volkening, 4 Thomp. & C. (N. Y.) 650.

⁵³ Ransom v. Masten, 52 Hun, 610, 4 N. Y. Supp. 781.

⁵⁴ Isaksson v. Williams, 26 Fed. 642.

the measurement of many of the rights and acts of men. It must be *certain* or the measurements by this standard will be unequal and unjust. It must be *uniform*; for, if it vary, it furnishes no rule by which to mete. It must be *known*, or must be so uniform and notorious that no person of ordinary intelligence who has to do with the subject to which it relates and who exercises reasonable care would be ignorant of it; for no man may be justly condemned for the violation of a law or a custom which he neither knows nor ought to know. In short, a binding custom must be certain, definite, uniform and known, or so notorious that it would have been known to any person of reasonable prudence who dealt with its subject with the exercise of ordinary care.⁵⁵ Hence it is held, in regard to *notorious and uniform usages* of trade, that one who seeks to avoid the effect of such a usage must show that he was ignorant of it, the presumption being that all persons know general usages of trade.⁵⁶ The *customs of an individual* in his private business are not binding upon others, unless known.⁵⁷ It is obvious, however, that a

⁵⁵ Chicago etc. R. Co. v. Lindeman, 143 Fed. 946, 75 C. C. A. 18; United States v. Buchanan, 8 How. (U. S.) 83, 102, 103, 12 L. Ed. 997; Boeling v. Harrison, 6 How. (U. S.) 248, 259, 12 L. Ed. 425; Collings v. Hope, Fed. Cas. No. 3003, 3 Wash. C. C. 149; Parrott v. Thacher, 9 Pick. (Mass.) 426; York v. Wistar, Fed. Cas. No. 18,141; Greenwich Ins. Co. v. Waterman, 54 Fed. 839, 842, 4 C. C. A. 600, 603; Robinson v. United States, 13 Wall. (U. S.) 363, 366, 20 L. Ed. 653; Jones v. Hoey, 128 Mass. 585; Thayer v. Smoky Hollow Coal Co., 121 Iowa, 121, 96 N. W. 718; McSherry v. Blanchfield, 68 Kan. 310, 75 Pac. 121; Martin v. Western Union Tel. Co., 81 S. C. 432, 62 S. E. 833; Pennsylvania R. Co. v. Naive, 112 Tenn. 239, 64 L. R. A. 443, 79 S. W. 124; John O'Brien Lumber Co. v. Wil-

kinson, 123 Wis. 272, 101 N. W. 1050; The Gualala, 178 Fed. 402, 102 C. C. A., 548.

⁵⁶ Robertson v. National Steamship Co., 139 N. Y. 416, 34 N. E. 1053; A. J. Tower Co. v. Southern Pac. Co., 184 Mass. 472, 69 N. E. 348.

⁵⁷ This is true of a particular *hotel*: Berkshire Woollen Co. v. Proctor, 7 Cush. (Mass.) 417; of a single *lessor*: Beatty v. Gregory, 17 Iowa, 109, 85 Am. Dec. 546; of a particular *mill*: Schlessinger v. Dickinson, 5 Allen (Mass.), 47; *railroad company*: Detroit etc. R. Co. v. Van Steinberg, 17 Mich. 99; or *bank*: Allen v. Merchants' Bank, 22 Wend. (N. Y.) 215, 34 Am. Dec. 289; Chesapeake Bank v. Swain, 29 Md. 483; of a *city* as against nonresidents: Farmers' etc. Nat. Bank v. Sprague, 52 N. Y.

different rule should prevail when the usage relates, not to the mode of business of a particular individual, but to that of a *profession or trade*. It has frequently been declared that, if there is a general usage applicable to a particular profession, parties employing a professional or business man are supposed to deal with him according to that usage.⁵⁸ All trades have their usages; and when a contract is made with a man about the business of his craft, it is framed on the bases of its usage, which becomes part of it, except when its place is occupied by particular stipulations.⁵⁹ Although this may be a reasonable presumption, it is a presumption of fact merely, which may

605; of a particular *merchant* to charge his customers interest: *Wood v. Hickok*, 2 Wend. (N. Y.) 501; *Trotter v. Grant*, 2 Wend. (N. Y.) 413; *Fisher v. Sargent*, 10 Cush. (Mass.) 250; *Turner v. Dawson*, 50 Ill. 85; *Goodnow v. Parsons*, 36 Vt. 46; of a *loan agency*: *Citizens' State Bank v. Chambers*, 129 Iowa, 414, 105 N. W. 692; of an *employer* to require that notice be given by servants before they leave his employment: *Stevens v. Reeves*, 9 Pick. (Mass.) 198; in actions on *insurance policies* where evidence was offered to prove the special usages of insurance companies: *Carter v. Boehm*, 3 Burr. 1905, 97 Eng. Reprint, 1160; *Luce v. Dorchester Mut. Fire Ins. Co.*, 105 Mass. 297, 7 Am. Rep. 522; *Taylor v. Aetna Life Ins. Co.*, 13 Gray (Mass.), 434; *Stebbins v. Globe Ins. Co.*, 2 Hall (N. Y.), 632; *Washington Fire Ins. Co. v. Davison*, 30 Md. 91; *Hartford Protection Ins. Co. v. Harmer*, 2 Ohio St. 452, 59 Am. Dec. 684; *Illinois Mut. Fire Ins. Co. v. O'Neile*, 13 Ill. 89; *Schwartz v. Germania Life Ins. Co.*, 18 Minn. 448; *Goodall v. New England Mut. Fire Ins. Co.*, 25 N. H. 169; *Insurance Co. of North America v. Hibernia Ins. Co.*,

140 U. S. 565, 35 L. Ed. 517, 11 Sup. Ct. Rep. 909. So where an engraver offered to prove the course of his business in respect to the price paid for agency commissions, the offered testimony was incompetent, unless it was shown that the agent assented thereto and rendered his services in view of the compensation which such usage would afford him: *Flynn v. Murphy*, 2 E. D. Smith (N. Y.), 378.

⁵⁸ *Bragg v. Bletz*, 7 D. C. 105; *Currie v. Syndicate*, 104 Ill. App. 165; *Bodfish v. Fox*, 23 Me. 90, 39 Am. Dec. 611; *Ford v. Tirrell*, 9 Gray (Mass.), 401, 69 Am. Dec. 297; *Barton v. McKelway*, 22 N. J. L. 165; *Walls v. Bailey*, 49 N. Y. 464, 10 Am. Rep. 407; *Carter v. Philadelphia Coal Co.*, 77 Pa. 286, 2 Morr. Min. Rep. 287; *Pittsburgh, Mayor etc. of, v. O'Neill*, 1 Pa. 342; *Hazard v. New England Mar. Ins. Co.*, 8 Pet. (U. S.) 557, 8 L. Ed. 1043; *Sewell v. Cerp*, 1 Car. & P. 392; *Clayton v. Gregson*, 5 Ad. & E. 302, 111 Eng. Reprint, 1180; *Pollock v. Stables*, 12 Q. B. 765, 116 Eng. Reprint, 1057.

⁵⁹ *Pittsburgh, Mayor etc. of, v. O'Neill*, 1 Pa. 342.

be rebutted. In a New York case the proof showed that there was a uniform usage among the plasterers of Buffalo as to the mode of measuring work, and that the party against whom evidence of the usage was given was a builder who had resided in the city for ten years, yet in the decision Folger, J., after reviewing the authorities, held that the defendant might testify that he had no knowledge of the usage.⁶⁰ When both parties to the contract are engaged in the same trade, they will be presumed to have knowledge of the customs and usages affecting it. It is not necessary in such a case to prove actual knowledge, or that the custom is so general or universal that knowledge may be presumed.⁶¹ The question under discussion has frequently arisen in the dealings of *principals with their brokers*. It has been held that one who employs a broker to deal in a particular market is bound by the usages of that market, whether he has actual knowledge of such usages or not. Those decisions have been placed on the ground that the agent could not act for his principal at all without conforming to the prescribed rules or usages; and that the principal must be deemed to know that fact,⁶² inasmuch as the general law is that the usage of a particular business is impliedly incorporated into every contract of agency, and that a person who employs an agent to do business for him at a particular place must be taken to have contracted according to the custom of that place.⁶³ The supreme court of the United States adds to this statement, "especially

⁶⁰ Walls v. Bailey, 49 N. Y. 464, 10 Am. Rep. 407.

⁶¹ Smith & Co. v. Russell Lumber Co., 82 Conn. 116, 72 Atl. 577. See Crawford v. Kansas City Stockyards Co., 215 Mo. 394, 114 S. W. 1057, as to knowledge by railroad company of the customs of its employees.

⁶² Guesnard v. Louisville etc. R. Co., 76 Ala. 453; Taylor v. Bailey, 169 Ill. 181, 48 N. E. 200; Samuel v. Oliver, 130 Ill. 73, 22 N. E. 499; Austrian v.

Springer, 94 Mich. 343, 34 Am. St. Rep. 350, 54 N. W. 50; Harris v. Tumbridge, 83 N. Y. 92, 38 Am. Rep. 398; Walls v. Bailey, 49 N. Y. 464, 10 Am. Rep. 407; Sutton v. Tatham, 10 Ad. & E. 27, 113 Eng. Reprint, 11; Bayliffe v. Butterworth, 1 Ex. 425, 17 L. J. Ex. 78, 11 Jur. 1019.

⁶³ Charlotte Oil etc. Co. v. Hartog, 85 Fed. 150, 29 C. C. A. 56; Clews v. Jamieson, 182 U. S. 461, 45 L. Ed. 1183, 21 Sup. Ct. Rep. 845.

when such usage is known to the principal, and is fair in itself, and does not change in any essential particular the contract between the principal and agent, or involves no departure from the instructions of the principal; provided, the transaction for which the broker is employed is legal in its character, and does not violate any rule of law, good morals, or public policy.”⁶⁴ The fact that it was the custom of brokers at the place of sale to negotiate sales in their own names, without disclosing their principals, and to assume personal liability for the completion of such sales, is not sufficient to prove authority to sell in the broker’s name, if it is not shown that the principal had knowledge of the custom.⁶⁵

§ 465 (472). The usage must be consistent with the contract.—Since evidence of usage is received for the very purpose of ascertaining the true meaning of the contract, on the theory that the parties entered into their contract with reference to such usage, it is clear that proof of the usage should not be received, if it contradicts expressly or by implication the language of the contract. As was said by Lord Lyndhurst:⁶⁶ “Usage may be admissible to explain what is doubtful; *it is never admissible to contradict what is plain.*” Mr. Justice Miller has put it very plainly in speaking of the tendency to establish local and limited usages and customs in the contracts of parties, who had no reference to them when the transactions took place. After pointing out that it places in the hands of corporations, such as banks, insurance companies, and others, by compelling individuals to comply with rules

⁶⁴ Bibb v. Allen, 149 U. S. 481, 37 L. Ed. 819, 13 Sup. Ct. Rep. 950.

⁶⁵ Robbins v. Maher, 14 N. D. 228, 103 N. W. 755.

⁶⁶ Blackett v. Royal Exch. Assur. Co., 2 Crompt. & J. 249, 2 Tyr. 266, 1 L. J. Ex. 101; De Cordora v. Barnum, 130 N. Y. 615, 27 Am. St. Rep. 538, 29 N. E. 1099; Sheffield Furnace

Co. v. Hull Coal etc. Co., 101 Ala. 446, 14 South. 672; Baltimore Baseball Club v. Pickett, 78 Md. 375, 44 Am. St. Rep. 304, 22 L. R. A. 690, 28 Atl. 279; Gilbert v. McGinnis, 114 Ill. 28, 28 N. E. 382; Portland Flouring Mills Co. v. Ins. Co., 130 Fed. 860, 65 C. A. 344.

established for the interests alone of the former, a power of establishing those rules as usage or custom with the force of law, the learned judge continues: "When this is confined to establishing an implied contract, and the knowledge of the usage is brought home to the other party, the evil is not so great. But when it is sought to extend the doctrine beyond this, and incorporate the custom into an express contract whose terms are reduced to writing and are expressed in language neither technical nor ambiguous, and therefore needing no such aid in its construction, it amounts to establishing the principle that a custom may add to or vary or contradict the well expressed intention of the parties made in writing. No such extension of the doctrine is consistent either with authority or with the principles which govern the law of contracts."⁶⁷ And it is well settled that usage cannot be allowed to subvert the settled rules of law.⁶⁸ This principle has long been generally recognized as the one which should govern, although it would be difficult to reconcile many of the decisions which have attempted to apply the rule to the special contracts which were under consideration.⁶⁹ The best test by which to determine the existence

⁶⁷ Partridge v. Phoenix Ins. Co., 15 Wall. (U. S.) 573, 21 L. Ed. 229.

⁶⁸ Barnard v. Kellogg, 10 Wall. (U. S.) 383, 19 L. Ed. 987.

⁶⁹ Courts have refused to receive evidence of a custom by which *other property*, for example, other brands of flour of equal quality to that specified in the contract *might be delivered*: Beals v. Terry, 2 Sand. (N. Y.) 127; of the understanding by *stock dealers* of the notice to be given under a contract providing for delivery at buyer's option, "by giving ten days' notice at any time in December": Willmering v. McGaughey, 30 Iowa, 205, 6 Am. Rep. 673, and note; of a usage where the contract provided for delivery of goods

on cars at the place of shipment, that the *place of delivery* and payment is the place of destination: Duncan v. Green, 43 Iowa, 679; of a usage providing for a *different mode of compensation* than that specifically provided for in the contract: Partridge v. Phoenix Ins. Co., 15 Wall. (U. S.) 573, 21 L. Ed. 229; Advertiser & T. Co. v. Detroit, 43 Mich. 116, 5 N. W. 72; Lonergan v. Courtney, 75 Ill. 580; of the usage of the business of *banking* where a note is given to the bank with authority to sell certain stock placed as collateral for the nonperformance of a promise, whereby the bank had the right to dispose of collaterals at pleasure and on payment or tender of the debt to

or nonexistence of such repugnancy or inconsistency as will exclude the proposed evidence of the custom and usage is to inquire whether the explanation furnished by the evidence is such as, if expressed in the written con-

return an equal number of the shares of the same kind of stock: *Allen v. Dykers*, 3 Hill (N. Y.), 593; of a usage to change the well-known meaning of the letters C. O. D. on an *express* receipt: *Collender v. Dinsmore*, 55 N. Y. 200, 14 Am. Rep. 224; of a custom where the contract is to *transport stock* in open cars to carry stock in other kind of cars: *Sager v. Portsmouth etc. R. Co.*, 31 Me. 228, 50 Am. Dec. 659; of a usage inconsistent with the terms of an *express* contract for the sending of a telegram: *Grinnell v. Western Union Tel. Co.*, 113 Mass. 299, 18 Am. Rep. 485; of a usage that an *insurance policy* in blank is equivalent to one "for whom it may concern": *Turner v. Burrows*, 5 Wend. (N. Y.) 541; of usage to establish a rate of premium on *insurance* policies different from that agreed upon: *Insurance Cos. v. Wright*, 1 Wall. 456, 17 L. Ed. 505; of a usage providing for a different liability on the part of insurance company than that specified in the contract: *Bargett v. Orient Ins. Co.*, 3 Bosw. (N. Y.) 385; of a usage giving the *way-going crop* to the tenant when the lease provides that it shall go to the landlord: *Stultz v. Dickey*, 5 Binn. (Pa.) 285, 6 Am. Dec. 411; of a custom of terminating a *contract for hire* at any time without notice, where the hire is for a stated time: *Peters v. Stavelly*, 15 L. T., N. S., 275; of a custom which made the delivery of goods subject to the *exigencies of transportation* and subject to the further condition that, if the goods could not be shipped within a reasonable time, the contract was no

longer obligatory upon either party: *Menz Lumber Co. v. McNeely*, 58 Wash. 223, 108 Pac. 621. In a contract for drilling a well for a city was contained a provision that the city "will assume all risk on the twelve-inch pipe." A coupling having dropped out of place, rendering that section of the pipe useless and necessitating its replacement by a new pipe, the contractor sought to avail himself of a custom that in well diggers' parlance meant that the city should substitute the new pipe or be ready to pay for it. On the ground, *inter alia*, that such custom was not consistent with the contract, which provided that the contractor would bear all expenses not specified in the contract, such contractor could not claim the benefit of the alleged custom: *Dillow v. Monticello*, 145 Iowa, 424, 124 N. W. 186. Where a contract expressly stated the number of pounds to the bushel of produce, no evidence of custom as to such number is admissible to vary the contract: *Brent v. Lilly*, 174 Fed. 877. In the face of a contract to excavate to a specified depth at a specified price, an alleged usage in the business under which the contractor is entitled to compensation for excavating an extra amount below grade while reaching grade is not admissible in evidence: *Norton v. University of Maine*, 106 Me. 436, 76 Atl. 912. A custom that, on a shortage in the output of coal, such coal as could be delivered should be divided proportionately among the customers of the mine cannot be admitted to vary an express contract for delivery of a specified quantity: *Finch v. Zenith Fur-*

tract, would make it insensible or inconsistent.⁷⁰ It need hardly be stated that *parties are not compelled to incorporate usages*, no matter how well established, *into their written agreements*. It may, however, be the main object of the writing to furnish evidence that in the particular case the usage has been dispensed with. The rule on this subject was stated by Davis, J., in a decision by the supreme court of the United States: "The proper office of a custom or usage in trade is to ascertain and explain the meaning and intention of the parties to a contract, whether written or parol, which could not be done without the aid of this extrinsic evidence. It does not go beyond this, and is used as a mode of interpretation on the theory that the parties knew of its existence and contracted with reference to it. It is often employed to explain words or phrases in a contract of doubtful signification, or which may be understood in different senses according to the subject matter to which they are applied. But if it be inconsistent with the contract, or expressly or by necessary implication contradicts it, it cannot be received in evidence to affect it."⁷¹ An English case well illustrates the rule that, if there is an *implied contradiction* of the

nace Co., 146 Ill. App. 257. See, also, Pittsburgh Coal Co. v. Northy, 158 Mich. 530, 123 N. W. 47. Evidence that leniency had been extended customarily to members of fraternal order in regard to payment of their assessments is inadmissible, since under contract of insurance assessments must be promptly paid: Dillon v. National Council of the K. & L. of Security, 148 Ill. App. 121. Evidence as to neighborhood custom of division of crops between landlord and cropper is inadmissible when division is expressly provided for by contract: Turner v. Morris, 142 Mo. App. 60, 125 S. W. 238. For these later illustrations we are indebted to 15 Current Law, p. 1218, where other cases are also collected on the same subject.

⁷⁰ McClure v. Cox, 32 Ala. 617, 70 Am. Dec. 552.

⁷¹ Barnard v. Kellogg, 10 Wall. (U. S.) 383, 19 L. Ed. 987. This follows the opinion of Story, C. J., in The Reeside, Fed. Cas. No. 11,657, 2 Sum. 567. That learned judge added: "An express contract of the parties is always admissible to supersede, or vary, or control, a usage or custom; for the latter may always be waived at the will of the parties. But a written and express contract cannot be controlled, or varied, or contradicted by a usage or custom; for that would not only be to admit parol evidence to control, vary, or contradict written contracts; but it would be to allow mere presumptions and implications, properly arising in the absence of any

contract, the usage is not admissible. The custom of the country required a tenant to plow, sow and manure a certain portion of the land in the last year of his tenancy, and entitle him on quitting to receive from the landlord a reasonable compensation for his labor, seed and manure. It was held that evidence of such custom should be rejected where the tenant had covenanted to plow, sow and manure in accordance with the custom, and where he was to be paid for the plowing.⁷² Not only must the custom

positive expressions of intention, to control, vary, or contradict the most formal and deliberate written declarations of the parties." See, also, *Capel v. Weir*, 45 Misc. Rep. 419, 90 N. Y. Supp. 394. From the mass of decisions on the inadmissibility of custom when inconsistent or repugnant to the contract, the following have been selected for reference: *Wilson v. Smith*, 111 Ala. 170, 20 South. 134; *American Can Co. v. Agricultural Ins. Co.*, 12 Cal. App. 133, 106 Pac. 720; *First Nat. Bank v. Londonderry Min. Co.*, 50 Colo. 85, 114 Pac. 313; *Smith v. Russell Lumber Co.*, 82 Conn. 116, 72 Atl. 577; *Thompson v. Riggs*, 6 D. C. 99; *Vardeman v. Penn. Mut. Life Ins. Co.*, 125 Ga. 117, 5 Ann. Cas. 221, 54 S. E. 66; *Delaware etc. Canal Co. v. Mitchell*, 113 Ill. App. 429; *Lake Shore etc. R. Co. v. Richards*, 126 Ill. 448, 18 N. E. 794; *Shedd v. American Credit Indem. Co.*, 48 Ind. App. 23, 95 N. E. 316; *Ryan v. City of Dubuque*, 112 Iowa, 284, 83 N. W. 1073; *Graham v. Trimmer*, 6 Kan. 230; *Covington v. Kanawha Coal etc. Co.*, 121 Ky. 681, 123 Am. St. Rep. 219, 12 Ann. Cas. 311, 3 L. R. A., N. S., 248, 89 S. W. 1126, 28 Ky. Law Rep. 636; *Crook v. Tensas Basin Levee Dist.*, 51 La. Ann. 285, 25 South. 88; *Ripley v. Crooker*, 47 Me. 370, 74 Am. Dec. 491; *Denton v. Gill*, 102 Md. 386, 3 L. R. A., N. S., 465, 62 Atl. 627; *Menage v. Rosenthal*, 175 Mass.

358, 56 N. E. 579; *Pittsburgh Coal Co. v. Northy*, 158 Mich. 530, 123 N. W. 47; *Keavy v. Thuet*, 47 Minn. 266, 50 N. W. 126; *Postal Telegraph-Cable Co. v. Willis*, 93 Miss. 540, 47 South. 380; *Wolff v. Campbell*, 110 Mo. 114, 19 S. W. 622; *Keefe v. Doreland*, 16 Mont. 16, 39 Pac. 916; *Schenck v. Griffin*, 38 N. J. L. 462; *Metz v. Miller*, 113 N. Y. Supp. 527; *Thompson v. Exum*, 131 N. C. 111, 42 S. E. 543; *Deacon v. Mattison*, 11 N. D. 190, 91 N. W. 35; *Beer v. Forest City Mut. Ins. Co.*, 39 Ohio St. 109; *Savage v. Salem Mills Co.*, 48 Or. 1, 10 Ann. Cas. 1065, 85 Pac. 69; *Maust v. Creasy*, 42 Pa. Sup. Ct. 633; *Watkins v. Greene*, 22 R. I. 34, 46 Atl. 38; *Bryan v. Spurgin*, 5 Sneed (Tenn.), 681; *Dayton Lumber Co. v. Stockdale*, 54 Tex. Civ. App. 611, 118 S. W. 805; *Anderson v. Daly Min. Co.*, 16 Utah, 28, 50 Pac. 815; *Harris v. Carson*, 7 Leigh (Va.), 632, 30 Am. Dec. 510; *Swadling v. Barneson*, 21 Wash. 699, 59 Pac. 506; *Exchange Bank v. Cookman*, 1 W. Va. 69; *The Gazele*, 128 U. S. 474, 32 L. Ed. 496, 9 Sup. Ct. Rep. 139; *Jenkins S. S. Co. v. Preston*, 186 Fed. 609, 108 C. C. A. 473; *Marshall v. Jamieson*, 42 U. C. Q. B. 115.

⁷² *Hutton v. Warren*, 1 Mees. & W. 477, 2 Gale, 71, 1 Tyr. & G. 646; *Webb v. Plummer*, 2 Barn. & Ald. 746, 106 Eng. Reprint, 537.

be not inconsistent with the contract, but it may not be inconsistent with other customs; one custom cannot be set up in opposition to another. "For if both are really customs, then both are of equal antiquity, and both established by mutual consent: which to say of contradictory customs is absurd. Therefore, if one man prescribes that by custom he has a right to have windows looking into another's garden, the other cannot claim a right by custom to stop up or obstruct those windows: for these two contradictory customs cannot both be good, nor both stand together. He ought rather to deny the existence of the former custom."⁷³

§ 466 (473). Proof that the usage is general—Uniform and certain—Continuous and obligatory—Peaceable.— We have already dealt with the requisite of knowledge of usages and customs.⁷⁴ Since it is necessary that there should be knowledge of the usage, either actual or presumptive, before parties are bound thereby, it frequently becomes important to show that the usage is general in its character. In most cases it may not be possible to prove the actual knowledge of the usage; and in such cases the usage must be shown to be so notorious or general that notice may be presumed. It is, of course, not necessary to the validity of a usage that it should exist throughout the whole country. *It suffices to show that the usage exists generally among the persons of any given class in a city or locality.*⁷⁵ These usages differ essentially from those more general customs, which are known and exist as part of the general law of the land, and which are observed and applied without being established by evidence offered in each particular case.

⁷³ 1 Blackst. Comm. 78.

⁷⁴ § 464, *ante*.

⁷⁵ Gleason v. Walsh, 43 Me. 397; Thompson v. Hamilton, 12 Pick. (Mass.) 425, 22 Am. Dec. 619; Perkins v. Jordan, 35 Me. 23; Clark v.

Baker, 11 Met. (Mass.) 186, 45 Am. Dec. 199; Lane v. Union Nat. Bank, 3 Ind. App. 299, 29 N. E. 613; Shute v. Bills, 191 Mass. 433, 114 Am. St. Rep. 631, 7 L. R. A., N. S., 965, 78 N. E. 96.

These local usages may be of comparatively recent origin, and may be limited to a single city or village; and yet, if reasonable in their provisions and so generally adopted by those concerned in any particular branch of business as to authorize the presumption that they are known by those who are dealing as vendor and vendees in that branch of trade or business, the dealings and contracts of such persons are considered to have been made in reference to such usages, and to be governed thereby.⁷⁶ It is very clear that a few isolated instances of a mode of doing business do not establish a usage of trade.⁷⁷ The rule was thus stated in a Massachusetts case in the charge to the jury, which was approved by supreme court: "It must be a custom of sufficiently long continuance that all parties may be presumed to know it; it must be uniform; it must be universal. It does not show a usage of trade to show that many persons or a majority of persons engaged in a business practice in a particular mode. To constitute a usage of trade, so as to have it affect the contract, the practice must be universal. It must be the mode in which persons in that trade do their business."⁷⁸ If it is sometimes practiced and sometimes not, although it may be more frequently done than not done, that does not make what is in law a usage, which enters into and makes part of a contract.⁷⁹ It has been held, however, that there may be exceptions to the usage, provided they are such as prove the rule.⁸⁰ The

⁷⁶ *Clark v. Baker*, 11 Met. (Mass.) 186, 45 Am. Dec. 199.

⁷⁷ *Berry v. Cooper*, 28 Ga. 543; *Champion v. Wilson*, 64 Ga. 184; *Chesapeake Bank v. Swain*, 29 Md. 483; *Larkin v. Mitchell etc. Lumber Co.*, 42 Mich. 296, 3 N. W. 904. See § 463, *ante*. Such instances are very often only what are called in Cincinnati etc. *Mail Line Co. v. Boal*, 15 Ind. 345, accommodations usages.

⁷⁸ *Porter v. Hills*, 114 Mass. 106; *Chicago M. & St. P. Ry. Co. v. Linde-*

man, 143 Fed. 946, 75 C. C. A. 18. See the Canadian case of *Trent Valley etc. Co. v. Oelrichs*, 23 S. C. R. 682.

⁷⁹ *Seudder v. Bradbury*, 106 Mass. 422.

⁸⁰ *Champion v. Wilson*, 64 Ga. 184; *Berry v. Cooper*, 28 Ga. 543; *Chesapeake Bank v. Swain*, 29 Md. 483; *Larkin v. Mitchell etc. Lumber Co.*, 42 Mich. 296, 3 N. W. 904. A deviation from a universal custom in particular instances does not destroy or impair its validity as such custom. It is

usage must also be *uniform* and *certain*. If different persons in the trade practice differently, it is not a usage, even though more persons practice one way than do another. "A custom that lands shall descend to the most worthy of the owner's blood is void; for how shall this worth be determined? But a custom to descend to the next male of the blood, exclusive of females, is certain, and therefore good. A custom to pay two-pence an acre in lieu of tithes, is good; but to pay sometimes two-pence, and sometimes three-pence, as the occupier of the land pleases, is bad for its uncertainty. Yet a custom, to pay a year's improved value for a fine on a copyhold estate, is good, though the value is a thing uncertain; for the value may at any time be ascertained; and the maxim of law is *id certum est, quod certum reddi potest* (that is certain which can be made certain)."⁸¹ The custom or usage must be *continuous*. Any interruption of it, not mere nonuser, would cause a temporary ceasing, and it would date only from the time of the resumption

enough if it be so usual, so customary, so generally practiced by those engaged in the business that the exceptions only serve to establish the habit of the trade: *Robertson v. Wilder*, 69 Ga. 340, citing *Champion v. Wilson*, *supra*.

⁸¹ 1 Blackst. Comm. 78; *Desha v. Holland*, 12 Ala. 513, 46 Am. Dec. 261; *Heistand v. Bateman*, 41 Colo. 20, 91 Pac. 1111; *Bryan v. Brown*, 3 Penne. (Del.) 504, 53 Atl. 55; *Robertson v. Wilder*, 69 Ga. 340; *Swern v. Churchill*, 155 Ill. App. 505; *Sweet v. Leach*, 6 Ill. App. 212; *Smith v. Hess*, 83 Iowa, 238, 48 N. W. 1030; *National Fire Ins. Co. v. Peaslee-Gaulbert Co.*, 120 Ky. 752, 87 S. W. 1115, 89 S. W. 3, 27 Ky. Law Rep. 1155; *Rochester German Ins. Co. v. Peaslee-Gaulbert Co.*, 89 S. W. 3, 28 Ky. Law Rep. 130; *Thorn v. Rice*, 15 Me. 263; *Foley v. Mason*, 6 Md. 37; *Fay v.*

Alliance Ins. Co., 16 Gray (Mass.), 455; *Strong v. Grand Trunk R. Co.*, 15 Mich. 206, 93 Am. Dec. 184; *Nippolt v. Firemen's Ins. Co.*, 57 Minn. 275, 59 N. W. 191; *Manzke v. Goldenberg*, 149 Mo. App. 12, 120 S. W. 32; *Eckstein v. Schleimer*, 62 Misc. Rep. 635, 116 N. Y. Supp. 7; *Isham v. Fox*, 7 Ohio St. 317; *Adams v. Pittsburg Ins. Co.*, 76 Pa. 411; *Singleton v. Hilliard*, 1 Strobl. (S. C.) 203; *Philips v. Wheeler*, 10 Tex. 536; *Woldert v. Arledge*, 11 Tex. Civ. App. 484, 33 S. W. 372; *Nelson v. Southern Pac. Co.*, 15 Utah, 325, 49 Pac. 644; *Russell v. Ferguson*, 77 Vt. 433, 60 Atl. 802; *Catlin v. Smith*, 24 Vt. 85; *Sterling Organ Co. v. House*, 25 W. Va. 64; *Hinton v. Coleman*, 45 Wis. 165; *Oelricks v. Ford*, 23 How. (U. S.) 49, 16 L. Ed. 534; *Kalamazoo Corset Co. v. Simon*, 129 Fed. 144.

of its operation.⁸² Thus testimony introduced in a personal injury case concerning the usages of runners and hackmen at remote periods was objectionable when used to establish a custom which would be material.⁸³ It must be *obligatory*. "Customs, though established by consent, must be (when established) *compulsory*; and not left to the option of every man, whether he will use them or no. Therefore, a custom that all the inhabitants shall be rated toward the maintenance of a bridge will be good; but a custom that every man is to contribute thereto at his own pleasure, is idle and absurd, and indeed no custom at all."⁸⁴ Mutual exchange of courtesies, binding on neither party, though customary at a port, does not become of binding force upon a contract there made.⁸⁵ A custom must have been *peaceable*, and acquiesced in; not subject to contention and dispute. For as customs owe their original to common consent, their being immemorially disputed, either at law or otherwise, is a proof that such consent was wanting.⁸⁶

§ 467 (474). To admit parol proof the usage must be lawful.—A custom, however ancient, if contrary to morality, religion, and the law of the land, cannot be a legal one, and it is clearly unreasonable, and cannot be compulsory.⁸⁷ Evidence is not admissible to prove a usage

⁸² 1 Blackst. Comm. 77.

⁸³ Michigan Cent. R. Co. v. Coleman, 28 Mich. 440.

⁸⁴ 1 Blackst. Comm. 78. It does not follow that a usage is obligatory from the time of its adoption. To give it the force of law, it requires an acquiescence and notoriety from which flows the inference that it is known especially to those who may be affected by it: Adams v. Otterback, 15 How. (U. S.) 539, 14 L. Ed. 805.

⁸⁵ Pitch Pine Lumber Co. v. Wood Lumber Co., 57 Fla. 140, 48 South. 993.

⁸⁶ 1 Blackst. Comm. 77; McMasters v. Pennsylvania R. Co., 69 Pa. 374, 8 Am. Rep. 264.

⁸⁷ Holmes v. Johnson, 42 Pa. 159 (an attempt to prove in a certain locality a custom of promiscuous cohabitation), Seagar v. Sligerland, 2 Caines (N. Y.), 219 (where proof was offered of the custom of "bundling"—engaged couples sleeping together). The suggestion by Blackstone of the probable origin of the custom of borough English is also interesting: 2 Blackst. Comm. 83.

which would *contravene the statute law* of the forum.⁸⁸ It has frequently been declared that no usage can be shown in opposition to the established rules of *common law*;⁸⁹ but many cases might be cited in which proof has been allowed of usages inconsistent with common-law rules. "A usage or custom is not invalid simply because it is different in its effect from the general principles of law applicable to the particular circumstances in its absence. But if it conflicts with an established rule of *public policy*, which it is not to the general interest to disturb, if its effect is injurious to the parties themselves in their relations to each other, if, in short, it is an unjust, oppressive or impolitic usage, then it will not be recognized in courts of justice, for it will lack one of the requisites of a valid custom, viz., *reasonableness*."⁹⁰

§ 468 (475). Parol evidence as to consideration.—Perhaps the most important exception to the general rule under discussion is that, in actions where written agree-

⁸⁸ The rule has been applied to usage to collect *usurious interest*: *Dunham v. Dey*, 13 Johns. (N. Y.) 40; *Dunham v. Gould*, 16 Johns. (N. Y.) 367, 8 Am. Dec. 323; *Greene v. Tyler*, 39 Pa. 361; *Jones v. McLean*, 18 Ark. 456; *Niagara Co. Bank v. Baker*, 15 Ohio St. 68; *Gore v. Lewis*, 109 N. C. 539, 13 S. E. 909; usage by which notaries in New York made *demand on bills of exchange* different from that provided by statute: *Otsego County Bank v. Warren*, 18 Barb. (N. Y.) 290; *Commercial Bank v. Var-num*, 3 Lans. (N. Y.) 86; attempt to *enlarge the power of officers* whose authority is defined by statute of usages: *Walters v. Senf*, 115 Mo. 524, 22 S. W. 511; to the *sales* of a larger number of pounds to the ton than required by statute: *Evans v. Myers*, 25 Pa. 114, 15 Morr. Min. Rep. 243; *Weaver v. Fegely*, 29 Pa. 27, 70 Am.

Dec. 151; or a larger number of ounces per pound of butter: *Noble v. Durell*, 3 Term Rep. 271, 100 Eng. Reprint, 569.

⁸⁹ *Edie v. East India Co.*, 1 W. Black. 295, 96 Eng. Reprint, 166, 2 Burr. 1216, 97 Eng. Reprint, 797; *Eager v. Atlas Ins. Co.*, 14 Pick. (Mass.) 141, 25 Am. Dec. 363; *Rapp v. Palmer*, 3 Watts (Pa.), 178; *Raisin v. Clark*, 41 Md. 158, 20 Am. Rep. 66; *Thompson v. Riggs*, 5 Wall. (U. S.) 663, 18 L. Ed. 704; *Barnard v. Kellogg*, 10 Wall. (U. S.) 383, 19 L. Ed. 987; *Frith v. Barker*, 2 Johns. (N. Y.) 327; *Southwestern Freight etc. Co. v. Stanard*, 44 Mo. 71, 100 Am. Dec. 255; *Meaber v. Lufkin*, 21 Tex. 383; *Inglebright v. Hammond*, 19 Ohio, 337, 53 Am. Dec. 430.

⁹⁰ Lawson, Usages, 465 et seq., and many illustrations. See § 462, *ante*.

ments are involved, the consideration stated is generally open to explanation.⁹¹ Thus, in actions on *notes* or *other contracts*, the defense is frequently interposed that the agreement was without consideration, or that the consideration has failed; and proof sustaining such a defense is admissible, provided it does not in other respects vary the legal effect of the contract.⁹² For example, when the con-

⁹¹ Pollack v. Gunter, 162 Ala. 317, 50 South. 155; Cox v. Smith, 99 Ark. 218, 138 S. W. 978; Arnold v. Arnold, 137 Cal. 291, 70 Pac. 23; Rouse v. Wallace, 10 Colo. App. 93, 50 Pac. 366; Sherman's Sons Co. v. Industrial & Mfg. Co., 82 Conn. 479, 74 Atl. 773; Bing v. Bank, 5 Ga. App. 578, 63 S. E. 652; Kelly v. Leachman, 3 Idaho, 672, 34 Pac. 813, 3 Idaho, 629, 33 Pac. 44; Spence v. Central Acc. Ins. Co., 236 Ill. 444, 19 L. R. A., N. S., 88, 86 N. E. 104; Smith v. McClain, 146 Ind. 77, 45 N. E. 41; Mehlin v. Mutual Reserve Fund L. Assn., 2 Ind. Ter. 396, 51 S. W. 1063; Hall v. Barnard, 138 Iowa, 523, 116 N. W. 604; Foxworthy v. Adams, 136 Ky. 403, Ann. Cas. 1912A, 327, 27 L. R. A., N. S., 308, 124 S. W. 381; Sere v. Darby, 118 La. 619, 43 South. 255; Haslam v. Jordan, 104 Me. 49, 70 Atl. 1066; Higdon v. Thomas, 1 Har. & G. (Md.) 139; Drury v. Tremont Imp. Co., 13 Allen (Mass.), 168; Scanlon v. Northwood, 147 Mich. 139, 141, 110 N. W. 493; Kramer v. Gardner, 104 Minn. 370, 22 L. R. A., N. S., 492, 116 N. W. 925; Campbell v. Davis, 94 Miss. 164, 19 Ann. Cas. 239, 47 South. 546; Burgher v. Wabash R. Co., 139 Mo. App. 62, 120 S. W. 673; Noyes v. Young, 32 Mont. 226, 79 Pac. 1063; Davis v. Sterns, 85 Neb. 121, 122 N. W. 672; Karpf v. Borgenicht, 65 Misc. Rep. 592, 120 N. Y. Supp. 876; McPeters v. English, 141 N. C. 491, 54 S. E. 417; Alsterberg v. Bennett, 14 N. D. 596, 106

N. W. 49; In re Barnes, 221 Pa. 399, 70 Atl. 790; National Exch. Bank v. Watson, 13 R. I. 91, 43 Am. Rep. 13; Trimmier v. Liles, 58 S. C. 284, 36 S. E. 652; Syler v. Culp (Tex. Civ. App.), 138 S. W. 175; Miller v. Livingston, 22 Utah, 174, 61 Pac. 569; Citizens' Sav. Bank etc. Co. v. Babbitt, 71 Vt. 182, 44 Atl. 71; Bruce v. Slemp, 82 Va. 352, 4 S. E. 692; Warwick v. Hitchings, 50 Wash. 140, 96 Pac. 960; Thomas v. Linn, 40 W. Va. 122, 20 S. E. 878; Perkins v. McAuliffe, 105 Wis. 582, 81 N. W. 645; Cabrera v. American Bank, 214 U. S. 224, 53 L. Ed. 974, 29 Sup. Ct. Rep. 623.

⁹² Long v. Davis, 18 Ala. 801; Waymack v. Heilman, 26 Ark. 449; Pettibone v. Roberts, 2 Root (Conn.), 258; Smith v. Brooks, 18 Ga. 440; Stackpole v. Arnold, 11 Mass. 27, 6 Am. Dec. 150; Erwin v. Saunders, 1 Cow. (N. Y.) 249, 13 Am. Dec. 520; Foy v. Blackstone, 31 Ill. 538, 83 Am. Dec. 246; Meyer v. Casey, 57 Miss. 615; Griffin v. Cowan, 15 La. Ann. 487; Anthony v. Harrison, 74 N. Y. 613; Herrick v. Bean, 20 Me. 51; Eaton v. Eaton, 35 N. J. L. 290; Thompson v. Thompson, 9 Ind. 323, 68 Am. Dec. 638, and note; Cross v. Rowe, 22 N. H. 77; Fechheimer v. Trounstone, 15 Colo. 386, 24 Pac. 882; Barbee v. Barbee, 108 N. C. 581, 13 S. E. 215; Macomb v. Wilkinson, 83 Mich. 486, 47 N. W. 336; Halpin v. Stone, 78 Wis. 183, 47 N. W. 177; Fitzpatrick v. Moore, 53 Ark. 4, 16

sideration stated has failed, another can be proved;⁹³ if a bill of sale, release or other written instrument⁹⁴ fails to state the entire consideration, the same may be shown; so whether the true consideration is greater or less than that stated;⁹⁵ and if the consideration stated is in ambiguous terms, or if it is clear that the whole consideration is not stated, the true consideration may be proved,⁹⁶ and it is now the rule generally adopted that the *real consideration* may be proved although different from that expressed;⁹⁷ for example, where there is merely a nominal

S. W. 7; Walker v. Haggerty, 30 Neb. 120, 46 N. W. 221; Pray v. Rhodes, 42 Minn. 93, 43 N. W. 838; Volkenand v. Drum, 154 Pa. 616, 26 Atl. 611. See note to Goldsmith v. Howe, 1 L. R. A. 816, 817.

⁹³ Leifchild's Case, L. R. 1 Eq. 231, 11 Jur., N. S., 941, 13 L. T. 267; Tull v. Parlett, 1 Moody & M. 472, 31 R. R. 751; Dorsey v. Hagard, 5 Mo. 420; Cowan v. Cooper, 41 Ala. 187; Barbee v. Barbee, 109 N. C. 299, 13 S. E. 792, where the consideration stated was an advancement.

⁹⁴ *Bill of sale*: Nedvidek v. Meyer, 46 Mo. 600; Halpin v. Stone, 78 Wis. 183, 47 N. W. 177; *release*: Pennsylvania Ry. Co. v. Dolan, 6 Ind. App. 109, 51 Am. St. Rep. 289, 32 N. E. 802; Osborne v. Stringham, 1 S. D. 406, 47 N. W. 408; *indorsement of note*: Farmers' Sav. Bank v. Hansmann, 114 Iowa, 49, 86 N. W. 31.

⁹⁵ Pique v. Arendale, 71 Ala. 91; Cheesman v. Nicholl, 18 Colo. App. 174, 70 Pac. 797; Droop v. Ridenour, 11 App. Cas. (D. C.) 224; Rook v. Rook, 111 Ill. App. 398; Maxwell v. McCall, 145 Iowa, 687, 124 N. W. 760; Morton v. Jones, 136 Ky. 797, 125 S. W. 247; Hodges v. Heal, 80 Me. 281, 6 Am. St. Rep. 199, 14 Atl. 11; Galvin v. Boston El. R. Co., 180 Mass. 587, 62 N. E. 961; Harwood v. Harwood, 22 Vt. 507; Don Yook v.

Washington Mill Co., 16 Wash. 459, 47 Pac. 964.

⁹⁶ Thomas v. Barker, 37 Ala. 392; Mobile etc. Ry. Co. v. Wilkinson, 72 Ala. 286; Coles v. Soulsby, 21 Cal. 47; Fraley v. Bentley, 1 Dak. 25 (24), 46 N. W. 506; Diggins v. Doherty, 4 Mackey (D. C.), 172; Henderson v. Tobey, 105 Ill. App. 154; First Nat. Bank v. Snyder, 79 Iowa, 191, 44 N. W. 356; Bourne v. Bourne, 92 Ky. 211, 17 S. W. 443, 13 Ky. Law Rep. 545; Abbott v. Marshall, 48 Me. 44; Clark v. Deshon, 12 Cush. (Mass.) 589; Bolles v. Sachs, 37 Minn. 315, 33 N. W. 862; Breitenwischer v. Clough, 111 Mich. 6, 66 Am. St. Rep. 372, 69 N. W. 88; Beagle v. Harby, 73 Hun, 310, 26 N. Y. Supp. 375; Vail v. McMillan, 17 Ohio St. 617; Scoggin v. Schloath, 15 Or. 380, 15 Pac. 635; Street v. Robertson, 28 Tex. Civ. App. 222, 66 S. W. 1120; Harvey v. Alexander, 1 Rand. (Va.) 219, 10 Am. Dec. 519; Williams v. Blumenthal, 27 Wash. 24, 67 Pac. 393; Kickland v. Menasha Woodenware Co., 68 Wis. 34, 60 Am. Rep. 831, 31 N. W. 471; Mills v. Dow, 133 U. S. 423, 33 L. Ed. 717, 10 Sup. Ct. Rep. 413.

⁹⁷ Butt v. Smith, 121 Wis. 566, 105 Am. St. Rep. 1039, 99 N. W. 328. Thus if the consideration of a *mortgage* is stated to be for money advanced, it may be shown to have been

consideration expressed.⁹⁸ The fact that the consideration *dehors* the instrument rests in contingency will not preclude its admissibility, as, for instance, when one made a contract to pay off for another a debt due to a third person, taking a conveyance of the debtor's land, which was to be sold and the surplus (if any) paid to the debtor, and the conveyance showed only the amount of the debt

as security for the indorsement of a note: *McKinster v. Babcock*, 26 N. Y. 378; *Harrington v. Samples*, 36 Minn. 200, 30 N. W. 671; or that it was given partly as security for the debt of a third person: *Metzner v. Baldwin*, 11 Minn. 150; or to secure future responsibilities: *Foster v. Reynolds*, 38 Mo. 553; *McKinster v. Babcock*, 37 Barb. (N. Y.) 265; *Truscott v. King*, 6 N. Y. 147; *Lawrence v. Tucker*, 23 How. 14, 16 L. Ed. 474; or merely as collateral security: *Chester v. Bank of Kingston*, 16 N. Y. 336; *Pond v. Eddy*, 113 Mass. 149; *Fullwood v. Blanding*, 26 S. C. 312, 2 S. E. 565; *Kimball v. Myers*, 21 Mich. 276, 4 Am. Rep. 487; *Mulford v. Muller*, 1 Keyes (N. Y.), 31; *Aller v. Aller*, 40 N. J. L. 446. So it may be shown that an instrument silent upon the subject was executed for a sufficient consideration: *Board of Trustees v. Saunders*, 84 Wis. 570, 54 N. W. 1094; *Guidery v. Green*, 95 Cal. 630, 30 Pac. 786. A promise by one party to a contract not under seal to do or refrain from doing some act before the other party to the contract is to be obligated to perform is the consideration for the contract, and may be shown by parol, and failure to fulfill the promise or to perform the agreement constitutes a failure of consideration and relieves the other party from performing: *Ward v. Textile Commission Co.*, 139 App. Div. 109, 123 N. Y. Supp. 918; so, also,

may be shown the true consideration of a written instrument whereby a party released another from liability for damages: *Illinois Cent. R. Co. v. Fairchild*, 48 Ind. App. 300, 91 N. E. 836; *American Car & Foundry Co. v. Smock*, 48 Ind. App. 359, 91 N. E. 749, 93 N. E. 78. Where the consideration expressed in a promissory note is "value received," in a suit thereon by the payee against the maker, the defendant can plead and prove by parol the consideration of the note, and the total or partial failure thereof: *Pope v. Peterson*, 7 Ga. App. 395, 66 S. E. 984. The additional consideration may always be shown unless it is contractual: *International Land Co. v. Parmier* (Tex. Civ. App.), 123 S. W. 196. See, also, *Coverdill v. Seymour*, 94 Tex. 1, 57 S. W. 37, in which the subject is well discussed. See, also, *McCormick v. Kampmann*, 102 Tex. 215, 115 S. W. 24, where the consideration sought to be substituted was contractual. See, also, *Sherman's Sons Co. v. Industrial etc. Co.*, 82 Conn. 479, 74 Atl. 773; *Karpf v. Borgenicht*, 65 Misc. Rep. 592, 120 N. Y. Supp. 876. See, also, the Canadian cases: *Porteous v. Muir*, 8 O. R. 127; *Mutual Life etc. Co. v. Quiguere*, 32 S. C. R. 348.

⁹⁸ In *Harraway v. Harraway*, 136 Ala. 499, 34 South. 836, the expressed consideration was one dollar; the real consideration proved was an exchange of property.

as the consideration, the debtor was allowed to give evidence of the contingency.⁹⁹ When the instrument itself expresses that there is other consideration, evidence of it is, of course, admissible as well on the ground of explaining the ambiguity.¹⁰⁰ When the consideration for different properties is expressed in a lump sum, parol evidence is admissible to show the division. Thus under a written contract for the purchase of a business and the stock of a corporation for an aggregate sum, parol evidence is competent to show that a cash payment made was wholly for the business, and that the sole consideration for the balance of the purchase money taken in notes was the stock of the corporation. The effect of such proof is the same as if the separate consideration were recited in the contract, making it, not an entire, but a separate contract of purchase.¹ But if the parol *testimony proposed tends to change the contract* itself, instead of the consideration, *it should be rejected.*² A party cannot, under the guise of varying the consideration, ingraft upon the agreement by parol new terms and covenants.³

§ 469 (476). Proof of consideration in deeds.—Among the earlier decisions there was much conflict as to the rule in respect to deeds and other instruments under seal; and in numerous cases it was held that the *clause stating the consideration must be held conclusive* like other parts of the instrument, and not open to contradiction and explanation.⁴ But the rule is now well settled that although the

⁹⁹ Hall v. Hall, 8 N. H. 129; Nickerson v. Saunders, 36 Me. 413.

¹⁰⁰ Hynes v. Campbell, 6 T. B. Mon. (Ky.) 286; Maigley v. Hauer, 7 Johns. (N. Y.) 341; Boise Valley Const. Co. v. Kroeger, 17 Idaho, 384, 105 Pac. 1070.

¹ Field v. Austin, 131 Cal. 379, 63 Pac. 692.

² Stillings v. Timmins, 152 Mass. 147, 25 N. E. 50; Indianapolis Union R. Co. v. Houlihan, 157 Ind. 494, 54

L. R. A. 787, 60 N. E. 943; Milich v. Armour Packing Co., 60 Kan. 229, 56 Pac. 1; Stevens v. Wiley, 165 Mass. 402, 43 N. E. 177; Hubbard v. Marshall, 50 Wis. 322, 6 N. W. 497; Kahn v. Kahn, 94 Tex. 114, 58 S. W. 825.

³ Kingsland v. Haines, 62 App. Div. 146, 70 N. Y. Supp. 873.

⁴ Schemerhorn v. Vanderheyden, 1 Johns. (N. Y.) 139, 3 Am. Dec. 304, and note; Maigley v. Hauer, 7 Johns. (N. Y.) 341. See valuable notes dis-

consideration expressed in the deed is *prima facie* the sum agreed to be paid,⁵ it *may still be shown*, as between the parties, that the real consideration of a deed or mortgage is *different from that expressed*.⁶ The rule on this

cussing the whole subject of parol evidence as to the consideration of deeds, to Velten v. Carmack, 20 L. R. A. 101-114, and Shehy v. Cunningham, 25 L. R. A., N. S., 1194.

⁵ Clements v. Landrum, 26 Ga. 401; Belden v. Seymour, 8 Conn. 304, 21 Am. Dec. 661; McCrea v. Purmort, 16 Wend. (N. Y.) 460, 30 Am. Dec. 103, and note; Barbee v. Barbee, 108 N. C. 581, 13 S. E. 215.

⁶ Burroughs v. Patc, 166 Ala. 223, 51 South. 978; Magill Lumber Co. v. Lane-White Lumber Co., 90 Ark. 426, 119 S. W. 822; Hoover v. Binkley, 66 Ark. 645, 51 S. W. 73; Merced Oil Min. Co. v. Patterson, 153 Cal. 624, 96 Pac. 90; Carty v. Connolly, 91 Cal. 15, 27 Pac. 599; Welch v. Brown, 46 Colo. 129, 103 Pac. 296; Hannah v. Wadsworth, 1 Root (Conn.), 458; Nat. Metropolitan Bank v. Hitz, 1 Mackey (D. C.), 111; Herrin v. Abbe, 55 Fla. 769, 18 L. R. A., N. S., 907, 46 South. 183; Shackelford v. Orris, 135 Ga. 29, 68 S. E. 838; Carter v. Walden, 136 Ga. 700, 71 S. E. 1047; Worrell v. Forsyth, 141 Ill. 22, 30 N. E. 673; Indianapolis etc. R. Co. v. Wycoff (Ind. App.), 95 N. E. 442; Maxwell v. McCall, 145 Iowa, 687, 124 N. W. 760; Bristol Sav. Bank v. Stiger, 86 Iowa, 344, 53 N. W. 265; Harper v. Perry, 28 Iowa, 57; Stirman v. Crabtree (Ky.), 122 S. W. 194; Louisville etc. Ry. Co. v. Neafus, 93 Ky. 53, 18 S. W. 1030; Jackson v. Miller, 32 La. Ann. 432; Tyler v. Carlton, 7 Me. 175, 20 Am. Dec. 357; Smith v. Davis, 49 Md. 470; Blackwell v. Blackwell, 196 Mass. 186, 12 Ann. Cas. 1070, 81 N. E. 910; Car-

dinal v. Hadley, 158 Mass. 352, 35 Am. St. Rep. 492, 33 N. E. 575; Hill v. Whidden, 158 Mass. 267, 33 N. E. 526; Ruch v. Ruch, 159 Mich. 231, 124 N. W. 52; Cutler v. Steele, 93 Mich. 204, 53 N. W. 521; Le May v. Brett, 81 Minn. 506, 84 N. W. 339; Parker v. Foy, 43 Miss. 260, 55 Am. Rep. 484; Kerr v. Calvit, Walk. (Miss.) 115, 12 Am. Dec. 537; Staed v. Rosier, 157 Mo. App. 300, 137 S. W. 901; See v. Mallonee, 107 Mo. App. 721, 82 S. W. 557; Chambers v. Chambers, 227 Mo. 262, 137 Am. St. Rep. 567, 27 S. W. 86; Rabsuhl v. Lack, 35 Mo. 316; Wilttrout v. Showers, 82 Neb. 777, 118 N. W. 1080; Fall v. Glover, 34 Neb. 522, 52 N. W. 168; Lake v. Bender, 18 Nev. 361, 4 Pac. 711, 7 Pac. 74; Pritchard v. Brown, 4 N. H. 397, 17 Am. Dec. 431; Voight v. Dowe, 74 N. J. Eq. 560, 70 Atl. 344; Silvers v. Potter, 48 N. J. Eq. 539, 22 Atl. 584; Morris Canal etc. Co. v. Ryerson, 27 N. J. L. 457; Naylor v. Davis, 130 App. Div. 311, 114 N. Y. Supp. 248; McCrea v. Purmort, 16 Wend. (N. Y.) 460, 30 Am. Dec. 103; Faust v. Faust, 144 N. C. 383, 57 S. E. 22; Smith v. (Gaub) Hogue, 19 N. D. 337, 123 N. W. 827; Shehy v. Cunningham, 81 Ohio St. 289, 90 N. E. 805; Williams v. Poppleton, 3 Or. 139; Hoffa v. Hoffa, 38 Pa. Sup. Ct. 356; National Exch. Bank v. Wat-son, 13 R. I. 91, 43 Am. Rep. 13; Whitman v. Corley, 72 S. C. 410, 52 S. E. 49; Singletary v. Goeman (Tex. Civ. App.), 123 S. W. 436; O'Farrell v. O'Farrell, 56 Tex. Civ. App. 51, 119 S. W. 899; Wheeler v. Campbell, 68 Vt. 98, 34 Atl. 35; Pierce v. Brew,

subject has been thus stated in a Maine case: "*The only effect of the consideration clause in a deed is to estop the grantor from alleging that it was executed without consideration, and to prevent a resulting trust in the grantor.*"

43 Vt. 292; Bruce v. Slemp, 82 Va. 352, 4 S. E. 692; Windsor v. St. Paul etc. R. Co., 37 Wash. 156, 3 Ann. Cas. 62, 79 Pac. 613; Furst v. Galloway, 56 W. Va. 246, 49 S. E. 146; Mueller v. Cook, 126 Wis. 504, 105 N. W. 1054; Butt v. Smith, 121 Wis. 566, 105 Am. St. Rep. 1039, 99 N. W. 328; Halpin v. Stone, 78 Wis. 183, 47 N. W. 177; Reynolds v. Vilas, 8 Wis. 471, 76 Am. Dec. 238; Mills v. Allen, 133 U. S. 423, 33 L. Ed. 717, 10 Sup. Ct. Rep. 413. The true consideration may be shown where *none is expressed* in the deed: Warren v. Walker, 23 Me. 453; where the consideration is expressed in *general terms*: Pierce v. Brew, 43 Vt. 292. Then the particular consideration may be shown, as that the grantee agreed to assume a certain encumbrance: Hays v. Peck, 107 Ind. 389, 8 N. E. 274; McDill v. Gunn, 43 Ind. 315; Bristol Bank v. Stiger, 86 Iowa, 344, 53 N. W. 265; or it may be shown to have been *property, instead of money*, as expressed: Carneal v. May, 2 A. K. Marsh. (Ky.) 587, 12 Am. Dec. 453; Steele v. Worthington, 2 Ohio, 182; McCrea v. Purmort, 16 Wend. (N. Y.) 460, 30 Am. Dec. 103; the sum named in the deed may be shown to include *payment of a debt* as well as the purchase price: Harwood v. Harwood, 22 Vt. 507; to be in *satisfaction of claims*, as for all the grantees' prior trespasses on the land conveyed: Hodges v. Heal, 80 Me. 281, 6 Am. St. Rep. 199, 14 Atl. 11; that the real consideration was the *extinguishment of a debt*: Mason v. Buchanan, 62 Ala. 110; that the consideration was *paid by another person* than the one

named in the instrument: Anthony v. Chapman, 65 Cal. 73, 2 Pac. 889; Marks v. Spencer, 81 Va. 751; that there was a consideration *in addition* to the one stated: Vail v. McMillan, 17 Ohio St. 617; Miller v. Goodwin, 8 Gray (Mass.), 542; Henderson v. Dodd, Bail. Eq. (S. C.) 138; Perry v. Central Southern R. Co., 5 Cold. (Tenn.) 138; Hayden v. Mentzer, 10 Serg. & R. (Pa.) 329; Walter A. Wood Machine Co. v. Gaertner, 55 Mich. 453, 21 N. W. 885; Bolles v. Sachs, 37 Minn. 315, 33 N. W. 862; Nichols v. Burch, 128 Ind. 324, 27 N. E. 737; Mobile Bank v. McDonnell, 89 Ala. 434, 18 Am. St. Rep. 137, 9 L. R. A. 645, 8 South. 137; Fraley v. Bentley, 1 Dak. 25 (24), 46 N. W. 506; Nedvidek v. Meyer, 46 Mo. 600; that the *grantee should hold* the entire consideration and apply it to extinguish existing encumbrances: Becker v. Knudson, 86 Wis. 14, 56 N. W. 192; when after the mention of a particular consideration, the clause in the deed read "and for various other considerations," proof of such *other considerations* was allowed: Benedict v. Lynch, 1 Johns. Ch. (N. Y.) 331, 7 Am. Dec. 491; Norris v. Ham, R. M. Charlt. (Ga.) 267; Pomeroy v. Bailey, 43 N. H. 118; Chesson v. Pettijohn, 6 Ired. (N. C.) 121; Tull v. Parlett, 1 Moody & M. 472, 31 R. R. 751; where *nominal consideration* is expressed, other consideration may be shown: Hattersley v. Bissett, 51 N. J. Eq. 597, 40 Am. St. Rep. 532, 29 Atl. 187; where the action is for *breach of covenant*, the true consideration may be shown though it differs from that expressed: Donlan v. Evans,

For every other purpose, it may be varied or explained by parol proof. The grantor may show, notwithstanding the acknowledgment of payment, that no money was paid, and recover the price, in whole or part, against the

40 Minn. 501, 42 N. W. 472; so it may be shown that the real consideration for a deed was an *advancement*: Palmer v. Culbertson, 143 N. Y. 213, 38 N. E. 199; Barbee v. Barbee, 108 N. C. 581, 13 S. E. 215 (Schmidt v. Schmidt, 123 Wis. 295, 101 N. W. 678, was a defense to a note that the amount of it was an advancement and involved the application of Rev. Stats. 1898, § 3959, that parol evidence is inadmissible to prove advancements); or a *gift*: Velten v. Carmack, 23 Or. 282, 20 L. R. A. 101, 31 Pac. 658; or *contemplated marriage*: Tolman v. Ward, 86 Me. 303, 41 Am. St. Rep. 556, 29 Atl. 1081; or the *support of grantor*: Coleman v. Gammon (Iowa), 83 N. W. 898; that the grantor agreed as part of the consideration to pay *existing encumbrance*: Harts v. Emery, 184 Ill. 560, 56 N. E. 865; Lowry v. Downey, 150 Ind. 364, 50 N. E. 79; Langan v. Iverson, 78 Minn. 299, 80 N. W. 1051; where the true consideration was the promise of the grantee (the grantor's wife) to *make her will* and therein provide in a specified manner for the husband: Manning v. Pippen, 86 Ala. 357, 11 Am. St. Rep. 46, 5 South. 572. A parol agreement, being part of the consideration of a sale, restricting the use of the premises in some particular for a limited period, is not merged in the deed, and does not qualify or in any way affect the title to the land, and the admission of parol evidence to prove such an agreement is not an infringement of the rule that parol evidence is not admissible to contradict, vary or explain a written agreement:

Hall v. Solomon, 61 Conn. 476, 29 Am. St. Rep. 218, 23 Atl. 876. The true consideration being the *relinquishment of dower* may be shown by parol: Bullard v. Briggs, 7 Pick. (Mass.) 533, 19 Am. Dec. 292; as also to prove that the price of the land was to depend on the number of square feet in its area, and that by reason of a mistake in computing such area the plaintiff paid a greater sum than was due from him: Cardinal v. Hadley, 158 Mass. 352, 35 Am. St. Rep. 492, 33 N. E. 575; and that the grantee was to purchase another property to convey it to the grantor: Stirman v. Crabtree (Ky.), 122 S. W. 194; and that although the consideration was expressed pecuniarily, the true consideration was the resumption of marital relations of the parties, who were husband and wife: Pavloski v. Klassing, 134 Ga. 704, 68 S. E. 511; and that part of the consideration of a conveyance to a municipality for ornamental purposes was that the grantee should abstain from increasing the assessments on his abutting property by reason thereof: Seovel v. Detroit, 159 Mich. 95, 123 N. W. 569; that although a written instrument showed that the consideration was for services generally, it could be shown for what services the payment was made: Foxworthy v. Adams, 136 Ky. 403, Ann. Cas. 1912A, 327, 27 L. R. A., N. S., 308, 124 S. W. 381. See note on "Parol Evidence to Show Agreement of Parties at Time of Execution of Deed to Railroad for Right of Way or Depot Purposes," to Louisville etc. R. Co. v. Willbanks, 17 Ann. Cas. 863.

grantee.” The consideration expressed is only presumptive evidence that it is the real consideration, and that presumption may be overcome by parol evidence showing another or greater consideration. The reason for relaxing the general rule in this particular is stated to be that a change in or contradiction of the expressed consideration touches not the covenants of grantor and grantee in the deed, and neither limits nor enlarges the grant.⁸ It has been held in numerous cases that while the grantor cannot so far impeach the deed as to defeat the title which has passed by showing want of consideration, yet he may show that the consideration remains unpaid in an action to recover the same.⁹ For the purpose of showing the consideration for a large tract of land a memorandum furnished by the defendant to the conveyancer who drew the deed, setting out the price for each lot, was admitted by evidence.¹⁰ A want of consideration cannot be shown against a recital of a consideration for the purpose of defeating the operative words of a deed.¹¹ In a recent Maryland case,¹² the additional question was presented whether, the grantor having shown that the expressed consideration had not in fact been paid, the

⁷ *Goodspeed v. Fuller*, 46 Me. 141, 71 Am. Dec. 572, and note; *Cardinal v. Hadley*, 158 Mass. 352, 35 Am. St. Rep. 492, 33 N. E. 575.

⁸ *Henry v. Zurflieh*, 203 Pa. 440, 53 Atl. 243; *Jack v. Dougherty*, 3 Watts (Pa.), 151, in which the subject is instructively treated.

⁹ *Wilkinson v. Scott*, 17 Mass. 249; *Kumler v. Ferguson*, 7 Minn. 442; *Rhine v. Ellen*, 36 Cal. 362; *Bullard v. Briggs*, 7 Pick. (Mass.) 533, 19 Am. Dec. 292; *McCrea v. Purmort*, 16 Wend. (N. Y.) 460, 30 Am. Dec. 103; *Belden v. Seymour*, 8 Conn. 304, 21 Am. Dec. 661; *Watson v. Blaine*, 12 Serg. & R. (Pa.) 131, 14 Am. Dec. 669; *Whitbeck v. Whitbeck*, 9 Cow. (N. Y.) 266, 18 Am. Dec. 503; *Eppes v. Randolph*, 2 Call (Va.), 125; *Duval*

v. Bibb, 4 Hen. & M. (Va.) 113, 4 Am. Dec. 506. As to admissibility of parol evidence to show true nature of transaction where the recited consideration of a deed is shown not to have been paid, see note to *Coogle v. Cline*, 24 L. R. A., N. S., 413.

¹⁰ *Guinotte v. Chouteau*, 34 Mo. 154.

¹¹ *Strong v. Whybark*, 204 Mo. 341, 120 Am. St. Rep. 710, 12 L. R. A., N. S., 240, 102 S. W. 968; *McCrea v. Purmort*, 16 Wend. (N. Y.) 460, 30 Am. Dec. 103; *Farrington v. Barr*, 36 N. H. 86; *Kimball v. Walker*, 30 Ill. 482.

¹² *Coogle v. Cline*, 110 Md. 587, 73 Atl. 682, 24 L. R. A., N. S., 413, and note.

grantee or his privies might show on his behalf that it was not intended that the consideration should be paid, or that the consideration had been paid in some other way than that expressed in the deed. The exhaustive opinion in that case contains references to some of the most important decisions. It was a suit to recover the consideration money expressed in a deed as having been paid and which in fact had not been paid. The plaintiffs were the grantor's administrators, and parol evidence that the recital was inserted merely to show that the grantor had no intention of claiming payment was admitted. "It would seem clear upon principle and authority," said the court, "that the defendants had the right to show that when their father inserted in the deed the consideration of eight thousand dollars paid by the grantees at and before the delivery of the deed, when, in fact, no part of it had been paid, he intended thereby to evidence the understanding of the grantor and grantee that it was not intended to be paid. The effect of such evidence is not to vary or contradict the provisions of the deed, but to explain what would otherwise, on proof that the consideration had not been paid, be a contradiction in its terms." To have decided otherwise would have been to have permitted the plaintiffs to contradict the recitals in the deed—namely, the payment of the consideration—and deny to the grantees the right to explain them—an inconsistent position not sanctioned by law. So, in *actions on a warranty* in a deed, the defendant may show, for the purpose of reducing damages, that the real consideration was less than that stated.¹³ But in an action on a covenant of warranty brought by one to whom the grantee in a deed had conveyed, it was held that the grantor was not at liberty to show that the consideration was less than the sum stated in the deed.¹⁴ Although the grantor cannot show want of consideration

¹³ Garrett v. Stuart, 1 McCord (S. C.), 514.

¹⁴ Greenvault v. Davis, 4 Hill (N. Y.), 643.

to defeat the conveyance, it need hardly be said that, as against strangers who attack the conveyance for *fraud*, no conclusive force can be claimed for the recital which states the consideration.¹⁵ Generally, *as against third persons*, the recital of consideration is no evidence whatever;¹⁶ and as against *creditors* or innocent purchasers without notice, the mere statement that a nominal consideration has been paid raises no presumption of a substantial consideration. In such cases the burden is on the grantee to prove a sufficient consideration.¹⁷ It will be seen from the illustrations already given that the tendency of later decisions is in the direction of the doctrine that the acknowledgment of payment in a deed is open to *almost unlimited explanation*,—in short, that the consideration clause is of no greater effect than a separate receipt for the money which might always be explained,¹⁸—and that the consideration of a written instrument is always open to inquiry, and the party may show that the design and object of the agreement is different from what the language, alone considered, would indicate.¹⁹ The inquiry is practically unlimited. The mere recital of the payment, as we have shown, may be regarded as a receipt, subject to explanation—the mode in which the payment was made whether in money or property is admissible²⁰—

¹⁵ *Rose v. Taunton*, 119 Mass. 99; *Spaulding v. Knight*, 116 Mass. 148.

¹⁶ *Tutwiler v. Munford*, 68 Ala. 124; *Rose v. Taunton*, 119 Mass. 99.

¹⁷ *Kelson v. Kelson*, 10 Hare, 385, 68 Eng. Reprint, 976.

¹⁸ *McCrea v. Purmort*, 16 Wend. 460, 30 Am. Dec. 103; *Goodspeed v. Fuller*, 46 Me. 141, 71 Am. Dec. 572; *Witbeck v. Waine*, 16 N. Y. 532; *McKinster v. Babcock*, 26 N. Y. 378; *Wilkinson v. Scott*, 17 Mass. 249; *Collins v. Tillou*, 26 Conn. 368, 68 Am. Dec. 398; *Harrison v. Castner*, 11 Ohio St. 339; *Holbrook v. Holbrook*, 30 Vt. 432; *Swafford v. Whipple*, 3 G. Greene (Iowa), 261, 54 Am. Dec.

498; *Bolles v. Beach*, 22 N. J. L. 680, 53 Am. Dec. 263; *Hamilton v. McGuire*, 3 Serg. & R. (Pa.) 355; *Pritchard v. Brown*, 4 N. H. 397, 17 Am. Dec. 431; *Peck v. Vandenberg*, 30 Cal. 11; *Ewing v. Wilson*, 132 Ind. 223, 19 L. R. A. 767, 31 N. E. 64. See note to *Schemerhorn v. Vanderheyden*, 3 Am. Dec. 306, as to parol proof. As to execution and delivery of deeds, see § 471, *post*.

¹⁹ *Baird v. Baird*, 145 N. Y. 659, 28 L. R. A. 375, 40 N. E. 222; *Griereson v. Mason*, 60 N. Y. 394.

²⁰ *Steed v. Hinson*, 76 Ala. 298; *Erie Crawford Oil Co. v. Jones*, 43 Ind. App. 187, 86 N. E. 1027; *Bris-*

and even where no consideration is stated at all, evidence of consideration (if any) is admissible;²¹ except, of course, the document is inherently bad under the statute of frauds,²² or invalid for some good and sufficient reason. It is held, however, by one class of cases that when the deed contains a warranty against encumbrances, parol proof is inadmissible to show an agreement by the grantee to pay the encumbrances, and that a grantor in a deed cannot defend an action for a breach of his covenant by saying that the grantee, as a part of the consideration for the conveyance, made an oral agreement to pay a tax as part of the consideration.²³ These cases are, however, opposed to the weight of authority; and the rule of the preponderant decisions is that, notwithstanding a covenant against encumbrances in a deed, it may be shown by parol evidence that it was agreed between the parties at the time of the conveyance, and as part of the consideration, that the covenantee should himself discharge a

tol Sav. Bank v. Stiger, 86 Iowa, 344, 53 N. W. 265; *Carneal v. May*, 2 A. K. Marsh. (Ky.) 587, 12 Am. Dec. 453; *Holden v. Parker*, 110 Mass. 324; *Kriling v. Cramer*, 152 Mo. App. 431, 133 S. W. 655; *Miller v. McCoy*, 50 Mo. 214; *Lake v. Bender*, 18 Nev. 361, 4 Pac. 711, 7 Pac. 74; *Seaman v. Hasbrouck*, 35 Barb. (N. Y.) 151; *Smith Premier Typewriter Co. v. Rowan Hardware Co.*, 143 N. C. 97, 55 S. E. 417; *Keller v. Cohen*, 224 Pa. 434, 73 Atl. 918, 217 Pa. 522, 66 Atl. 862; *Calvert v. Nickles*, 26 S. C. 304, 2 S. E. 116; *Duveneck v. Kutzer*, 17 Tex. Civ. App. 577, 43 S. W. 541; *Beckman v. Beckman*, 86 Wis. 655, 57 N. W. 1117.

²¹ *Reader v. Helms*, 57 Ala. 440; *Sullivan v. Lear*, 23 Fla. 463, 11 Am. St. Rep. 388, 2 South. 846; *Witting v. Ringwood*, 13 Ky. Law Rep. 687; *Haskell v. Tukesbury*, 92 Me. 551, 69 Am. St. Rep. 529, 43 Atl. 500;

Horn v. Hansen, 56 Minn. 43, 57 N. W. 315, 22 L. R. A. 617; *Conklin v. Hancock*, 67 Ohio St. 455, 66 N. E. 518; *Dyer v. Gibson*, 16 Wis. 557.

²² See "Statute of Frauds," chapter 14, *ante*.

²³ *Flynn v. Bourneouf*, 143 Mass. 277, 58 Am. Rep. 135, 9 N. E. 650; *Simanovich v. Wood*, 145 Mass. 180, 13 N. E. 391; *Edison Electric Co. v. Gibby Foundry Co.*, 194 Mass. 258, 80 N. E. 479. The Minnesota decisions have not been squarely on this proposition, but the leaning toward the Massachusetts rule disclosed in *Bruns v. Schreiber*, 43 Minn. 468, 45 N. W. 861, is not so marked in the later decisions of *Jensen v. Crosby*, 80 Minn. 158, 83 N. W. 43, *Johnson v. McClure*, 92 Minn. 257, 2 Ann. Cas. 144, 99 N. W. 893, and *Clement v. Willett*, 105 Minn. 267, 127 Am. St. Rep. 562, 15 Ann. Cas. 1053, 17 L. R. A., N. S., 1094, 117 N. W. 491.

particular encumbrance. The reasoning on which these decisions rest is that the admission of the evidence does not affect the warranty, which is of full force and effect as to all encumbrances save and except that one which, it is claimed, was included in the computation of the consideration.²⁴

§ 470 (477). **Same—In cases of fraud.**—The various rules we have discussed have all been considered in connection with circumstances which are not tainted by fraud. The existence of fraud at once gives the widest latitude for inquiry by means of which such fraud may be checked and justice done between the parties. Whatever may be the consideration that is stated, the parties attacking a conveyance for *fraud* may show the actual facts, as that the conveyance was a gift or advancement, or that it was for a less consideration than the one stated.²⁵ Want of consideration in a deed may be shown, notwithstanding a recital to the contrary, in connection with and as part of the fraud which is charged in obtaining the deed.²⁶ In order to support the deed when attacked by third persons, it has in such cases been held admissible to show that there was another consideration, or one in addition to that named in the deed, as that, in addition to the expressed consideration of love and affection, there was also a valuable con-

²⁴ Gage v. Cameron, 212 Ill. 146, 72 N. E. 204; Lowry v. Downey, 150 Ind. 364, 50 N. E. 79; Barton v. Eminence Bldg. etc. Assn., 29 Ky. Law Rep. 330, 93 S. W. 9; Burnham v. Dorr, 72 Me. 198; Mahoney v. Mackubin, 54 Md. 268; Mowry v. Mowry, 137 Mich. 277, 100 N. W. 388; Frase v. Lee, 152 Mo. App. 562, 134 S. W. 10; Buckley's Appeal, 48 Pa. 491, 88 Am. Dec. 468; Miller v. Kennedy, 12 S. D. 478, 81 N. W. 906; Johnson v. Elman, 94 Tex. 168, 86 Am. St. Rep. 845, 52 L. R. A. 162, 59 S. W. 253; Morgan v. South Mil-

waukee Lake View Co., 97 Wis. 275, 72 N. W. 872.

²⁵ Gelpeke v. Blake, 19 Iowa, 263; Johnson v. Taylor, 4 Dev. (N. C.) 355; Myers v. Peek, 2 Ala. 648; Gordon v. Gordon, 1 Met. (Ky.) 285; Abbott v. Marshall, 48 Me. 44; McKinster v. Babcock, 26 N. Y. 378; Foster v. Reynolds, 38 Mo. 553; Metzner v. Baldwin, 11 Minn. 150.

²⁶ Brison v. Brison, 75 Cal. 525, 7 Am. St. Rep. 189, 17 Pac. 689, which contains a valuable discussion on the subject.

sideration.²⁷ There is, however, an undoubted conflict upon this point—the right of supporting the deed—and there are several decisions which hold that once the deed is attacked for fraud the parties to it must stand or fall by the consideration expressed.²⁸ Others, again, take the middle course of allowing the true consideration to be stated if it is consistent with that in the deed.²⁹ We think, however, the true rule to be that it is admissible to repel an attack on a deed by evidence *aliunde*, by like testimony; and that where a deed is assailed for fraud, in that a valuable consideration expressed in it did not pass between the parties, it is competent to show that another valuable consideration did exist, though not mentioned in the deed. In the language of the case which supports this view,³⁰ “the assailant of a conveyance for fraud may show the truth as to its consideration, whatever are its statements. He who is interested to uphold the conveyance is entitled to show the real consideration, in order to maintain it. Truth is the proper object of investigation, and both parties should stand on the same footing, and have equal opportunity to establish it.” As between the parties and privies to a deed, evidence was held admissible to show that a conveyance was in reality an advancement from father to son, although a money consideration was the only one recited.³¹ But in other cases it has been held that,

²⁷ *Hair v. Little*, 28 Ala. 236; *Gordon v. Gordon*, 1 Met. (Ky.) 285; *Brown v. Lunt*, 37 Me. 423; *Leach v. Shelby*, 58 Miss. 681; *Eystra v. Capelle*, 61 Mo. 578; *Potter v. Everitt*, 7 Ired. Eq. (N. C.) 152; *Buckley's Appeal*, 48 Pa. 491, 83 Am. Dec. 468; *Ferguson v. Harrison*, 41 S. C. 340, 19 S. E. 619; *Miller v. Bagwell*, 3 McCord (S. C.), 562; *Finn v. Krut*, 13 Tex. Civ. App. 36, 34 S. W. 1013; *Wait v. Wait*, 28 Vt. 350; *Casto v. Fry*, 33 W. Va. 449, 10 S. E. 799, *Reynolds v. Vilas*, 8 Wis. 471, 76 Am. Dec. 238; *Gale v.*

Williamson, 8 Mees. & W. 405, 10 L. J. Ex. 446.

²⁸ *Houston v. Blackman*, 66 Ala. 559, 41 Am. Rep. 756; *Carmack v. Lovett*, 44 Ark. 180; *Diggs v. McCullough*, 69 Md. 592, 16 Atl. 453.

²⁹ *Gordon v. Tweedy*, 71 Ala. 202; *Harris v. Alcock*, 10 Gill & J. (Md.) 226, 32 Am. Dec. 158.

³⁰ *Leach v. Shelby*, *supra*.

³¹ *Clifford v. Turrell*, 9 Jur. 633, 1 *Younge & C. C. C.* 138, 13 L. J. Ch. 390, 62 Eng. Reprint, 826; *Harrison v. Castner*, 11 Ohio St. 339; *Rockhill v. Spraggs*, 9 Ind. 30, 68 Am. Dec. 607.

where only a consideration of love and affection is stated, a money consideration cannot be proved; in other words, that the deed cannot be changed by showing a consideration of an entirely different species.³² It must be borne in mind that, although wide latitude is given in other cases, it is not admissible as between parties and their privies, in the absence of fraud, to explain or contradict the consideration expressed for the *purpose of defeating or changing the legal effect of the conveyance*.³³ The rule is well expressed in a California case:³⁴ "There is no doubt but that parol evidence is admissible for the purpose of contradicting or showing that the true consideration is other and different from that expressed in the written instrument. But this is not a rule, but an exception to the rule, that the legal effect of a written instrument cannot

³² Emery v. Chase, 5 Me. 232; Hurn v. Soper, 6 Har. & J. (Md.) 276; Griswold v. Messenger, 6 Pick. (Mass.) 517; Ellinger v. Crowl, 17 Md. 361; Peacock v. Monk, 1 Ves. Sr. 127, 27 Eng. Reprint, 934.

³³ Hamaker v. Coons, 117 Ala. 603, 23 South. 655; Brooks v. Maltbie, 4 Stew. & P. (Ala.) 96; Arnold v. Arnold, 137 Cal. 291, 70 Pac. 23; Cheesman v. Nicholl, 18 Colo. App. 174, 70 Pac. 797; Belden v. Seymour, 8 Conn. 304, 21 Am. Dec. 661; Louisville etc. R. Co. v. Willbanks, 133 Ga. 15, 17 Ann. Cas. 860, 24 L. R. A., N. S., 374, 65 S. E. 86; Redmond v. Cass, 226 Ill. 120, 80 N. E. 708; Lowry v. Downey, 150 Ind. 364, 50 N. E. 79; Schrimper v. Chicago etc. R. Co., 115 Iowa, 35, 82 N. W. 916, 87 N. W. 731; Johnson v. Winfield Town Co., 14 Kan. 390; Logan Turnpike Road Co. v. Pettit, 2 B. Mon. (Ky.) 428; Sere v. Darby, 118 La. 619, 43 South. 255; Emery v. Chase, 5 Me. 232; Cole v. Albers, 1 Gill (Md.), 412; Trafton v. Hawes, 102 Mass. 533, 3 Am. Rep. 494; Wilkinson v. Scott, 17 Mass.

249; Adams v. Watkins, 103 Mich. 431, 61 N. W. 774; Jensen v. Crosby, 80 Minn. 158, 83 N. W. 43; Bruns v. Schreiber, 43 Minn. 468, 45 N. W. 861; Pile v. Bright, 156 Mo. App. 301, 137 S. W. 1017; Connor v. Follansbee, 59 N. H. 124; Morse v. Shattuck, 4 N. H. 229, 17 Am. Dec. 419; Wooden v. Shotwell, 23 N. J. L. 465; Karpf v. Borgenicht, 65 Misc. Rep. 592, 120 N. Y. Supp. 876; Shephard v. Little, 14 Johns. (N. Y.) 210; McCrea v. Purmort, 16 Wend. (N. Y.) 460, 30 Am. Dec. 103; Alsterberg v. Bennett, 14 N. D. 596, 106 N. W. 49; Nave v. Marshall, 9 Ohio S. & C. Pl. Dec. 415, 6 Ohio N. P. 488; Greenville County v. City of Greenville, 84 S. C. 410, 66 S. E. 417; Miller v. Kennedy, 12 S. D. 478, 81 N. W. 906; Crooker v. National Phonograph Co. (Tex. Civ. App.), 135 S. W. 647; Wright v. Stewart, 19 Wash. 179, 52 Pac. 1020; Whiting v. Gould, 2 Wis. 552; Hartshorn v. Day, 19 How. (U. S.) 211, 15 L. Ed. 605.

³⁴ Hendrick v. Crowley, 31 Cal. 471.

be varied or defeated in whole or in part by parol evidence. The exception can never be allowed to override the rule, for that would be to dispense with the rule entirely and preserve only the exception. The exception always loses its governing force when it comes in conflict with the rule which it qualifies, and must yield to its higher claims. Hence the consideration cannot be contradicted or shown to be different from that expressed when thereby the legal operation of the instrument to pass the entire interest according to the purpose therein designated would be defeated."

§ 471 (478). Parol proof as to execution and delivery—**Suspension of operation.**—On the principle so often referred to that parol evidence is admissible to show that there never was any actual agreement, it may, of course, be shown that there was no proper execution or delivery of the apparent agreement.³⁵ The general rule that antecedent and contemporaneous oral stipulations cannot be received to alter or vary the term of a written contract "has no application when the execution of the writing is the subject of inquiry. It presupposes the due execution and delivery of the writing in a way to bind both parties to its terms."³⁶ When the execution of a deed is in issue, what was said and done at the time and by whom done are the very vital facts. It is always permissible for a party to show, if he can, not only that the writing was not in fact executed by him, but even in a case where execu-

³⁵ See §§ 435, 436, *ante*. It may be shown that the party signing the instrument was *deceived*, that its contents were falsely stated to him, or that his signature was obtained by the *fraudulent substitution* of a spurious document: *Franchot v. Leach*, 5 Cow. (N. Y.) 506; *Dale v. Roosevelt*, 9 Cow. (N. Y.) 307; *Van Valkenburgh v. Rouk*, 12 Johns. (N. Y.) 337; *Johnson v. Miln*, 14 Wend. 195; *Tribble v. Oldham*, 5 J. J. Marsh.

(Ky.) 137; that the note was signed with a *fictional name*: *Bartlett v. Tucker*, 104 Mass. 336, 6 Am. Rep. 240; that the paper was never intended as a contract; *Harwood et al. v. Jones*, 10 Gill & J. (Md.) 404, 32 Am. Dec. 180; or that the paper was a mere memorandum, and *not a contract*: *Lathrop v. Bramhall*, 64 N. Y. 365.

³⁶ *White v. Kahn*, 103 Ala. 308, 15 South. 595.

tion is admitted that the written instrument was never in fact delivered as a present contract, unconditionally binding upon the obligor.³⁷ The question has most frequently arisen in respect to negotiable paper, and is elsewhere discussed.³⁸ If a *deed* has never been delivered, or if a party to an instrument obtains possession thereof by fraud or in any improper manner, this of necessity must be shown by parol; and such evidence is no contradiction of the writing.³⁹ The act and fact of delivery is independent of the language of the instrument. Delivery consists of an act of the hand joined with a purpose of the mind. It comes after the scrivener has done his work, and after the signing of the paper. Whether or not a deed was delivered is an issue frequently made in the courts, and has been since deeds were written. If parol evidence, to establish or to refute delivery, is incompetent, then the issue of delivery would never arise, for delivery rests, not in words written, but in things done and said.⁴⁰ The discussion of what a delivery is affords in itself the key to the admis-

³⁷ Hartman Stock Farm v. Henley, 8 Ga. App. 255, 68 S. E. 957. See, also, Acme Food Co. v. Tousey, 148 Mich. 697, 112 N. W. 484; Gribble v. Everett, 98 Mo. App. 32, 71 S. W. 1124; Flowers v. Fletcher, 40 W. Va. 103, 20 S. E. 870 (evidence admitted, denying execution and the truth of the deed). Evidence is admissible when it relates to the execution or authenticity of the instrument, or to its delivery, or whether the delivery was absolute or conditional. In such cases the execution and acts of delivery being mostly a matter *in pais*, oral declarations of intentions connected with the execution and delivery may properly come in as part of the *res gestae*: 2 Phillips' Ev., C. H. & E.'s Notes, 754; Verzan v. McGregor, 23 Cal. 339.

³⁸ See § 495, *post*.

³⁹ Scaife v. Byrd, 39 Ark. 568; Drinkwater v. Hollar, 6 Cal. App. 117, 91 Pac. 664; Black v. Sharkey, 104 Cal. 279, 37 Pac. 939; Mosier v. Kershow, 16 Colo. App. 453, 66 Pac. 449; Price v. Hudson, 125 Ill. 284, 17 N. E. 817; Harrison v. Morton, 83 Md. 456, 35 Atl. 99; Faunce v. State Mut. Life Assur. Co., 101 Mass. 279; Roberts v. Jackson, 1 Wend. (N. Y.) 478; Clark v. Gifford, 10 Wend. (N. Y.) 310; Jackson v. Myers, 11 Wend. (N. Y.) 533; Sargent v. Cooley, 12 N. D. 1, 94 N. W. 576; Brandon v. Oregonian R. Co., 11 Or. 161, 2 Pac. 86; Shute v. Shute, 82 S. C. 264, 64 S. E. 145; Large v. Parker (Tex. Civ. App.), 56 S. W. 587; Winn v. Chamberlin, 32 Vt. 318; Gilman v. Gross, 97 Wis. 224, 72 N. W. 885. As to deeds in general, see § 485 et seq., *post*.

⁴⁰ Shute v. Shute, *supra*.

sion of parol evidence in connection with it. It is usefully considered in a well-known Vermont case.⁴¹ Peck, J., in that case said: "It is in its legal acceptation something more than merely changing the manual custody or possession. That may or may not be a delivery according to the intent of the parties. It is a question of intent and purpose; of mutual intent and purpose, implying an acceptance as well as a delivery. It is the final act of the parties by which the party executing the instrument puts it into the possession of the other party to it, who receives it, both intending thereby to make it operative and binding. This intent and purpose is generally inferred from the act itself of thus changing the custody, or from the fact that the party to whom it purports to be executed has it in his possession, but it may be explained and rebutted." The illustrations given by the learned judge are highly instructive. As he says, it may be shown that the party executing the contract handed it to the other party, not as a final delivery, but to be examined and returned to the party for further examination, or for the purpose of being retained till some precedent act is done by the party to whom it purports to be executed. It may be shown that the party obtained possession of it by accident, and against the will of the other party, or that by mistake of both parties a wrong paper was delivered. Nor is it necessary that it should be shown that it was by a mistake of both parties; a mistake of either is sufficient, especially when that mistake is caused by the conduct and declarations of the other party.⁴² It is a familiar rule that parol proof will be received to show that a deed was delivered in *escrow*,⁴³ and when an agreement was without consider-

⁴¹ King v. Woodbridge, 34 Vt. 565.

⁴² For further illustrations see note 46, *post*.

⁴³ Cannon v. Handley, 72 Cal. 133, 13 Pac. 315; Wittenbrock v. Cass, 110 Cal. 1, 42 Pac. 300; Baldwin v. Potter, 2 Root (Conn.), 81; Ryan v. Cooke, 172 Ill. 302, 50 N. E. 213;

Demesmey v. Gravelin, 56 Ill. 93; McCormick Harvesting Mach. Co. v. Morlan, 121 Iowa, 451, 96 N. W. 976; Lewis v. Prather, 14 Ky. Law Rep. 749, 21 S. W. 538; Beall v. Poole, 27 Md. 645; Taft v. Taft, 59 Mich. 185, 60 Am. Rep. 291, 26 N. W. 426; Dikeman v. Arnold, 71 Mich. 656, 40

ation and was *delivered on conditions*, such conditions may be proved.⁴⁴ The rule was thus stated in a Massachusetts case: "The manual delivery of an instrument may always be proved to have been on a condition which has not been fulfilled, in order to avoid its effect. This is not to show any modification or alteration of the written agreement, but to show that it never became operative, and that its obligation never commenced."⁴⁵ The question whether a

N. W. 42; *Fulton v. Priddy*, 123 Mich. 298, 31 Am. St. Rep. 201, 82 N. W. 65; *Francis v. Francis*, 143 Mich. 300, 106 N. W. 864; *Tharaldson v. Everts*, 87 Minn. 168, 91 N. W. 467; *Gregory v. Littlejohn*, 25 Neb. 368, 41 N. W. 253; *Fred v. Fred* (N. J. Ch.), 50 Atl. 776; *Stanton v. Miller*, 58 N. Y. 192, reversing 1 Thomp. & C. 23; *Gaston v. City of Portland*, 16 Or. 255, 19 Pac. 127; *Sweet v. Stevens*, 7 R. I. 375; *Blair v. Security Bank*, 103 Va. 762, 50 S. E. 262; *Manning v. Foster*, 49 Wash. 541, 126 Am. St. Rep. 876, 16 Ann. Cas. 95, 18 L. R. A., N. S., 337, 96 Pac. 233; *Nichols v. Oppermann*, 6 Wash. 618, 34 Pac. 162; *Bronx Invest. Co. v. National Bank*, 47 Wash. 566, 92 Pac. 380; *Campbell v. Thomas*, 42 Wis. 437, 24 Am. Rep. 427; *Davis v. Jones*, 17 Com. B. 625, 25 L. J. C. P. 91; *Stoytes v. Pearson*, 4 Esp. 255; *Millership v. Brookes*, 5 Hurl. & N. 787, 29 L. J. Ex. 369. But not that the deed was delivered in escrow directly to the grantee or his agent: *Hubbard v. Greeley*, 84 Me. 340, 17 L. R. A. 511, 24 Atl. 799; *Worrall v. Munn*, 5 N. Y. 229, 55 Am. Dec. 330; *Duncan v. Pope*, 47 Ga. 445. But it may be shown that the grantee received the deed merely for inspection: *Curry v. Colburn*, 99 Wis. 319, 67 Am. St. Rep. 860, 74 N. W. 778. Where the escrow agreement is itself in writing, and is neither ambiguous nor uncertain,

parol evidence is not admissible to modify or vary its terms: *Pacific Nat. Bank v. San Francisco Bridge Co.*, 23 Wash. 425, 63 Pac. 207. See *Western Timber Co. v. Kalama River Lumber Co.*, 42 Wash. 620, 114 Am. St. Rep. 137, 7 Ann. Cas. 667, 6 L. R. A., N. S., 397, 85 Pac. 338; *Pierce v. Wheeler*, 44 Wash. 326, 87 Pac. 361; 16 Cyc. 570, 577; *Tharaldson v. Everts*, 87 Minn. 168, 91 S. W. 467; *Brown v. Munger*, 42 Minn. 482. 44 N. W. 519; *Perry v. Paschal*, 103 Ga. 134, 29 S. E. 703; *Engler v. Garrett*, 100 Md. 387, 59 Atl. 648; *Browne on Statute of Frauds*, 5th ed., 366; *Daniel on Negotiable Instruments*, § 68. And if the deed on its face shows that it was not deposited in escrow, parol evidence is inadmissible to show that it was so deposited: *Martin v. Witty*, 104 Mo. App. 262, 78 S. W. 829. See note to *Manning v. Foster* in 18 L. R. A., N. S., 337, on proof of escrow agreement by parol from which the illustrations are taken. See, also, note on "Escrows," to *Wilkins v. Somerville*, 130 Am. St. Rep. 910.

⁴⁴ *Cuthrell v. Cuthrell*, 101 Ind. 375; *Julliard v. Chaffee*, 92 N. Y. 529; *Wilson v. Powers*, 131 Mass. 539; *Skaaras v. Finnegan*, 31 Minn. 48, 16 N. W. 456; *Beall v. Poole*, 27 Md. 645; *Clever v. Kirkman*, 33 L. T., N. S., 672, 24 W. R. 159.

⁴⁵ *Wilson v. Powers*, 131 Mass. 539; *Hurlburt v. Dusenbery*, 26 Colo.

paper setting forth a bilateral executory contract, signed only by one of the parties, was delivered and assented to as containing the whole contract is one for the jury under suitable instructions; and evidence of previous and contemporaneous conversations between the parties to prove that the paper was only a partial memorandum is admissible, this being consistent on its face with that view.⁴⁶ In a New York case it was held that, in an action on a written contract for the sale of lumber on credit, the defendants might show a verbal agreement with the plaintiff that their *obligation* to sell *should be contingent* on their obtaining satisfactory reports as to the plaintiff's financial con-

240, 57 Pac. 860; Oakland Cemetery Assn. v. Lakins, 126 Iowa, 121, 3 Ann. Cas. 559, 101 N. W. 778; Caudle v. Ford (Ky.), 72 S. W. 270; Nutting v. Minnesota Ins. Co., 98 Wis. 26, 73 N. W. 432; Sweet v. Stevens, 7 R. I. 375; Rawlings v. Fisher, 24 Ind. 52; Reynolds v. Robinson, 110 N. Y. 654, 18 N. E. 127; Burke v. Dulaney, 153 U. S. 228, 38 L. Ed. 698, 14 Sup. Ct. Rep. 816; Tug River Coal & Salt Co. v. Brigel, 86 Fed. 818, 30 C. C. A. 415; Elastic Tip Co. v. Graham, 185 Mass. 597, 71 N. E. 117; Fulton v. Priddy, 123 Mich. 298, 81 Am. St. Rep. 201, 82 N. W. 65; Mendenhall v. Ulrich, 94 Minn. 100, 101 N. W. 1057; Cleveland Ref. Co. v. Dunning, 115 Mich. 238, 73 N. W. 239.

⁴⁶ Thomas v. Barnes, 156 Mass. 581, 31 N. E. 683; Edwards Lumber Co. v. Baker, 2 N. D. 289, 50 N. W. 718; Courtenay v. Fuller, 65 Me. 156; Pym v. Campbell, 6 El. & B. 370, 88 E. C. L. 370, 119 Eng. Reprint, 903. It may be shown by parol that a deed was delivered to the grantee to await his decision whether he would accept or not: Brackett v. Barney, 28 N. Y. 333; that it was to be carried by the grantee to a third party: Gilbert v. North American

Fire Ins. Co., 23 Wend. (N. Y.) 43, 35 Am. Dec. 543; that it was to be examined and returned, if found defective: Graves v. Dudley, 20 N. Y. 76; that it was delivered to await complete execution by other parties: Chouteau v. Snyder, 21 N. Y. 179; Brackett v. Barney, 28 N. Y. 333; that the contract should not be binding until other signatures had been secured: Manufacturers' Furn. Co. v. Kremer, 7 S. D. 463, 64 N. W. 528; that the agent delivering it contravened his instructions: Belleville Sav. Bank v. Bornman (Ill.), 7 N. E. 686; Large v. Parker (Tex. Civ. App.), 56 S. W. 587; that a party accepting a document believed it was a mere receipt when it was a contract: Boorman v. American Express Co., 21 Wis. 152, followed in Strohn v. Detroit etc. Ry. Co., 21 Wis. 554, 94 Am. Dec. 569, in which case the "receipt" was not delivered until several days after an oral contract for delivery of goods. Dixon, C. J., said that having entered into a special verbal agreement, it might be rightfully assumed, in the absence of notice, that the contract was embodied in the "receipt," or at least that the "receipt" contained nothing contrary to it.

dition. The court held the case within the rule, now quite well established, that parol evidence is admissible to show that a written paper, which in form is a complete contract of which there has been a manual tradition, was nevertheless not to become a binding contract until the performance of some *condition precedent* resting in parol.⁴⁷ But it cannot be shown that an agreement was made to the effect that a deed should not be operative, or that it was the intention or agreement of the parties that the grantee should acquire no rights whatever under it, or that he should reconvey to the grantor on his request without any consideration.⁴⁸ It is on the same principle that it has often been held that one of the signers of a bond, when it is not executed by all whose names appear on its face, may show that there was an express agreement that it should not be operative, unless signed by all.⁴⁹ But it is necessary that the obligee should be aware of every circumstance in connection with the conditions likely in any way to affect the liability under it. A bond with sureties was required from a deputy sheriff to the sheriff and furnished with the names of A, B, C, D, E, and F as sureties. It was executed by the principal and A, B, E, F, G, and H, the latter two not being named in it and apparently being substituted for C and D. When E signed, he did so on the express condition that all the parties named in the bond should sign it before delivery, of which fact the obligee had notice. In an action upon it by the obligee it was held that the claim of E to have the deposit declared an escrow on that condition was sound; that the bond was

⁴⁷ Reynolds v. Robinson, 110 N. Y. 654, 18 N. E. 127; Golden v. Meier, 129 Wis. 14, 116 Am. St. Rep. 935, 107 N. W. 27.

⁴⁸ Hutchins v. Hutchins, 98 N. Y. 56.

⁴⁹ Pawling v. United States, 4 Cranch (U. S.), 219, 2 L. Ed. 601; State Bank v. Evans, 15 N. J. L. 155, 28 Am. Dec. 400; Fletcher v.

Austin, 11 Vt. 447, 34 Am. Dec. 698; Guild v. Thomas, 54 Ala. 414, 25 Am. Rep. 703, and note; Chouteau v. Suydam, 21 N. Y. 179; Whitford v. Laidler, 94 N. Y. 145, 46 Am. Rep. 131. The same rule is applied to stock subscriptions: Gibbons v. Ellis, 83 Wis. 434, 53 N. W. 701; Gilman v. Gross, 97 Wis. 224, 73 N. W. 885.

delivered and accepted by the sheriff in the same condition it was in when signed by E. The face of the instrument was plain as to the terms upon which E had agreed to become liable. The bond purported to be the bond of those who never executed it, and gave every evidence to the holder that it was an incomplete instrument. He saw the names of those who signed, and, as an ordinarily prudent man, should have felt put on his inquiry. The extent of the liability was plain and unmistakable, and was notice to the sheriff of the condition upon which E had agreed to become bond.⁵⁰ It is no violation of the general rule to admit parol proof that a written instrument was in fact executed, when this fact comes in issue incidentally or collaterally; and where no attempt is made to prove the contents, the paper need not be produced.⁵¹ In this connection we will give one of the exceptions as stated very broadly by Stephen: Parol evidence may be given to prove "the existence of any separate oral agreement constituting a condition precedent to the attachment of any obligation under any such contract, grant or disposition of property."⁵² Two of the cases cited by him serve to illustrate the rule. A and B enter into a written agreement for the sale of an interest in a patent, and at the same time agree verbally that the agreement shall not come into force unless C approves of it. C does not approve. The party interested may show this.⁵³ A, a farmer, agrees in writing to transfer to B, another farmer, a farm which A holds of C. It is verbally agreed that the agreement is to be conditional on C's consent. B sues A for not trans-

⁵⁰ *Hall v. Smith*, 77 Ky. (14 Bush) 604. The same principle is to be found in *Perry v. Patterson*, 5 Humph. (Tenn.) 133, 42 Am. Dec. 424, in which a court of equity enjoined a suit at law upon a note given as surety upon the express condition that another person's signature was also to be obtained.

⁵¹ *Roberts v. Burgess*, 85 Ala. 192, 4 South. 733.

⁵² Reynolds' Steph. Ev., art. 90; *Richards v. Day*, 137 N. Y. 183, 33 Am. St. Rep. 704, 23 L. R. A. 601, 33 N. E. 146.

⁵³ *Pym v. Campbell*, 6 El. & B. 370, 88 E. C. L. 370, 119 Eng. Reprint, 903.

ferring the farm. A may prove the condition as to C's consent, and the fact that he does not consent.⁵⁴

§ 472 (479). **Parol proof of latent ambiguities.**—The law with regard to the parol explanation of latent ambiguities may be said to be well settled. It is not so unreasonable, says a great authority,⁵⁵ as to deny to the reader of an instrument the same light which the writer enjoyed. It is necessary, nevertheless, to inquire what a latent ambiguity is said to be, the better to guide us in the application of the rules concerning it. A latent ambiguity is described by Lord Bacon to be "that which seemeth certain and without ambiguity for anything that appeareth upon the deed or instrument, but there is some collateral matter out of the deed that breedeth the ambiguity."⁵⁶ In a will case, the supreme court of the United States thus classified latent ambiguities: "Latent ambiguities are of two kinds: first, where the description of the devisee or the property devised is clear upon the face of the will, but it turns out that there is more than one estate or person to which the description applies;⁵⁷ and second, where the

⁵⁴ *Wallis v. Littell*, 11 Com. B., N. S., 369, 31 L. J. C. P. 100, 8 Jur., N. S., 745, 5 L. T. 489. Reynolds gives the following American cases supporting the text: *Shughart v. Moore*, 78 Pa. 469; *Pike v. Fay*, 101 Mass. 134; *Rearich v. Swinehart*, 11 Pa. 233, 51 Am. Dec. 540; *Ware v. Allen*, 128 U. S. 590, 32 L. ed. 563, 9 Sup. Ct. Rep. 174; *Burke v. Dulaney*, 153 U. S. 228, 38 L. Ed. 698, 14 Sup. Ct. Rep. 816. The reader is referred to an interesting article, note 49, on page 256, Reynolds' *Stephen's Evidence*, in which Mr. Reynolds discusses the distinction often made between the conditional delivery of simple contracts and those under seal. He points out that the language used by Mr. Justice Miller in *Ware v. Allen*, *supra*, was suffi-

ciently broad to include *all* contracts.

⁵⁵ *Wigram, Wills*, 2d Am. ed., 161.

⁵⁶ *Bacon, Max.* 23; *Broom, Leg. Max.* 608. In general, see note to *Ferguson v. Rafferty*, 6 L. R. A. 42.

⁵⁷ *Wolff v. Elliott*, 68 Ark. 326, 57 S. W. 1111; *Coit v. Starkweather*, 8 Conn. 289; *Melcher v. Ocean Ins. Co.*, 59 Me. 217; *Obenauer v. Solomon*, 151 Mich. 570, 115 N. W. 696; *Slosson v. Hall*, 17 Minn. 95; *French v. Hayes*, 43 N. H. 30, 80 Am. Dec. 127; *Teague v. Sowder*, 121 Tenn. 132, 114 S. W. 484; *Belcher v. Big Four Coal etc. Co.*, 68 W. Va. 716, 70 S. E. 712; *Begg v. Begg*, 56 Wis. 534, 14 N. W. 602; *Babcock v. Pettibone*, 2 Fed. Cas. No. 700, 12 Blatchf. 354.

devisee or property devised is imperfectly or, in some respects, erroneously described, so as to leave it doubtful what person or property is meant."⁵⁸ To these is sometimes added a third class, though it is perhaps included in those mentioned, where the name applies perfectly to one person or thing, while a description applies as perfectly to another, as in a devise in a will to "Anna Maria German, wife of Jonathan German," there is a latent ambiguity, it appearing that Anna Maria was not in fact the wife, but the daughter, of Jonathan German, and that his wife was named Katherine.⁵⁹ An illustration of a latent ambiguity which has borne the test since the time of Lord Bacon was thus stated by him: "If I grant my manor of S. to I. F. and his heirs, here appeareth no ambiguity at all, but if the truth be that I have the manors both of South S. and North S., this ambiguity is matter in fact; and, therefore, it shall be holden by averment whether of them was that the party intended should pass."⁶⁰ In an

⁵⁸ *Hereford v. Hereford*, 131 Ala. 573, 32 South. 620; *Okie v. Person*, 23 App. Cas. (D. C.) 170; *Sharp v. Thompson*, 100 Ill. 447, 39 Am. Rep. 61; *Putnam v. Bond*, 100 Mass. 58, 1 Am. Rep. 82; *Gentile v. Crossan*, 7 N. M. 589, 38 Pac. 247; *Sherrod v. Battle*, 154 N. C. 345, 70 S. E. 834; *Kanne v. Otty*, 25 Or. 531, 36 Pac. 537; *Wilkins v. Clawson*, 37 Tex. Civ. App. 162, 83 S. W. 732; *Lego v. Medley*, 79 Wis. 211, 24 Am. St. Rep. 706, 48 N. W. 375; *Patch v. White*, 117 U. S. 210, 29 L. Ed. 860, 3 Sup. Ct. Rep. 617; *Gilmer v. Stone*, 120 U. S. 586, 30 L. ed. 734, 7 Sup. Ct. Rep. 689. See the late cases: *Paepcke-Leicht Lumber Co. v. Talley* (Ark.), 153 S. W. 833; *Hammond v. Capitol etc. Ins. Co.*, 151 Wis. 62, 138 N. W. 92; *Duffey v. Scientific Am. Com. Dept.*, 30 Okl. 742, 120 Pac. 1088.

⁵⁹ *Stokeley v. Gordan*, 8 Md. 496.

⁶⁰ *Bacon*, Max. 25; *Putnam v. Bond*, 100 Mass. 58, 1 Am. Rep. 82. A latent ambiguity arises if a conveyance is made to John Smith, and it appears that there are father and son or other persons bearing that name: *Coit v. Starkweather*, 8 Conn. 289; or if a grant is made to a Presbyterian church of a given city, and the testimony shows that there are two Presbyterian churches in that city: *Com. Wyandotte County v. Wyandotte Presbyterian Church*, 30 Kan. 620, 1 Pac. 109; if land is described as in a certain section, the township and range being omitted: *Halliday v. Hess*, 147 Ill. 588, 35 N. E. 380; or if fifty cords of wood situated on a certain lot are mortgaged, and it appears that there was other wood on the same lot: *Sargent v. Solberg*, 22 Wis. 132. See, also, *Thacker v. Howell* (Ky.), 26 S. W. 719.

early Massachusetts case^{60a} the deed of land in Blandford, bounded "north on the line of said Blandford," which was held to be limited to the legal boundary line of the town, was made after that line had been established by acts of the legislature; the evidence offered and held incompetent went no further than to show that before those acts a different line, defined by marked trees, had been understood and reputed to be the boundary line of Blandford; and Chief Justice Shaw said: "When, indeed, upon application of the description to the land, it is doubtful what was intended, this is a latent ambiguity, and then evidence *aliunde* may be given; as where a description gives the line as running to a maple tree marked, and two maple trees are found, either of which would answer the description"; and again: "When the true line had been long doubtful, and conveyances have been made, bounding on the reputed or supposed line, or line of actual holding and possession, and such reputed or supposed line is capable of being shown by proof, such conveyances will have their full effect in passing the land up to such supposed line, though a different line be afterward fixed by the legislature as the true line by a declaratory act." In the supreme court of New Hampshire it was held that the words "Derry old line," used in a deed to define a boundary, were susceptible of various meanings, as the original line of Londonderry, or any other line marked by monuments and called by that name; and that evidence that there was such another line showed such an ambiguity in the words of the deed as to admit of parol testimony to prove which line was intended to be designated thereby.^{60b} Another good illustration of the principle is afforded in a later Massachusetts case, in which goods were, by the terms of a bill of lading, to be delivered "at the Essex railroad wharf"; it appeared that the Essex Railroad Company owned but one wharf, and there was another generally known as the Essex railroad wharf and used by the railroad company to receive merchandise at; and it was

^{60a} Cook v. Babcock, 7 Cush. (Mass.) 526.

^{60b} Hall v. Davis, 36 N. H. 569.

held that, for the purpose of showing that the latter wharf was intended, evidence of the comparative ease of access and rate of freight to the two wharves, and of the previous dealings of the parties under similar bills of lading, was admissible.^{60c} No ambiguity is apparent in such cases to the person construing the written instrument, until from the evidence of relevant surrounding circumstances, it is found that there is more than one person or thing answering the description given. In other words, the *ambiguity does not appear on the face of the instrument*, but lies hidden in the person or subject whereof it speaks.⁶¹ It is an old and familiar rule that, when the ambiguity is thus raised by extrinsic evidence, it may be removed by the same means.⁶² The

^{60c} Sutton v. Bowker, 5 Gray (Mass.), 416.

⁶¹ Hand v. Hoffman, 8 N. J. L. 71; Storer v. Freeman, 6 Mass. 435, 4 Am. Dec. 155; Peisch v. Dickson, Fed. Cas. No. 10,911, 1 Mason (U. S.), 9; Mann v. Mann, 1 Johns. Ch. (N. Y.) 231.

⁶² McGhee v. Alexander, 104 Ala. 116, 16 South. 148; Hughes v. Wilkinson, 35 Ala. 453; Cato v. Stewart, 28 Ark. 146; Fireman's Fund Ins. Co. v. Aachen etc. Ins. Co., 2 Cal. App. 690, 84 Pac. 253; Hotchkiss v. Barnes, 34 Conn. 27, 91 Am. Dec. 713; Tatman v. Barrett, 3 Houst. (Del.) 226; Cawthon v. Stearns Culver Lumber Co., 60 Fla. 318, 53 South. 738; Cable Co. v. McFeeley, 7 Ga. App. 435, 66 S. E. 1103; Hull v. Croft, 132 Ill. App. 509; Halliday v. Hess, 147 Ill. 588, 35 N. E. 380; Thomas v. Troxel, 26 Ind. App. 322, 59 N. E. 683; Symmes v. Brown, 13 Ind. 318; Lamb's Estate v. Morrow, 140 Iowa, 89, 18 L. R. A., N. S., 226, 117 N. W. 1118; Day v. Asher, 141 Ky. 468, 132 S. W. 1035; Guillory v. Elms, 126 La. 560, 52 South. 767; Tyler v. Fickett, 73 Me. 410; Mitchell v. Mitchell, 6 Md. 224;

Flagg v. Mason, 141 Mass. 64, 6 N. E. 702; Putnam v. Bond, 100 Mass. 58, 1 Am. Rep. 82; Purkiss v. Benson, 28 Mich. 538; Miles v. Miles, 78 Miss. 904, 30 South. 2; Thetford v. General Accident Assur. Corp., 140 Mo. App. 254, 124 S. W. 39; Bell v. Woodward, 46 N. H. 315; Webster v. Atkinson, 4 N. H. 21; Sullivan v. Visconti, 68 N. J. L. 543, 53 Atl. 598; Gentile v. Crossan, 7 N. M. 589, 38 Pac. 247; Godman v. Adamson, 130 App. Div. 317, 114 N. Y. Supp. 408; Jackson v. Sill, 11 Johns. (N. Y.) 201, 6 Am. Dec. 363; Sherrod v. Battle, 154 N. C. 345, 70 S. E. 834; Clements v. Baldwin Quarry Co., 4 Ohio Dec. 218, 1 Clev. L. Rep. 130; Olympia Bottling Wks. v. Olympia Brewing Co., 56 Or. 87, 107 Pac. 969; Deposit etc. Co. v. Bovaird etc. Mfg. Co., 229 Pa. 295, 78 Atl. 268; Vernor v. Henry, 3 Watts (Pa.), 385; Coombs v. Patterson, 19 R. I. 25, 31 Atl. 428; Barkley v. Barkley, 3 McCord (S. C.), 269; Osborne v. Stringham, 1 S. D. 406, 47 N. W. 408; Couturie v. Roensch (Tex. Civ. App.), 134 S. W. 413; Brown v. Markland, 16 Utah, 360, 67 Am. St. Rep. 629, 52 Pac. 597; Pitts

general rule is stated by Tyndal, C. J., that "in all cases in which a difficulty arises in applying the words of a will to the thing which is the subject matter of the devise, or to the person of the devisee, the difficulty or ambiguity which is introduced by the admission of extrinsic evidence may be rebutted and removed by the production of further evidence upon the same subject, calculated to explain what was the estate or subject matter really intended to be devised."⁶³ Chief Justice Marshall lays down the general rule that underlies all others: "The intent of the testator is the cardinal rule in the construction of wills; and if that intent can be clearly perceived, and is not contrary to some positive rule of law, it must prevail, although in giving effect to it some words should be rejected or so restrained in their application as materially to change the literal meaning of the particular sentence."^{63a} Although the illustrations relate most frequently to wills, the doctrine applies to all writings.⁶⁴ It is always interesting to see what Stephen says upon any subject relating to evidence. In this regard we find: "If the document applies in part but not with accuracy to the circumstances of the case, the court may draw inferences from those circumstances as to the meaning of the document, whether there is more than one, or only one thing or person to whom or to which the inaccurate description may apply. In such cases no evidence can be given of statements made by the author of the document as to his

v. Brown, 49 Vt. 86, 24 Am. Rep. 114; Richmond v. Barry, 109 Va. 274, 63 S. E. 1074; Wetzler v. Nichols, 53 Wash. 285, 132 Am. St. Rep. 1075, 101 Pac. 867; Belcher v. Coal etc. Co., 68 W. Va. 716, 70 S. E. 712; Loree v. Webster Mfg. Co., 134 Wis. 173, 114 N. W. 449; Atkinson v. Cummins, 9 How. (U. S.) 479, 13 L. Ed. 223; Lorraine Mfg. Co. v. Oshinsky, 182 Fed. 407; Patch v. White, 117 U. S. 210, 29 L. Ed. 860, 6 Sup. Ct. Rep. 617, 710; Clay v. Field, 138 U. S. 464, 34 L. Ed. 1044,

11 Sup. Ct. Rep. 419; Kean v. Drope, 35 U. C. Q. B. 415.

⁶³ Miller v. Travers, 8 Bing. 244, 131 Eng. Reprint, 395; Atkinson v. Cummins, 9 How. (U. S.) 479, 13 L. Ed. 223.

^{63a} Finlay v. King's Lessee, 3 Pet. (28 U. S.) 377, 7 L. Ed. 712.

⁶⁴ Tax deeds seem to form an exception: See Wofford v. McKinna, 23 Tex. 36, 76 Am. Dec. 53, and cases cited therein. See note to Green v. McGrew, 111 Am. St. Rep. 159.

intentions in reference to the matter to which the document relates, though evidence may be given as to his circumstances, and as to his habitual use of language or names for particular persons or things.”⁶⁵ Stephen goes on to say: “If the language of the document, though plain in itself, applies equally well to more objects than one, evidence may be given both of the circumstances of the case and of statements made by any party to the document as to his intentions in reference to the matter to which the document relates.”⁶⁶ The following case is used to illustrate this: A devises one house to George Gord, the son of George Gord, another to George Gord, the son of John Gord, and a third to George Gord the son of Gord. Evidence both of circumstances and of the testator’s statements of intention may be given to show which of the two George Gordes he meant.⁶⁷ This explanatory evidence is, of course, not admissible *to contradict, or add to, or subtract from the writing*.⁶⁸ The theory on which the testimony is allowed is that the instrument does describe the person or subject intended, and that the extrinsic evidence only enables the court to reject one of the subjects to which the description might apply, and to determine which was intended. The rule has been well laid down that, “A

⁶⁵ Reynolds’ Steph. Ev., art. 91, which contains this illustration: “A devises land to John Hiscocks, the eldest son of John Hiscocks. John Hiscocks had two sons, Simon, his eldest, and John, his second son, who, however, was the eldest son by a second marriage. The circumstances of the family, but not the testator’s declarations of intention, may be proved in order to show which of the two was intended”: Doe v. Hiscocks, 6 Mees. & W. 363. Reynolds cites the following American authorities: Atkinson’s Lessee v. Cummins, 9 How. 479, 13 L. Ed. 223; Reed v. Merchants’ etc. Ins. Co., 95 U. S. 23, 24 L. Ed. 348; Langlois v.

Crawford, 59 Mo. 456; Heidenheimer v. Bauman, 84 Tex. 174, 31 Am. St. Rep. 29, 19 S. W. 382.

⁶⁶ Reynolds’ Steph. Ev., art. 91.

⁶⁷ Doe v. Needs, 2 Mees. & W. 129. See, also, Mechanics’ Bank v. Bank of Columbia, 5 Wheat. (U. S.) 326, 5 L. Ed. 100; Cavazos v. Trevino, 6 Wall. (U. S.) 773, 18 L. Ed. 813.

⁶⁸ Streeter v. Seigman (N. J. Ch.), 48 Atl. 907; Barkley v. Barkley, 3 McCord (S. C.), 269; Clark v. Gregory, 87 Tex. 189, 27 S. W. 56; Stewart v. Phoenix Ins. Co., 9 Lea (Tenn.), 104; Roanoke v. Blair, 107 Va. 639, 60 S. E. 75; Bank v. Catzen, 63 W. Va. 535, 60 S. E. 499.

description, though false in part, may, with reference to extrinsic circumstances, be absolutely certain, or at least sufficiently so to enable a court to identify the subject intended; as where a false description is superadded to one which by itself would have been correct. Thus, if a testator devise his black horse, having only a white one, or devise his freehold houses, having only leasehold houses, the white horse in the one case and the leasehold houses in the other would clearly pass. In these cases the substance of the subject intended is certain, and if there is but one such substance, the superadded description, though false, introduces no ambiguity; and, as by the supposition the rejected words are inapplicable to any subject, the court does not alter, vary or add to the effect of the will by rejecting them."⁶⁹ If the latent ambiguity is self-contained, that is to say, if the language is capable of two constructions, parol evidence is admissible to show the intention of the parties.⁷⁰ But where a latent ambiguity

⁶⁹ Wigram, *Extrinsic Ev.* 53. Of course when the author speaks of the rejected words as being "inapplicable to any subject," he means inapplicable, because the subject is not in existence, or does not belong to the testator. See, also, *Patch v. White*, 117 U. S. 210, 29 L. Ed. 860; *Roman Catholic Orphan Asylum v. Emmons*, 3 Bradf. (N. Y.) 144. See, also, a learned note of Chief Justice Redfield, 10 Am. Law. Reg., N. S., p. 93, to the case of *Kwitz v. Hibner*, 55 Ill. 514.

⁷⁰ *Smith v. Aikin*, 75 Ala. 209; *Hotchkiss v. Barnes*, 34 Conn. 27, 91 Am. Dec. 713; *Bulkley v. Devine*, 127 Ill. 406, 3 L. R. A. 330, 20 N. E. 16; *Bowman v. Agricultural Ins. Co.*, 59 N. Y. 521. In *Smith v. Aikin*, *supra*, the language was: "S. agrees to saw lumber for H. at the price of two dollars per thousand feet." The court asked whether it meant per thousand feet of sawed lumber

or per thousand feet of logs sawed into lumber? In *Hotchkiss v. Barnes*, *supra*, the words of a guaranty were, "You can let Mr. Day have what goods he calls for, and I will see that the same are settled for." Was this a guaranty for the first lot of goods called for or a continuing one? In both cases it was permitted to show extrinsic circumstances to ascertain the intention of the parties. Speaking of this class of ambiguity, Judge Story said in *Peisch v. Dickson*, Fed. Cas. No. 10,911, 1 Mason, 9: "There seems, indeed, to be an intermediate class of cases, partaking of the nature both of patent and latent ambiguities; and that is, where the words are all sensible, and have a settled meaning, but at the same time consistently admit of two interpretations, according to the subject matter in the contemplation of the parties. In such a case, I should

in the terms of an instrument is established by parol testimony, which itself serves to explain the ambiguity, the language of the instrument controls, just as where the instrument itself contains an explanation of the ambiguity raised by the parol evidence.⁷¹ Although a latent ambiguity does not usually render the instrument void, yet it may be as fatal as a patent ambiguity. This is true where the extrinsic evidence proves entirely unsatisfactory, and results in leaving the matter wholly to conjecture. Thus, when a will contained the following: "I give to my granddaughter, Elinor Evans of Merthyr parish £40. Item, I devise to my granddaughter, Mary Thomas, of Llechlloyd in Merthyr parish the reversion," etc., and at the time of his death the devisor had a granddaughter of the name of Elinor Evans, who lived at Llechlloyd in Merthyr parish, and a great granddaughter Mary Thomas, an infant, of about the age of two years, the granddaughter of his eldest daughter Margaret by her second husband John Thomas, being the only person of that name in the family; but it appeared that she lived at Green-Castle, in the parish of Llangain, some miles from Merthyr parish, in which latter parish she had never been in her life, Lord Kenyon said: "It has been a long-established rule that where there is a latent ambiguity in a will, the parties may go into extrinsic evidence to render that certain which without the aid of such evidence is uncertain. But here the evidence given has itself raised the ambiguity. On the face of the will there is no uncertainty. . . . Then, do we arrive at any certainty respecting the person of the devisee? If we do, it must decide the case; but if the parol evidence has introduced uncertainty respecting the devisee then the heirs at law must take. . . . It was proper to let in the parol evidence to remove the latent ambiguity, but when

think that parol evidence might be admitted, to show the circumstances under which the contract was made, and the subject matter to which the parties referred."

⁷¹ *Pilcher v. Puckett*, 77 Kan. 284, 17 L. R. A., N. S., 1083, 94 Pac. 132; *Barkley v. Barkley*, *supra*.

received it leaves the question in uncertainty. If there had been no person answering the description of granddaughter living at Llechlloyd in Merthyr parish, I should have rejected the description, and have said that the devise applied to Mary Thomas; but it appears that there is another person answering that part of the description, who is also an object of the testator's bounty. Then, as there are two parts of the description not answering to Mary Thomas who is named in this clause in the will, we are left to conjecture who was meant by the devisor; but the law will not allow an heir at law to be disinherited by conjecture.''⁷²

§ 473 (480). Parol evidence not allowed in case of patent ambiguities.—Notwithstanding the fact that it should not be difficult to distinguish between ambiguities, latent or hidden, and those which are patent or open, the demarcation has given rise to much difference of opinion in the application of the rules concerning them. A hundred years ago Justice Story said he did not find it easy to reconcile the decisions. "Nothing is clearer," he says, "than the general rule—latent ambiguities may be removed by parol evidence, for they arise from the proof of facts *aliunde*; and where the doubt is created by parol evidence, it is reasonable that it should be removed in the same manner. But patent ambiguities exist in the contract itself; and if the language be too doubtful for any settled construction, by the admission of parol evidence you create, and do not merely construe, the contract. You attempt to do that for the party which he has not chosen to do for himself; and the law very properly denies such an authority to courts of justice. The difficulty, therefore, lies not in the rule itself, but in applying it to particular cases, where the shades of distinction are very

⁷² Thomas v. Thomas, 6 Term Rep. 671, 101 Eng. Reprint, 764; Tayl. Ev., 10th ed., § 1214. See, also,

Beaumont v. Fell, 2 P. Wms. 141, 24 Eng. Reprint, 673.

nice.”⁷³ From the multitude of definitions we select the following as most serviceable: “A patent ambiguity is an uncertainty that arises at once on the reading of the contract. We do not have to wait until some other fact is brought to our knowledge before the uncertainty is apparent, but the doubt is suggested at once, and by the phrase itself.”⁷⁴ A patent ambiguity is one that appears on the face of the instrument, and that which occurs when the expression of an instrument is so defective that a court of law which is obliged to put a construction on it, placing itself in the situation of the parties, cannot ascertain what they meant.⁷⁵ A patent ambiguity appears on the face of the instrument, while a latent ambiguity is raised by evidence.⁷⁶ A patent ambiguity has been defined as one “which appears to be ambiguous upon the deed or instrument,”⁷⁷ and the instrument is void for uncertainty.⁷⁸ In that class of cases the *persons or the subjects* named in the instrument *cannot be definitely ascertained*, either from the paper itself or from such testimony as to the surrounding circumstances as is admissible under the rules already given. It has long been stated as a familiar rule that patent ambiguities cannot be explained by extrinsic evidence.⁷⁹

⁷³ Peisch v. Dickson, Fed. Cas. No. 10,911, 1 Mason, 9.

⁷⁴ Strong v. Waters, 27 App. Div. 299, 50 N. Y. Supp. 257.

⁷⁵ Bouvier, Law Dict., and cases there cited.

⁷⁶ Petrie v. Trustees of Hamilton College, 158 N. Y. 458, 53 N. E. 216.

⁷⁷ 1 Greenl. Ev., § 297. See, also, note to Ferguson v. Rafferty, 6 L. R. A. 41. Illustrations of patent ambiguities are a bequest to the “poor children” of a certain church: Dashiell v. Attorney General, 5 Har. & J. (Md.) 392, 9 Am. Dec. 572; Estate of Hoffen, 70 Wis. 522, 36 N. W. 407, where a bequest to “the poor of Green Bay” was held void for uncertainty; “a handsome gratuity to each

of my executors”: Jubber v. Jubber, 9 Sim. 503, 59 Eng. Reprint, 452; a “bequest of some of my best linen”: Peck v. Halsey, 2 P. Wms. 382, 24 Eng. Reprint, 780; a devise to the “best men of the White Towners”: Year-Book, 49 Ed. 3, cited in Winter v. Perratt, 9 Clark & F. 688, 8 Eng. Reprint, 548; a devise to the “heirs of A. B.,” who is living: Hall v. Leonard, 1 Pick. (Mass.) 27.

⁷⁸ Pearce v. Watts, L. R. 20 Eq. 492.

⁷⁹ Elliott v. Coleman, 170 Ala. 355, 54 South. 491; Griffith v. Furry, 30 Ill. 251, 83 Am. Dec. 186; Castleman v. Du Val, 89 Md. 657, Ann. Cas. 1913A, 1194, 43 Atl. 821; McNair v. Toler, 5 Minn. 435; Reed v.

"*Ambiguitas patens* cannot be holpen by averment."⁸⁰ The difficulty arises in determining whether the ambiguity is patent within the meaning of the rule. It is very clear that all extrinsic evidence is not to be rejected merely because the instrument is of such doubtful meaning on its face as to admit of more than one interpretation. A great number of cases already cited in former sections show that words or phrases having an equivocal meaning may be thus explained.⁸¹ Hence has arisen a criticism, not only of Bacon's definition, but of those later ones, which may be attributed to the literal interpretation placed upon them. An examination of the cases will reveal that the criticism frequently hinges upon the definition of "ambiguity" rather than of "patent," that it calls for a less broad interpretation, that it is not of universal application and can point to cases which have decided contrary to the rule, and that the criticism in such respects is true.⁸² "It is impossible," says Cowen, J.,⁸³ "if we take *ambiguity* in its broad sense of *doubtfulness*, *uncertainty* and *double meaning* (see Johnson's Dict.), to maintain Lord Bacon's maxim one moment, when we compare it with the adjudged cases. Mr. Wigram has started, and I think, solved the

Reed, 98 Miss. 350, 53 South. 691; Carr v. Passaic Land Imp. etc. Co., 22 N. J. Eq. 85; Blossburg etc. R. Co. v. Tioga R. Co., 1 Abb. Dec. (N. Y.) 149; Wright v. Weakly, 2 Watts (Pa.), 89; State v. Racine Sattley Co. (Tex. Civ. App.), 134 S. W. 400; Pingry v. Watkins, 17 Vt. 379; Bradley v. Washington etc. Steam Packet Co., 13 Pet. (U. S.) 89, 10 L. Ed. 72; Pearce v. Watts, L. R. 20 Eq. 492.

⁸⁰ Bacon. Max., reg. 23; Broom, Leg. Max. 608.

⁸¹ Fish v. Hubbard, 21 Wend. (N. Y.) 651; Ely v. Adams, 19 Johns. (N. Y.) 313; Gallagher v. Black, 44 Me. 99; Fenderson v. Owen, 54 Me. 372, 92 Am. Dec. 551, 14 L. Ed. 472; Crawford v. Jarrett, 2 Leigh (Va.),

630; Ennis v. Smith, 14 How. (U. S.) 400; Smith v. Bell, 6 Pet. (U. S.) 68, 8 L. Ed. 322; Citizens' Bank v. Brigham, 61 Kan. 727, 60 Pac. 754; Lee v. Carter, 52 La. Ann. 1453, 27 South. 739; Thomas v. Scott, 127 N. Y. 133, 27 N. E. 961. See § 455 et seq., ante.

⁸² Jenny Lind Co. v. Bower, 11 Cal. 194, 5 Morr. Min. Rep. 589; Novelty Hat Mfg. Co. v. Wiseberg, 126 Ga. 800, 55 S. E. 923; Doyle v. Teas, 5 Ill. 202; Palmer v. Albee, 50 Iowa, 429; Schlottman v. Hoffman, 73 Miss. 188, 55 Am. St. Rep. 527, 18 South. 893.

⁸³ Fish v. Hubbard, 21 Wend. (N. Y.) 651.

inquiry into the extent of the maxim.”⁸⁴ But if the *instrument is unintelligible on its face* or inconsistent with itself, *and remains so after all the extrinsic evidence* as to the situation of the parties and the surrounding circumstances has been received, then a patent ambiguity exists.⁸⁵ In such cases no further extrinsic evidence can be received of the intention of the parties. As stated by Mr. Stephen: “If the words of a document are so defective or ambiguous as to be unmeaning, no evidence can be given to show what the author of the document intended to say.”⁸⁶ We purpose dealing with other declarations of the true rule in the next section.

§ 474 (481). Patent ambiguity—The true rule—How ascertained—Inaccuracies.—There are comparatively few cases in which a bare inspection of the instrument will show that no proper extrinsic evidence will afford any light on the construction of the writing. Hence the court cannot generally determine whether there is a patent ambiguity until extrinsic evidence of the surrounding circumstances has been received.⁸⁷ A distinguished writer has more fully expressed this view in the following language: “Words cannot be ambiguous because they are unintelligible to a man who cannot read; nor can they be ambiguous merely because the court which is called upon

⁸⁴ Wigram on Extr. Ev. 134, says: “To what class of cases, then, does Lord Bacon refer, in speaking of *patent ambiguities*? Let his own commentary upon the rule answer for him. The examples by which he illustrates that part of the rule which relates to patent ambiguities are not cases of misdescription of the *object* of the testator’s bounty or of the *subject of disposition*; but cases in which (the persons and things being *sufficiently* described) the testator’s general intention with respect to them is ambiguously ex-

pressed. A devise to *one of the sons* of A, who has several sons, is a case within the principle. No person in particular is intended by the will.”

⁸⁵ Elphinstone, Deeds, 105; 4 Phill. Ev. 524.

⁸⁶ Steph. Ev., art. 91; Campbell v. Johnson, 44 Mo. 247. See the late cases: Mills Power Co. v. Mohawk Hydro-Electric Co., 140 N. Y. Supp. 655; Powell v. Lawson (Ga. App.), 77 S. E. 183; Fevre v. Avent, 4 Ala. App. 551, 58 South. 727.

⁸⁷ Wig. Wills, 260.

to explain them may be ignorant of a particular fact, art or science which was familiar to the person who used the words, and a knowledge of which is therefore necessary to a right understanding of the words he has used. If this be not a just conclusion, it must follow that the question whether a will is ambiguous might be dependent, not upon the propriety of the language the testator has used, but upon the degree of knowledge, general or even local, which a particular judge might happen to possess, nay, the technical precision and accuracy of a scientific man might occasion his intestacy, a proposition too absurd for an argument."⁸⁸ *The courts are reluctant to declare contracts void for uncertainty.* It has been said that every shift will be resorted to rather than declare the gift void for uncertainty.⁸⁹ It by no means necessarily follows that an instrument fails as unmeaning or ambiguous because it may contain inaccuracies of description.⁹⁰ In conformity with the old maxim, "*Falsa demonstratio non nocet*," the instrument does not become inoperative by reason of some inaccuracy when there remains a sufficient description after rejecting the erroneous addition.⁹¹ Thus, if one grants his house in A, which formerly belonged to B, and it appears that the grantor had at the time only one house in A, it will pass though it never belonged to B.⁹² It is only, as we have said in the preceding section, when the instrument is unintelligible or uncertain after the extrinsic

⁸⁸ Wig. Wills, 259.

⁸⁹ Doe ex dem. Winter v. Parratt, 6 Man. & G. 362.

⁹⁰ Greenl. Ev., § 299; Wig. Wills, 174.

⁹¹ Goodtitle v. Southern, 1 Maule & S. 299, 105 Eng. Reprint, 112; Miller v. Travers, 8 Bing. 337, 131 Eng. Reprint, 395; Esty v. Baker, 50 Me. 325, 79 Am. Dec. 616; Bailey v. White, 41 N. H. 343; Park v. Pratt, 38 Vt. 545; Sargent v. Adams, 3 Gray (Mass.), 72, 63 Am. Dec. 718; Putnam v. Bond, 100 Mass. 58, 1

Am. Rep. 82; Loomis v. Jackson, 19 Johns. (N. Y.) 449; Lodge v. Barnett, 46 Pa. 477; Hildebrand v. Fogle, 20 Ohio, 147; Evansville v. Page, 23 Ind. 525; Colton v. Seavey, 22 Cal. 496; Atkinson v. Cummins, 9 How. (U. S.) 479, 13 L. Ed. 223; Broom, Leg. Max. 629; Elphinstone, Deeds, 159. See note to Bingel v. Volz, 16 L. R. A. 321.

⁹² Proctor v. Pool, 4 Dev. (N. C.) 370; Den v. Leggat, 3 Murph. (N. C.) 539; Boardman v. Reed, 6 Pet. (U. S.) 336, 8 L. Ed. 419.

evidence as to the situation of the parties and the surrounding circumstances have been received that a true patent ambiguity is established. Greenleaf adds, "In other words, and more generally, if the court placing itself in the situation in which the testator or contracting party stood at the time of executing the instrument, and with a full understanding of the force and import of the words, cannot ascertain his meaning and intention from the language of the instrument, then it is a case of incurable, hopeless uncertainty, and the instrument is, therefore, so far inoperative and void."⁹³ The authorities were well considered in an Iowa case, and from them the court deduced three rules which may be taken as a guide in considering the subject of ambiguities both latent and patent: *First*. Where the instrument itself seems to be clear and certain on its face, and the ambiguity arises from some extrinsic or collateral matter, the ambiguity may be helped by parol evidence. *Second*. Where the ambiguity consists in the use of equivocal words designating the person or subject matter, parol evidence of collateral or extrinsic matters may be introduced for the purpose of aiding the court in arriving at the meaning of the language used. *Third*. Where the ambiguity is such that a perusal of the instrument shows plainly that something more must be added before the reader can determine what of several things is meant, the rule is inflexible that parol evidence cannot be admitted to supply the deficiency. About this last-named class of cases there cannot, under the authorities, be any question. They belong to the *ambiguitas patens* of Lord Bacon.⁹⁴ The third rule, which follows closely the interpretation of Greenleaf, read by the light of the comments we have made, fairly announces the law of to-day upon the subject. It will be noted that in

⁹³ 1 Greenl. Ev., § 300. See, also, Doe v. Wilkinson, 35 Ala. 453; Shannon Copper Co. v. Potter, 13 Ariz. 245, 108 Pac. 486; Kretschmer v. Hard, 18 Colo. 223, 32 Pac. 418;

Doyle v. Teas, 4 Scam. (5 Ill.) 202; Kessler v. Clayes, 147 Mo. App. 88, 125 S. W. 799; Early v. Wilkinson, 9 Gratt. (Va.) 68.

⁹⁴ Palmer v. Albee, 50 Iowa, 429.

the statement of the third rule, the Iowa court uses the words "must be added," thereby emphasizing the principle that while the courts may construe writings as liberally as it is possible, and may receive parol evidence to aid them, they stop short of admitting parol evidence to contradict, add to, or otherwise vary for the parties the original intention. Briefly, the parol evidence admitted may be ancillary but not generative.

§ 475 (482, 483). Parol evidence as to wills—In general.—If the will of a testator violates no principles of law or morality, the testator's intention must be the only guide in giving effect to it. It cannot be altered to make it more liberal or just according to extrinsic estimate. If the language is not ambiguous, and the intention is signified by apt words and phraseology, there is no room for construction. It is not proper for the court first to determine what the will ought to be, and then exercise its ingenuity in producing such a result. The testator has the right, by law, to dispose of his property, arbitrarily, and without giving reasons for the disposition he makes of it. If there is any ambiguity of language or phraseology to make it doubtful what the intention of the testator was, the absence of all motive apparent on the face of the will, or derived from the situation or circumstances of his family, to induce him to make any particular disposition, would be entitled to great weight in controlling the construction. But if no such ambiguity exists, it is not entitled to any consideration.⁹⁵ Under ordinary circumstances, therefore, every consideration which can be urged in favor of the rule that written contracts cannot be varied or contradicted by parol evidence applies with peculiar force to wills with regard to the intention of the testator therein expressed.⁹⁶ Such

⁹⁵ *Brearley v. Brearley*, 9 N. J. Eq. 21.

⁹⁶ *Simmons v. Simmons*, 73 Ala. 235; *Bryan v. Bigelow*, 77 Conn. 604, 107 Am. St. Rep. 64, 60 Atl. 266;

McAleer v. Schneider, 2 App. Cas. (D. C.) 461; *Cochran v. Hudson*, 110 Ga. 762, 36 S. E. 71; *Vestal v. Garrett*, 197 Ill. 398, 64 N. E. 345; *McCray v. Lipp*, 35 Ind. 116; *Gilmore*

instruments are formal and solemn documents, often diverting from the natural course of inheritance large estates. They are presumed to have been made after due deliberation, and to express the final and full intention of the testator. Yet the illustrations already given, as well as those which follow, show that the books abound in cases where it has been held necessary in the construction of wills to ascertain their intent, not only from their face, but from the surrounding circumstances. As in the case of other instruments, the judges may, in interpreting the documents, put themselves in the place of the party as far as that is possible.⁹⁷ Parol evidence may be called for to aid the interpretation of a latent ambiguity as in the case of contracts.⁹⁸ A court may look beyond the face of the

v. Jenkins, 129 Iowa, 686, 6 Ann. Cas. 1008, 106 N. W. 193; Tuttle v. Berryman, 94 Ky. 553, 23 S. W. 345, 15 Ky. Law Rep. 294; Schapiro v. Howard, 113 Md. 360, 140 Am. St. Rep. 414, 78 Atl. 58; Turner v. Burr, 141 Mich. 106, 104 N. W. 379; Love v. Buchanan, 40 Miss. 758; Roberts v. Crume, 178 Mo. 572, 73 S. W. 662; Brown v. Brown, 43 N. H. 17; Zabriskie v. Huyler, 64 N. J. Eq. 794, 56 Atl. 1133; Perea v. Barela, 5 N. M. 458, 23 Pac. 766; Union Trust Co. v. St. Luke Hospital, 175 N. Y. 505, 67 N. E. 1090; Watkins v. Flora, 30 N. C. 374; Charch v. Charch, 57 Ohio St. 561, 49 N. E. 408; Reagan v. Curran, 226 Pa. 265, 75 Atl. 362; Clarke v. Clarke, 46 S. C. 230, 57 Am. St. Rep. 675, 24 S. E. 202; Clark v. Clark, 2 Lea (Tenn.), 723; Ellis v. Birkhead, 30 Tex. Civ. App. 529, 71 S. W. 31; Wells v. Wells, 37 Vt. 483; Waller v. Waller, 1 Gratt. (Va.) 454, 42 Am. Dec. 564; Wyatt v. Norris, 66 W. Va. 667, 66 S. E. 1016; Sandon v. Sandon, 123 Wis. 608, 101 N. W. 1089; Aspden's Estate, 2 Fed. Cas. No. 589, 2 Wall. Jr. 368.

⁹⁷ Smith v. Bell, 6 Pet. (U. S.) 68, 8 L. Ed. 322; 1 Greenl. Ev., § 287.

⁹⁸ Vandiver v. Vandiver, 115 Ala. 328, 22 South. 154; Taylor v. McCowen, 154 Cal. 798, 99 Pac. 351; Thompson v. Betts, 74 Conn. 576, 92 Am. St. Rep. 235, 51 Atl. 564; Hearn v. Ross, 4 Harr. (Del.) 46; Whiteman v. Whiteman, 152 Ind. 263, 53 N. E. 225; Whitehouse v. Whitehouse, 136 Iowa, 165, 125 Am. St. Rep. 250, 113 N. W. 759; Jackson v. Payne, 2 Met. (Ky.) 567; Howard v. American Peace Soc., 49 Me. 288; Mitchell v. Mitchell, 6 Md. 224; Wheaton v. Pope, 91 Minn. 299, 97 N. W. 1046; McMahon v. Hubbard, 217 Mo. 624, 118 S. W. 481; St. James Orphan Asylum v. Shelby, 75 Neb. 591, 106 N. W. 604; Brown v. Quintard, 177 N. Y. 75, 69 N. E. 225; Taylor v. Maris, 90 N. C. 619; Sharp v. Wightman, 205 Pa. 285, 54 Atl. 888; Donald v. Dendy, 2 McMul. (S. C.) 123; Ward v. Epsy, 6 Humph. (Tenn.) 447; Burke v. Lee, 76 Va. 386; Rathjens v. Marrill, 38 Wash. 442, 80 Pac. 754; Couch v. Eastham, 29 W. Va. 784, 3 S. E. 23; *In re*

will where there is an ambiguity as to the person or property to which it is applicable, but no case can be found where such testimony has been introduced to enlarge or diminish the estate devised.⁹⁹ While extrinsic evidence of the circumstances, situation and surroundings of the testator and of his property is legitimate to place the court which expounds the will in the situation of the testator, and thus to enable the court to understand the meaning and application of his language,¹⁰⁰ yet the intention must be determined from the language of the instrument as explained by such extrinsic evidence, and no proof, however conclusive in its nature, can be admitted with a view of setting up an *intention inconsistent* with the writing itself.¹

Grainger, [1900] 2 Ch. 756, 69 L. J. Ch. 789, 83 L. T., N. S., 209, 49 Wkly. Rep. 197.

⁹⁹ King v. Ackerman, 67 U. S. 408, 17 L. Ed. 292. See, also, Bryan v. Bigelow, 77 Conn. 604, 107 Am. St. Rep. 64, 60 Atl. 266; Case v. Young, 3 Minn. 209; Perrine v. Perrine, 6 N. J. L. 133, 10 Am. Dec. 392.

¹⁰⁰ Crumley v. Scales, 135 Ga. 300, 69 S. E. 531; Wallace v. Noland, 246 Ill. 535, 138 Am. St. Rep. 247, 92 N. E. 956; Skinner v. Spann, 175 Ind. 672, 93 N. E. 1061, 95 N. W. 243; Cox v. Jones, 229 Mo. 53, 129 S. W. 495; Hewitt v. Green, 77 N. J. Eq. 345, 77 Atl. 25; Eidt v. Eidt, 142 App. Div. 733, 127 N. Y. Supp. 680; Wright v. Wright, 140 App. Div. 634, 125 N. Y. Supp. 875; Maxey v. City of Oshkosh, 144 Wis. 238, 128 N. W. 899, 1138.

¹ Whitmore v. Learned, 70 Me. 276; Fitzpatrick v. Fitzpatrick, 36 Iowa, 674, 14 Am. Rep. 538; Magee v. McNeil, 41 Miss. 17, 90 Am. Dec. 354; Heidenheimer v. Bauman, 84 Tex. 174, 31 Am. St. Rep. 29, 19 S. W. 382; Waldron v. Waldron, 45 Mich. 350, 7 N. W. 894; Bingel v. Volz, 142 Ill. 214, 34 Am. St. Rep.

64, 16 L. R. A. 321, 31 N. E. 13; Charter v. Charter, L. R. 7 H. L. 364, 43 L. J. P. 73; Earl of Newburgh v. Countess of Newburgh, 5 Madd. 364, 56 Eng. Reprint, 934; Miller v. Travers, 8 Bing. 244, 131 Eng. Reprint, 395; Pickering v. Pickering, 50 N. H. 349; Griscom v. Evens, 40 N. J. L. 402, 29 Am. Rep. 251; Weston v. Foster, 7 Met. (Mass.) 297; Judy v. Gilbert, 77 Ind. 96, 40 Am. Rep. 289, and note; Avery v. Chappel, 6 Conn. 270, 16 Am. Dec. 53; Collins v. Hope, 20 Ohio, 492; Thomas v. Thomas, 6 Term Rep. 671, 101 Eng. Reprint, 764; Hodgson v. Hodgson, 2 Vern. 593, 23 Eng. Reprint, 895; Beaumont v. Fell, 2 P. Wms. 141, 24 Eng. Reprint, 673. On the general subject of this and the succeeding sections, see notes to Jackson v. Kniffen, 3 Am. Dec. 395; Judy v. Gilbert, 40 Am. Rep. 292-295; General Assembly of the Presbyterian Church v. Guthrie, 6 L. R. A. 321-324; Boston Safe Deposit etc. Co. v. Coffin, 8 L. R. A. 740-749. It cannot be proved by parol that a *devise absolute* on its face was intended to be held *in trust*: Elliott v. Morris, Harp. Eq. (S. C.) 281; that

When the word "revoke" was used in a codicil, where the word "confirm" was intended, it was held that the mistake could not be corrected by parol.² It is a settled principle that the construction of a will must be derived from the words of it and not from extrinsic averment.³ The intention is the polar star by which the courts must be guided. So far as concerns the construction, the question always is, not what the testator meant to say, but what is meant by what he did say.⁴ And therefore all extrinsic evidence intending to prove, not what the testator has expressed, but what he intended to express, is inadmissible.⁵ If no ambiguity is disclosed on the face of a will, extrinsic evidence is not admissible to raise one for the very purpose of limiting or qualifying the construction of the language used to give effect to some conjectured purpose of the testator which he did not express. Judicial tribunals cannot inquire any further into a testator's hopes or expectations or contemplations of possibilities of change in his circumstances than he has seen fit to express them. Where he has clearly expressed a wish, consistent with the rules of law, they must give it effect; they are not at

a bequest was intended to be in *lieu of dower*: *Timberlake v. Parish*, 5 Dana (Ky.), 345; that a clause was omitted by *mistake*: *Webb v. Webb*, 7 T. B. Mon. (Ky.) 626; that a legacy was intended to be a *charge on land*: *Massaker v. Massaker*, 13 N. J. Eq. 264; that the word "*children*" was intended to include illegitimate children: *Shearman v. Angel*, Bail. Eq. (S. C.) 351, 23 Am. Dec. 166; that some other language in the will was intended: *Taylor v. Maris*, 90 N. C. 619; to supply a complete *blank in the name* of the devisee: *Higgins v. Carlton*, 28 Md. 115, 92 Am. Dec. 666; or in the description of the land: *Sewell v. Slingluff*, 57 Md. 537. Although in some cases courts of equity have corrected mis-

takes in wills by supplying names or clauses: *Geer v. Winds*, 4 D. Saus. (S. C.) 85; *Webb v. Webb*, 7 T. B. Mon. (Ky.) 626; as a general rule, no such *omission* can be supplied by parol: *Abercrombie v. Abercrombie*, 27 Ala. 489; *Sherwood v. Sherwood*, 45 Wis. 357, 30 Am. Rep. 757. It cannot be proved by parol that a testatrix, who had made no provision for a child, believed him dead, there being nothing in the will to indicate such belief: *Gifford v. Dyer*, 2 R. I. 99, 57 Am. Dec. 708.

² *In re Davy*, 5 Jur., N. S., 252.

³ *Greene v. Dennis*, 6 Conn. 293, 16 Am. Dec. 58.

⁴ *Weed v. Scofield*, 73 Conn. 670, 49 Atl. 22.

⁵ *Wigram*, Ex. Ev. 650.

liberty to surmise that his real wishes were something different.⁶ Where, by the use of parol testimony, an ambiguity not apparent upon the face of the will is shown to exist, the same kind of testimony may be resorted to for its explanation.⁷ The following doctrines in relation to the construction of wills are well established: 1. Where the instrument is free from ambiguity, and there is no imperfection or inaccuracy in its language, the testator's intention is to be collected from the words used by him, and parol evidence is not allowable for the purpose of adding to, explaining, or subtracting from it, or to raise an argument in favor of any particular construction.⁸ 2. Extrinsic evidence of intention is inadmissible for the purpose of supplying a devise, or any other material provision, omitted by mistake, or to superadd any qualification to the terms used, or to evince a mistake in writing the instrument.⁹ 3. As a general rule, parol evidence is only allowable where a latent ambiguity or a resulting trust is manifested by the same kind of testimony, or where fraud has been practiced on the testator, and in the latter case the evidence is admitted, not for the purpose of explaining or altering the writing, but to show that it is void.¹⁰ It by no means follows, however, that a will necessarily fails because a mistake has been made. In many of the cases hereafter cited extrinsic evidence was held admissible to ascertain which of the two persons or subjects answering the description equally well was in the mind of the testator, and intended by him. In many such cases the

⁶ Kinney v. Kinney, 34 Mich. 250.

⁷ Bates v. Allison (Ky. 1847), cited in Stephen v. Walker, 8 B. Mon. (Ky.) 600; Pileher v. Puckett, 77 Kan. 284, 17 L. R. A., N. S., 1083, 94 Pac. 132.

⁸ 1 Phill. Ev. 543, 131 Eng. Reprint, 395; Miller v. Travers, 8 Bing. 244; Wigram on Ex. Evidence, 65.

⁹ Webb v. Webb, 7 T. B. Mon. (Ky.) 626; Jackson v. Sill, 11 Johns.

(N. Y.) 201, 6 Am. Dec. 363; Iddings v. Iddings, 7 Serg. & R. 111, 10 Am. Dec. 450; Newburgh v. Newburgh, 5 Madd. 364, 56 Eng. Reprint, 934; Worthington on Wills, side page 77; 60 Law Library.

¹⁰ 1 Johns. Ch. 231; Torbert v. Twining, 1 Yeates (Pa.), 432; McDermott v. United States Ins. Co., 3 Serg. & R. (Pa.) 604.

extrinsic evidence enables the court to ascertain the intention and apparently to correct the mistake, while in fact *no violence is done to the terms of the will*. It must be borne in mind, however, that it is not every uncertainty or ambiguity apparent on the face of an instrument which will justify the introduction of parol testimony to explain it. Evidence is only admitted *dehors* the will, from necessity, to explain that which otherwise would have had no operation. The modern doctrine is, that where a subject exists which satisfies the terms of the will, and to which they are perfectly applicable, there is no latent ambiguity.¹¹

§ 476 (484). **Wills—Parol evidence to identify property.**—The rule so often referred to, that extrinsic evidence may be given to apply the instrument to its proper subject matter or to the person intended, is one of frequent application in the construction of wills, as has already appeared from the cases heretofore cited. It requires but little examination of the cases or but little actual experience in the courts to ascertain that the descriptions of property in wills, and even the descriptions of the intended beneficiaries are very often somewhat indefinite and even inaccurate. The courts deal somewhat leniently with such cases, and seek to *ascertain the intent* of the testator, if this can be done without violation of the settled rules of evidence.¹² “Where the words of a will, aided by evidence

¹¹ Wusthoff v. Dracourt, 3 Watts (Pa.), 240.

¹² Vandiver v. Vandiver, 115 Ala. 328, 22 South. 154; Spencer v. Higgins, 22 Conn. 521; Flannery v. Hightower, 97 Ga. 592, 25 S. E. 371; Felkel v. O'Brien, 231 Ill. 329, 83 N. E. 170; Groves v. Culph, 132 Ind. 186, 31 N. E. 569; Chambers v. Watson, 60 Iowa, 339, 46 Am. Rep. 70, 14 N. W. 336; Douglas v. Blackford, 7 Md. 8; Cleverly v. Cleverly, 124 Mass. 314; Sorenson v. Carey, 96

Minn. 202, 104 N. W. 958; McMahan v. Hubbard, 217 Mo. 624, 118 S. W. 481; Second Congregational Soc. in Hopkinton v. First Cong. Soc. in Hopkinton, 14 N. H. 315; Crosson v. Carr, 70 N. J. L. 393, 67 Atl. 158; Jackson v. Wilkinson, 17 Johns. (N. Y.) 146; Grubb v. Foust, 99 N. C. 286, 6 S. E. 103; Merrick v. Merrick, 37 Ohio St. 126, 41 Am. Rep. 493; Black v. Hill, 32 Ohio St. 313; Jones v. Dove, 6 Or. 188; In re Gaston, 188 Pa. 374, 68 Am. St. Rep.

of the material facts of the case, are insufficient to determine the testator's meaning, no evidence will be admissible to prove what the testator intended; and the will will be void for uncertainty."¹³ On this general principle it often becomes necessary to prove by extrinsic evidence whether or not the testator had property answering to the exact description in the will, and, if not, what property he did have which sufficiently answers such description. The books abound in cases in which *wills have been upheld, although the subject matter has been indefinitely or inaccurately described*.¹⁴ A decision of the supreme court of the

874, 41 Atl. 529; Jones v. Quattlebaum, 31 S. C. 606, 9 S. E. 982; McCorry v. King, 3 Humph. (Tenn.) 267, 39 Am. Dec. 165; Packard v. De Miranda (Tex. Civ. App.), 123 S. W. 710; Townsend v. Downer, 23 Vt. 225; Roy v. Rowzie, 25 Gratt. (Va.) 599; Scott v. Neeves, 77 Wis. 305, 45 N. W. 421; Patch v. White, 117 U. S. 210, 29 L. Ed. 860, 6 Sup. Ct. Rep. 617, 710. See elaborate notes to Kurtz v. Hibner, 8 Am. Rep. 669; Bingel v. Volz, 16 L. R. A. 321; Ferguson v. Rafferty, 6 L. R. A. 43; Lomax v. Lomax, 6 L. R. A., N. S., 942.

¹³ Wig. Wills, prop. 6; Estate of Hoffen, 70 Wis. 522, 36 N. W. 407 (bequest to the "Poor of the City of Green Bay").

¹⁴ The rule has been applied where the testator bequeathed "4 per cent stock"; although several years before the bequest he had sold the stock and purchased annuities with the proceeds: Lindgren v. Lindgren, 9 Beav. 358, 50 Eng. Reprint, 381; Selwood v. Mildmay, 3 Ves. Jr. 306, 30 Eng. Reprint, 1025; see note, Kurtz v. Hibner, 8 Am. Rep. 669; where land was described correctly as land purchased of P., but the description was erroneous in other respects:

Winkley v. Kaime, 32 N. H. 268; Allen v. Lyons, Fed. Cas. No. 227, 2 Wash. C. C. 475. Exceptions to it will be found in Kurtz v. Hibner, 55 Ill. 514, 8 Am. Rep. 665, 10 Am. L. Reg., N. S., 93; Fitzpatrick v. Fitzpatrick, 36 Iowa, 674, 14 Am. Rep. 538; Judy v. Gilbert, 77 Ind. 96, 40 Am. Rep. 289; Sherwood v. Sherwood, 45 Wis. 357, 30 Am. Rep. 757; Bishop v. Morgan, 82 Ill. 351, 25 Am. Rep. 327. These cases were prior to Patch v. White, *infra*. See, also, a learned note of Chief Justice Redfield, 10 Am. Law Reg., N. S., 93, to the case of Kurtz v. Hibner, in which he strongly disapproves the decision in that case; and Eckford v. Eckford, 91 Iowa, 54, 26 L. R. A. 370, 58 N. W. 1093, and Flynn v. Holman, 119 Iowa, 731, 94 N. W. 447. Where land was described in a township in which the testator owned no land, the devise was upheld, there being in the will a reference to a "big spring" which was relied on to designate the land intended: Riggs v. Myers, 20 Mo. 239. Other illustrations of the same rule: Jackson v. Sill, 11 Johns. (N. Y.) 201, 6 Am. Dec. 363; Allen v. Lyons, Fed. Cas. No. 227, 2 Wash. C. C. 475; Winkley v. Kaime, 32 N. H. 268. See the late cases: Keeler

United States well illustrates the principle under discussion. A testator in his will described a lot as numbered 6 in square number 403; parol evidence was received to show that he did not own the lot described, but did own lot number 3 in square number 406. It was held by a divided court that the extrinsic evidence raised a latent ambiguity, and, taken in connection with the context of the will, showed that the lot really devised was the latter one.¹⁵ This case and some of those last cited seem to hold that where there is an erroneous particular description of the devise, the express *assertion of ownership* by the devisor is in the nature of a description, and is sufficient to authorize extrinsic evidence to identify the land. It sometimes becomes necessary to inquire what estate, or quantity of interest in the subject matter devised, the testator had at the time of making his will. If a person devise an estate for life generally, without saying whether for the life of another, or the life of the devisee, evidence is admissible to show what interest the testator had in the premises; for if he owned the premises in fee, the devisee would have an estate for his own life, but if he was tenant for life of a third person only, then the devisee would take that interest. Or, if a testator bequeath such a sum in a particular stock, it will be a specific legacy if he has the stock; but

v. Merchants' etc. Trust Co., 253 Ill. 528, 97 N. E. 1061; Fulwood v. Fulwood (N. C.), 77 S. E. 763.

¹⁵ Patch v. White, 117 U. S. 210, 29 L. Ed. 860, 6 Sup. Ct. Rep. 617, 710. The same rule was applied in the following cases: Hawkins v. Young, 52 N. J. Eq. 508, 28 Atl. 511; Eckford v. Eckford, 91 Iowa, 54, 26 L. R. A. 370, 58 N. W. 1093; Halliday v. Hess, 147 Ill. 588, 35 N. E. 380; Tewksbury v. Howard, 138 Ind. 103, 37 N. E. 355; Ladnier v. Ladnier, 75 Miss. 777, 23 South. 430; Skinner v. Harrison, 116 Ind. 139, 2 L. R. A. 137, 18 N. E. 529; Pocock v. Reddinger, 108 Ind. 573, 58 Am.

Rep. 71, 9 N. E. 473; Grubb v. Foust, 99 N. C. 286, 6 S. E. 103; Decker v. Decker, 121 Ill. 341, 12 N. E. 750; Covert v. Sebern, 73 Iowa, 564, 35 N. W. 636; Seebrock v. Fedawa, 33 Neb. 413, 29 Am. St. Rep. 488, 50 N. W. 270; Chambers v. Watson, 60 Iowa, 339, 46 Am. Rep. 70, and long note, 14 N. W. 336; Hanley v. Kraftezyk, 119 Wis. 352, 96 N. W. 820; Sherwood v. Sherwood, 45 Wis. 357, 30 Am. Rep. 757; Stewart v. Stewart, 96 Iowa, 620, 65 N. W. 976. See note to Bingel v. Volz, 16 L. R. A. 321. But see Lomax v. Lomax, 218 Ill. 629, 6 L. R. A., N. S., 942, and note, 75 N. E. 1076.

otherwise if he has it not.¹⁶ Indeed, the law as laid down in the United States supreme court case referred to leaves no room for any doubt as to the mode of interpretation or construction when the misdescription of the property devised is sufficiently shown by extrinsic evidence. It settles that where an ambiguity arises upon a will when it names a thing as the subject of it, and such thing does not belong to the testator or when it misdescribes such thing, then if the misdescription can be struck out and enough remain in the will to identify the thing, the court will deal with it in that way; or, if it is an obvious mistake, will read it as if corrected. The ambiguity in the latter case consists in the repugnancy between the manifest intent of the will and the misdescription of the subject of the gift. In such a case evidence is always admissible to show the condition of the testator's family and estate, and the circumstances by which he was surrounded at the time of making his will.¹⁷ The instances cited sufficiently illustrate the liberality with which the modern decisions admit evidence to identify the subject matter of the devise. It is clear that the maxim, "*Falsa demonstratio non nocet*," is given full effect, and that errors of description do not make void the bequest, provided enough is given to show with reasonable certainty what was intended.¹⁸

¹⁶ Phill. Ev. 544.

¹⁷ 1 Jarman, Wills, 364, 365; 1 Roper, Legacies, 4th ed., 297; 2 Wms. Executors, 988, 1032.

¹⁸ Selwood v. Mildmay, 3 Ves. Jr. 306, 30 Eng. Reprint, 1025; Jackson v. Sill, 11 Johns. (N. Y.) 201, 6 Am. Dec. 363; Eckford v. Eckford, 91 Iowa, 54, 26 L. R. A. 370, 58 N. W. 1093; Heidenheimer v. Bauman, 84 Tex. 174, 19 S. W. 382, 31 Am. St. Rep. 29, and note. See elaborate notes to Kurtz v. Hibner, 8 Am. Rep. 669; 10 Am. L. Reg., N. S., 97. Cases in which testimony has been rejected: Kurtz v. Hibner, 55 Ill.

514, 8 Am. Rep. 665, and note, 10 Am. L. Reg., N. S., 93, and note; Doe v. Oxenden, 3 Taunt. 147; Bingel v. Volz, 142 Ill. 214, 34 Am. St. Rep. 64, 16 L. R. A. 321, 31 N. E. 13; Doe v. Hiscocks, 5 Mees. & W. 363; Miller v. Travers, 8 Bing. 244, 131 Eng. Reprint, 395; Jackson v. Sill, 11 Johns. (N. Y.) 201, 6 Am. Dec. 363; Jackson v. Wilkinson, 17 Johns. (N. Y.) 146; Mann v. Mann, 1 Johns. Ch. (N. Y.) 231. See dissenting opinion to Eckford v. Eckford, 91 Iowa, 54, 26 L. R. A. 370, 58 N. W. 1093, citing many cases.

§ 477 (485, 486). **Wills—Evidence to identify devisee or legatee.**—On the same principle stated in the last section, extrinsic evidence of the character there referred to is frequently allowed to identify the legatee or devisee named in a will. Hence a misnomer or *misdescription* of a legatee or devisee *does not invalidate* the bequest, if either from the will itself or from some relevant extrinsic evidence the object of the testator's bounty can be ascertained.¹⁹ Where a latent ambiguity of this kind is apparent, and it appears that there is no person in existence precisely answering the description in the will, parol evidence may be received to ascertain who was intended.²⁰ Thus where the residuary legatees were "the legal heirs in Germany" of the testator, and only one of them lived in Germany, which fact was unknown to the testator, and all the rest lived in Switzerland, evidence of these facts was admitted and the will construed as making the heirs the residuary legatees, irrespective of their residence. The

¹⁹ *St. Luke's Home v. Association*, 52 N. Y. 191, 11 Am. Rep. 697; *Holmes v. Mead*, 52 N. Y. 332; *Gardner v. Heyer*, 2 Paige Ch. (N. Y.) 11; *Andrews v. Dyer*, 81 Me. 104, 16 Atl. 405; *Gordon v. Burris*, 141 Mo. 602, 43 S. W. 642; *Covert v. Sebern*, 73 Iowa, 564, 35 N. W. 636; *Smith v. Kimball*, 62 N. H. 606. See note to *Ferguson v. Rafferty*, 6 L. R. A. 43. See the late cases: *Suttle etc. Imp. Co. v. Barker* (Ala.), 60 South. 157; *Crabtree v. Dwyer*, 257 Ill. 101, 100 N. E. 510; *Alsman v. Walters* (Ind. App.), 101 N. E. 117; *Warden v. Overman* (Iowa), 135 N. W. 649; *Armstrong v. Crutchfield*, 150 Ky. 641, 150 S. W. 835; *Gardner v. McNeal*, 117 Md. 27, 82 Atl. 988; *Russell v. Lilly* (Mass.), 100 N. E. 668; *Naylor v. McRuer* (Mo.), 154 S. W. 772; *In re Smisson*, 79 N. J. Eq. 233, 82 Atl. 614; *In re Bauerdorf*, 77 Misc. Rep. 655, 138 N. Y. Supp. 682;

In re Fay, 77 Misc. Rep. 514, 137 N. Y. Supp. 983; *Shields v. Freeman*, 158 N. C. 123, 73 S. E. 805; *Moon v. Stewart* (Ohio), 101 N. E. 344; *Church v. Baer*, 236 Pa. 605, 84 Atl. 1099; *Perry v. Brown*, 34 R. I. 203, 83 Atl. 8; *Du Bose v. Flemming* (S. C.), 76 S. E. 277; *Farrell v. Cogley* (Tex. Civ. App.), 146 S. W. 315; *Commonwealth v. Wellford* (Va.), 76 S. E. 917; *Flint v. Wisconsin Trust Co.*, 151 Wis. 231, 138 N. W. 629.

²⁰ *Taylor v. McCowen*, 154 Cal. 798, 99 Pac. 351; *McMahan v. Hubbard*, 217 Mo. 624, 118 S. W. 481; *Taylor v. Tolen*, 38 N. J. Eq. 91; *Jay v. Lee*, 41 Misc. Rep. 13, 83 N. Y. Supp. 579; *In re Gaston*, 188 Pa. 374, 68 Am. St. Rep. 874, 41 Atl. 529; *Button v. American Tract Soc.*, 23 Vt. 336; *Webster v. Morris*, 66 Wis. 366, 57 Am. Rep. 278, 28 N. W. 353.

words "in Germany" were excluded from the construction.²¹ If the context of the will affords sufficient evidence of the identity of the person intended as the legatee, the will alone must be looked to in order to clear up the difficulty and determine the question. But if the context fails, or, after examining the whole will, it still remains uncertain who is the proper person to take, then recourse must be had to parol evidence. In no case, however, is a bequest to be deemed void for uncertainty as to the person, provided the person intended to take can be identified by any competent evidence.²² A court never considers a devise to be void "unless it is so absolutely dark that they cannot find out the testator's meaning."²³ It is laid down as a settled rule, where the description of the legatee is erroneous, but the error not occasioned by any fraud practiced upon the testator, and there is no doubt as to the person intended, that the mistake will not disappoint the bequest; and, therefore, if a legacy be given to a person by a correct name, but with a wrong description or addition, the mistaken description or addition will not vitiate the bequest, but will be rejected.²⁴ This principle has been

²¹ *Giger v. Busch*, 122 Ill. App. 13. See, also, *Mason v. Massachusetts General Hospital*, 207 Mass. 419, 93 N. E. 637; *Northrop v. Columbian Lumber Co.*, 186 Fed. 770, 108 C. C. A. 640.

²² *Smith v. Smith*, 1 Edw. Ch. (N. Y.) 189.

²³ *Minshull v. Minshull*, 1 Atk. 411, 26 Eng. Reprint, 260.

²⁴ 1 *Roper on Legacies*, 134. See, also, *Ward on Legacies*, 97. In *Careless v. Careless*, 1 Meriv. 384, 35 Eng. Reprint, 715, 19 Ves. 601, 34 Eng. Reprint, 639, a testator gave a legacy "to Robert Careless, his nephew, the son of Joseph Careless." The testator had two brothers, one named John and the other Thomas, who both survived him. And they

had each a son called Robert; but the deceased never had a brother named Joseph, and no other nephew called Robert except the sons of John and Thomas. They both claimed the legacy, and each went into parol evidence to show how he and not the other was intended. Sir William Grant, M. R., who decided the cause, remarks, there being two nephews both named Robert and neither of them the son of Joseph were facts *dehors* the will, and therefore constituting a latent ambiguity. The evidence was consequently admissible to explain the will; and it showed that the testator was intimately acquainted with one and but little known to the other. The presumption, therefore, was,

applied in a greater number of English cases. In a comparatively recent case it was extended somewhat beyond the usual rule. The devise was to "my nephew, Joseph Grant"; and it was found that both the testator's brother and the brother of the testator's wife had a son by that name. As the term "my nephew" was applicable to both these persons, the court held it a latent ambiguity which could be explained by parol evidence.²⁵ In the United States similar instances are recorded. In one the testator devised property to the "American Tract Society," and there were two societies of that name. Bigelow, C. J., said: "There is no contention at the bar as to the principles of law by which these cases are to be determined. Each of the clauses in the wills of the two testators by which bequests are given to the American Tract Society is on its face clear and intelligible. There is no ambiguity or uncertainty in the language of the instruments. The purpose or object for which the testators designed to give a portion of their estates is aptly and appropriately designated. We are not called on in these cases to give an interpretation to wills where the words descriptive of the legatee are inap-

the testator intended that nephew to take whom he best knew and with whose name it was certain he was best acquainted. In *Smith v. Smith*, 1 Edw. Ch. (N. Y.) 189, the will contained a bequest "To Mary Smith, wife of Nathaniel Smith, three hundred dollars." Mary Smith was the wife of Abraham Smith, and Nathaniel Smith's wife was named Sarah. Here was an ambiguity arising *dehors* the will, from the fact that neither of the claimants came within the full designation of the legatee, a part of it referring nominally to one person and the remainder of it descriptively to another—a latent ambiguity which the court allowed in extrinsic evidence to remove. "Although the case of *Careless v. Careless*," said the vice-chancellor, "is not

in all respects like the present, yet there is enough in the principle upon which it was decided to show it is not only proper but oftentimes necessary to resort to parol evidence as the only guide in determining the question. In *Thomas v. Thomas*, 6 Term Rep. 671, 101 Eng. Reprint, 764, it was held, such evidence was admissible to ascertain the person of the devisee, where the question was whether the name or the description should prevail. But it is true, as exemplified by the result of this case, that if neither the will nor the extrinsic evidence is sufficient to remove the ambiguity in respect of the devisee or legatee, the devise or bequest must fail from the uncertainty of its object."

²⁵ *Grant v. Grant*, 5 C. P. 727.

plicable with certainty to any subject, and parol evidence is sought to be introduced for the purpose of rendering intelligible that which on the face of the wills is uncertain and obscure. The ambiguity with which we have to deal arises on evidence of extrinsic facts. It is the existence of two bodies bearing the same corporate name as that inserted in the wills, which renders the meaning of the bequests doubtful. The ambiguity is therefore latent, and on well-established principles it can be helped and explained by evidence *dehors* the instruments. Such evidence does not vary the written language. It only enables the court to reject one of the two subjects to which the description applies, and to ascertain which of them the testator understood to be signified by the words used in the will. It is necessarily assumed in all cases where such latent ambiguity arises in the interpretation of a will by the existence of two persons or objects which answer the description given by the testator, that he was ignorant of the fact or did not remember that the two were known and called by the same name. This assumption rests on the ground that it is reasonable to suppose that if the testator had known of the existence of two objects bearing the same name, he would have made the description more definite, so as to remove the ambiguity. The law permits oral evidence to be introduced in such cases for the purpose of showing which subject was known to the testator, or which he had in mind when he inserted the name in his will."²⁶ Extrinsic evidence is, however, most frequently introduced *where there is no person precisely answering the description* in the will. In such cases the evidence is in

²⁶ *Bodman v. American Tract Society*, 9 Allen (Mass.), 447; *Wigram, Ex. Ev.*, §§ 150, 181; *Hiscocks v. Hiscocks*, 5 Mees. & W. 363; 1 Greenl. Ev., § 290. Where one claiming as devisee under a will is not designated therein by his proper name, he may show that he is also

known by the name used in the will to designate the devisee, although the name of another claimant exactly corresponds to the name thus used: *Second etc. Church v. First etc. Church*, 71 Neb. 563, 99 N. W. 252.

perfect harmony with this rule of construction given by Sir James Wigram: "Where there is nothing in the context of a will from which it is apparent that a testator has used the words in which he has expressed himself in any other than their strict and primary sense, and where his words so interpreted are sensible with reference to extrinsic circumstances, it is an inflexible rule of construction that the words of the will shall be interpreted in their strict and primary sense, and in no other, although they may be capable of some popular or secondary interpretation, and although the most conclusive evidence of intention to use them in such popular or secondary sense be tendered."²⁷ Ambiguities of this class are common where the testator has described his beneficiaries as belonging to a particular class of relationship with him, or has referred to children indiscriminately when both legitimate and illegitimate descendants might claim as objects of his bounty.²⁸ Wigram thus illustrates the subject: "Though the word 'child' may be construed to mean illegitimate child, where the proper meaning of the word is of absolute necessity excluded, yet if no such absolute necessity exist, the word shall receive no other than its strict and proper interpretation."²⁹ "So although the words 'son,' 'child,' 'grandchild,' etc., may be construed in a secondary sense, where the will would be insensible, if the primary meaning of the words were adhered to, yet it is only where that is the case that a departure from the strict sense of the words is permitted."³⁰ Formerly, it was the rule that the law

²⁷ Wig. Wills, prop. 11.

²⁸ As to meaning of words see further next section.

²⁹ Wig. Wills, prop. 11.

³⁰ Wig. Wills, prop. 11, § 28. Extraneous evidence has been received when the bequest was to "my son John," and the testator had two sons of that name: *Cheyney's Case*, 5 Coke, 68b, 77 Eng. Reprint, 158; where the devisee was to J. C., and

there were two persons, father and son, of that name: *Jones v. Newman*, 1 W. Black. 60, 96 Eng. Reprint, 32. Lord Chancellor Hardwicke said in *Baylis v. Attorney General*, 2 Atk. 239, 26 Eng. Reprint, 548: "There are instances where this court had admitted parol evidence to ascertain the person intended by the testator, where he has been mentioned only by a nick-

should fix the meaning of the will and of other written documents without reference to the circumstances of the testator or makers of the document. The rule now is unquestioned that extrinsic evidence in aid of the interpretation of wills is admissible for the purpose of showing the object of the testator's bounty, the property devised, and the quality of interest intended to be given. Evidence may be received

name, or where there have been two persons who have had the same Christian and surname; but I do not remember any case where the court has gone so far as to allow parol evidence of the intention of a testator, where there is only a blank, and therefore would not permit it to be read," but where the blank was only as to the Christian name, parol evidence was admitted to supply it, as where a legacy was given to "— Price, the son of — Price": *Price v. Page*, 4 Ves. Jr. 680, 31 Eng. Reprint, 351; *In re De Rosaz*, 2 Prob. Div. 66, 46 L. J. P. 6, 36 L. T. 263; when neither of two claimants bore the name of the legatee in the will: *Washington & Lee University Appeal*, 111 Pa. 572, 3 Atl. 664 (as to corporations, see *St. Luke's Home v. Association*, 52 N. Y. 191, 11 Am. Rep. 697; *Chappel v. Missionary Society*, 3 Ind. App. 356, 50 Am. St. Rep. 276, 29 N. E. 924; *Lefevre v. Lefevre*, 59 N. Y. 434; *Faulkner v. National Sailors' Home*, 155 Mass. 458, 29 N. E. 645; *Tucker v. Seaman's Aid Society*, 7 Met. (Mass.) 188; *Tilton v. American Bible Soc.*, 60 N. H. 377, 49 Am. Rep. 321); where the devise was to "the four boys," and it appeared that the testator had seven sons: *Bradley v. Rees*, 113 Ill. 327, 55 Am. Rep. 422; where a bequest was to Samuel, such evidence was allowed to show that William was intended, though there were persons of both names: *Powell*

v. Biddle, 2 Dall. (Pa.) 70, 1 Am. Dec. 263, 1 L. Ed. 293; *Thomas v. Stevens*, 4 Johns. Ch. 607. Other illustrations: *In re Gregory*, 34 Beav. 600, 55 Eng. Reprint, 767; *Masters v. Masters*, 1 P. Wms. 421, 24 Eng. Reprint, 454; *Lee v. Pain*, 4 Hare, 251, 67 Eng. Reprint, 619; *Gallup v. Wright*, 61 How. Pr. (N. Y.) 286; where there is no person bearing the name mentioned in the will: *Hawkins v. Garland*, 76 Va. 149, 44 Am. Rep. 158; *Connolly v. Pardon*, 1 Paige Ch. (N. Y.) 291, 19 Am. Dec. 433; *Hockensmith v. Slusher*, 26 Mo. 237; *Cresson's Appeal*, 30 Pa. 437; *Maund v. McPhail*, 10 Leigh (Va.), 199. For a case in which "*pet*" names occurred throughout the will, see *Beatty v. Trustees*, 39 N. J. Eq. 452. *Assumed names*: *Neathway v. Ham*, Tamlyn, 316, 48 Eng. Reprint, 126. Where there are *two sets of brothers* of the same name, each having equal legal claims upon the testator's bounty, extrinsic parol evidence is admissible to determine which of the two sets he meant: *Willard v. Darrah*, 168 Mo. 660, 90 Am. St. Rep. 468, 68 S. W. 1023. The *incorrect naming* of a granddaughter: *Gordon v. Nurris*, 141 Mo. 602, 43 S. W. 642. A devise to "*Hiram Stephens and family*": *Hall v. Stephens*, 65 Mo. 670, 27 Am. Rep. 302. See, also, for further illustrations of special names, nick-names, etc., § 479, *post*, and notes thereto.

as to every material fact relating to the person who claims under the will, and to the property devised, as to the circumstances of the testator and his family and affairs, so as to lead to a correct decision of the quantity of interest the claimant is entitled to by the will. This is true as to every disputed point respecting which it can be shown that a knowledge of extrinsic facts can aid in the right interpretation of the will.³¹

§ 478 (487). The rule where the description is more applicable to one subject or person than another.—The rule under discussion has been applied in a large number of cases where there is no person or corporation which corresponds in all particulars to the description given in the will, but where there is one which corresponds in many particulars, and no other which can be intended. In such case, the corporation or person will take under the will.³² Thus, where a bequest was to be “equally divided between the Board of Foreign and the Board of Home Missions,” extrinsic evidence was allowed to show that the testator had in mind the Board of Foreign Missions and the Board of Home Missions of the Presbyterian Church of the United States.³³ A will contained the following residuary clause:

³¹ Northrop v. Columbian Lumber Co., 186 Fed. 770, 108 C. C. A. 640.

³² Taylor v. McCowen, 154 Cal. 798, 99 Pac. 351; Dunham v. Averill, 45 Conn. 61, 29 Am. Rep. 642; American Bible Society v. Wetmore, 17 Conn. 181; Ayres v. Weed, 16 Conn. 291; Skinner v. Harrison Tp., 116 Ind. 139, 2 L. R. A. 137, 18 N. E. 529; Smith v. Holden, 58 Kan. 535, 50 Pac. 447; Howard v. American Peace Society, 49 Me. 288; Bodman v. American Tract Soc., 9 Allen (Mass.), 447; Wheaton v. Pope, 91 Minn. 299, 97 N. W. 1046; Den v. Cubberly, 12 N. J. L. 308; Terpening v. Skinner, 30 Barb.

(N. Y.) 373; Keith v. Scales, 124 N. C. 497, 32 S. E. 809; Roy v. Howzie, 25 Gratt. (Va.) 599; Wilson v. Perry, 29 W. Va. 169, 1 S. E. 302; Webster v. Morris, 66 Wis. 366, 57 Am. Rep. 278, 28 N. W. 353.

³³ Gilmer v. Stone, 120 U. S. 586, 30 L. Ed. 734, 7 Sup. Ct. Rep. 689. Approved in Cook v. Universalist Gen. Convention, 138 Mich. 157, 101 N. W. 217 (admitting evidence, where bequest to “Universalist Japan Mission Fund,” to show testatrix a Universalist in faith); Darnell v. Lafferty, 113 Mo. App. 282, 88 S. W. 784 (admitting parol evidence to show what heifers and cows were referred to by statement

"All the residue and remainder of my property shall be given to the Massachusetts Hospital for diseased and wounded soldiers." There was no institution of that name. The claimants for it were the Massachusetts General Hospital, the Massachusetts Homeopathic Hospital, and the trustees of the Soldiers' Home in Massachusetts. The probate court ordered the residue to be paid to the trustees of the Soldiers' Home for the benefit of diseased and wounded soldiers in Massachusetts and the Massachusetts General Hospital appealed. It was proved that the Soldiers' Home was not in existence when the will was made, but it was contended that although the testator did not refer to it when making his will, he did refer to a defunct institution known as the Discharged Soldiers' Home in Boston, and that the gift constituted a charitable trust, and that the case was one for the application of the *cy pres* doctrine and the fund should be handed to it to administer. The court, however, interpreted the words "for diseased and wounded soldiers" in the clause in question not as descriptive of the institution which was to take, but as naming the purpose to which the gift was to be devoted, and that left for interpretation only the words "Massachusetts Hospital." It was proved that the Massachusetts General Hospital was generally called and known as the Massachusetts Hospital and that at the time the will was made provision existed for the care of diseased and wounded soldiers thereat, and the court held that the name used by the testator described the Massachusetts General

"ten head of cows and heifers"). All that reason and the law require is that the beneficiary shall be so described and named as to be capable of identification; and therefore a legacy to the "Board of Managers of the Foreign Missionary Society of the Methodist Episcopal Church," for the education of girls in India, was held to mean "The Women's Foreign Missionary Society," it be-

ing the only foreign missionary society in that church engaged in work of that character: *The Women's Foreign Missionary Society v. Mitchell*, 93 Md. 199, 53 L. R. A. 711, 48 Atl. 737. A "Presbyterian Infirmary on Division street in Baltimore City" was held to mean "The Union Presbyterian Infirmary," being the only infirmary on that street: *Reilly v. The Union Protestant In-*

Hospital and no other.³⁴ "If the document has one distinct meaning in reference to the circumstances of the case, it must be construed accordingly; and evidence to show that the author intended to express some other meaning is not admissible."³⁵ That is to say, if there is no ambiguity lying hidden in the person or thing or subject whereof the will speaks, it is simply a question of construction, to ascertain the meaning of the testator in the language he has employed. All which should be done from the will itself, *ex visceribus testamenti*; as well from the particular clause, or devise, as from every other part of the will whence any light can be drawn.³⁶ We have seen that the courts deal very liberally in cases of misdescription where it is possible by *rejecting erroneous particulars* to arrive at the real intention of the testator. Chief Justice Marshall's statement of the law will well bear repetition. He lays down the general rule that underlies all others. "The intent of the testator," says he, "is the cardinal rule in the construction of wills; and if that intent can be clearly

firmly, 87 Md. 664, 40 Atl. 894. A bequest to the "Canandaigua Orphan Asylum, at Canandaigua, Ontario county, New York," was held to mean the "Ontario Orphan Asylum," located there: *Bristol v. Ontario Orphan Asylum*, 60 Conn. 472, 22 Atl. 848. A bequest to the "Methodist Episcopal Church School," situated in A., was held to mean a school at that place of a different name, but controlled by that church: *Ross' Exr. v. Kiger*, 42 W. Va. 402, 26 S. E. 193. Other cases illustrating the rule as to corporations: *Tilton v. American Bible Soc.*, 60 N. H. 377, 49 Am. Rep. 321; *Webster v. Morris*, 66 Wis. 366, 57 Am. Rep. 278, 28 N. W. 353; *St. Luke's Home v. Association*, 52 N. Y. 191, 11 Am. Rep. 697; *Holmes v. Mead*, 52 N. Y. 332; *Gardner v. Heyer*, 2 Paige Ch. (N. Y.) 11; *Dunham v. Averill*, 45 Conn.

61, 29 Am. Rep. 642; *Tucker v. Seaman's Aid Soc.*, 7 Met. (Mass.) 188; *Van Nostrand v. Board*, 59 N. J. Eq. 19, 44 Atl. 472; 1 Jarm. Wills, 330. See extended note to *Chambers v. Watson*, 46 Am. Rep. 72.

³⁴ *Mason v. Massachusetts General Hospital*, 207 Mass. 419, 93 N. E. 637.

³⁵ *Steph. Ev.*, art. 91, § 6; *American Bible Soc. v. Pratt*, 9 Allen (Mass.), 109; *Best v. Hammond*, 55 Pa. 409; *Jackson v. Sill*, 11 Johns. (N. Y.) 201, 6 Am. Dec. 363; *Cotton v. Smithwick*, 66 Me. 360; *Sherwood v. Sherwood*, 45 Wis. 357, 30 Am. Rep. 757; *Fitzpatrick v. Fitzpatrick*, 36 Iowa, 674, 14 Am. Rep. 538; *Kurtz v. Hibner*, 55 Ill. 514, 8 Am. Rep. 665; *Van Nostrand v. Moore*, 52 N. Y. 12.

³⁶ *Den v. Cubberly*, 12 N. J. L. 308.

perceived, and is not contrary to some positive rule of law, it must prevail although in giving effect to it some words should be rejected or so restrained in their application as materially to change the literal meaning of the particular sentence."³⁷ But it is to be constantly borne in mind that the extrinsic evidence of the character which has been discussed is to be received to apply the will to the subject matter or person; in other words, to ascertain the real intent expressed in the will, and *not to correct the mistakes of the testator, or to change the terms of the will, or to interpolate new provisions therein.*³⁸ Such mistakes cannot be rectified. There can be no reformation of a will on the ground of mistake, accident or surprise, as in the case of conveyances or contracts. But a mere false description will not vitiate a devise, if, after rejecting the false description there is sufficient left to lead to an identification. But if, after such rejection, nothing remains directing inquiry which may result in discovering the true subject of the devise, it is void.³⁹

³⁷ Finlay v. King's Lessee, 3 Pet. (U. S.) 346, 7 L. Ed. 701.

³⁸ Andrews v. Dobson, 1 Cox, 425, 29 Eng. Reprint, 1232; Dowset v. Sweet, Ambler, 175, 27 Eng. Reprint, 117; Francis v. Dichfield, 2 Coop. 531, 47 Eng. Reprint, 1289; Miller v. Travers, 8 Bing. 244, 131 Eng. Reprint, 395; Doe v. Hiscocks, 5 Mees. & W. 370; Patch v. White, 117 U. S. 210, 29 L. Ed. 860, 6 Sup. Ct. Rep. 617, 710; Eckford v. Eckford, 91 Iowa, 54, 26 L. R. A. 370, 58 N. W. 1093; Wallize v. Wallize, 55 Pa. 242. See the late cases: Goodwin v. New Church Board, 160 Ill. App. 483; Harness v. Harness (Ind. App.), 98 N. E. 357; Bullard v. Leach (Mass.), 100 N. E. 57; In re Raab's Will, 79 Misc. Rep. 185, 139 N. Y. Supp. 869; McLeod v. Jones (N. C.), 74 S. E. 733.

³⁹ Eckford v. Eckford, 91 Iowa,

54, 26 L. R. A. 370, 58 N. W. 1093; Christy v. Badger, 72 Iowa, 581, 34 N. W. 427. Jarman, in his valuable Treatise on Wills, vol. 1, p. 379, c. 13, 3d ed., says: "As the law requires wills both of real and personal estate (with an inconsiderable exception) to be in writing, it cannot consistently with this doctrine permit parol evidence to be adduced, either to contradict, vary, add to or subtract from the contents of such will; and the principle of this rule demands an inflexible adherence to it, even where the consequence is the partial or total failure of the testator's intended disposition; for it would have been of but little avail to require that a will *ab origine* should be in writing, or to fence a testator round with a guard of attesting witnesses, if, when the written instrument failed, to make a

§ 479 (488, 489). Wills—Meaning of words and terms—Proof in case of latent ambiguity—Declarations of testator.—So far we have dealt only with such extrinsic evidence as goes to explain latent ambiguities, and have excluded from consideration the declarations of the testator himself which might throw light upon what is regarded as the cardinal rule in the construction of wills, the intention of the testator as expressed in the testamentary writing. Evidence of mere *collateral statements* respecting persons or things which it is necessary to identify are not regarded as declarations of intention within the meaning of the general rule that declarations of intention are not admissible. Such evidence is always competent although there may be no latent ambiguity; for, “it is to be observed that evidence in the shape of sayings, etc., of the testator, may be in certain cases adduced to show that he habitually used certain words, even where the description is not equivocal, provided the sense thus sought to be put upon them does not contravene their ordinary and legitimate meaning; this being distinct from evidence adduced to show in what sense he used the words on the particular occasion of writing the will.”⁴⁰ It is well settled that it may be shown by extrinsic evidence, for the purpose of identifying the person or subject matter, that the testator was accustomed to apply special names to certain persons as nicknames, or that he used to designate his property in some peculiar manner.⁴¹ In accordance with rules already stated, if a

full and explicit disclosure of his scheme of disposition, its deficiencies might be supplied, or its inaccuracies corrected, from extrinsic sources. No principle connected with the law of wills is more firmly established, or more familiar in its application, than this.”

⁴⁰ Van Nostrand v. Board of Domestic Missions, 59 N. J. Eq. 19, 44 Atl. 472; Hawkins, Wills, p. 10; Duke of Leeds v. Amherst, 9 Jur.

359, 13 Sim. 459, 60 Eng. Reprint, 178.

⁴¹ Austee v. Nelms, 1 Hurl. & N. 225, 26 N. J. Ex. 5, 4 W. R. 612; Lee v. Pain, 4 Hare, 251, 67 Eng. Reprint, 619; Doe v. Collins, 2 Term Rep. 498, 100 Eng. Reprint, 268; Goodtitle v. Southern, 1 Maule & S. 299, 105 Eng. Reprint, 112. Where a testator had owned two farms that he habitually described one of them as the “home farm”: Boggs v.

will is in a foreign language,⁴² in shorthand, in a cipher,⁴³ or obscurely written,⁴⁴ or if technical terms are used,⁴⁵ parol evidence as to the meaning may be received; so if the words, "child," "children," "grandchildren," "son," "family," or "nearest relations," are employed in a will, parol evidence is admissible of any extrinsic circumstances tending to show what persons were intended by the testator or to ascertain his meaning in any other respect, and this without any infringement of the ordinary rule of exclusion of such testimony.⁴⁶ "And where the testator makes use of the words which in their ordinary sense are intelligible, but which are used, by certain class of persons to whom the testator belonged or in a certain locality where he dwelt, in a peculiar sense, parol evidence may be given to show the *fact* of such usage, unless it appears on the face of the will that the testator used the word in its ordinary sense."⁴⁷ The rule has been established by a long line of

Taylor, 26 Ohio St. 604; that the testator and his neighbors habitually described certain lands as "back lands": *Ryerss v. Wheeler*, 22 Wend. (N. Y.) 148; that a testator had habitually called a person by a wrong name: *Lee v. Pain*, 4 Hare, 251, 67 Eng. Reprint, 619; that ministers were known by the name of "Godly preachers of Christ's holy Gospel": *Shore v. Wilson*, 9 Clark & F. 565, 8 Eng. Reprint, 450; where land was described as "sixty acres, sec. 25, Town 7 and forty acres, sec. 24, town 6, Jasper county," that the testator stated at the time of the drawing of the will that he did not remember the range, but that the will was to include all the land that he owned in that county: *Chambers v. Watson*, 60 Iowa, 339, 46 Am. Rep. 70, and valuable note, 14 N. W. 336. See for further illustrations, § 477, *ante*, and notes thereto.

⁴² *Masters v. Masters*, 1 P. Wms.

421, 24 Eng. Reprint, 454; *Gerbrich v. Freitag*, 213 Ill. 552, 104 Am. St. Rep. 234, 2 Ann. Cas. 24, 73 N. E. 358; *Will of Walter*, 64 Wis. 487, 54 Am. Rep. 640, 25 N. W. 538 (will written in language not understood by testatrix, but evidence given of her having had it explained and that she understood it).

⁴³ *Clayton v. Lord Nugent*, 13 Mees. & W. 200.

⁴⁴ *Goblet v. Beechey*, 3 Sim. 24, 57 Eng. Reprint, 910.

⁴⁵ *Goblet v. Beechey*, 3 Sim. 24, 57 Eng. Reprint, 910. See the late cases: *In re Cochran's Estate* (Del. Ch.), 85 Atl. 1070; *Karsten v. Karsten*, 254 Ill. 480, 98 N. E. 947; *In re Zien's Estate* (Minn.), 134 N. W. 498; *In re U. S. Trust Co.*, 78 Misc. Rep. 227, 138 N. Y. Supp. 150; *Hyde v. Rainey*, 233 Pa. 540, Ann. Cas. 1913B, 726, 82 Atl. 781; *White v. Old* (Va.), 75 S. E. 182.

⁴⁶ *Greenl. Ev.*, Lewis' ed., § 288.

⁴⁷ *Jarm. Wills*, R. & T. ed., 732.

cases that, when the words of the will apply with equal propriety to two or more subjects or persons, in other words, when there is a latent ambiguity, the intention of the testator may be shown by his declarations.⁴⁸ When the bequest was to "—— Price, the son of —— Price," a question was raised as to the identity of the legatee, as the description applied equally well to the father of the claimant; parol evidence was received of the declarations of the testator that he had made or would make provision by will for the claimant.⁴⁹ A will may be explained by extrinsic evidence as to the person intended, though such person is not named therein, the thing intended, or the intention of the testator, as to each, when the employment of such evidence does not

⁴⁸ *Vandiver v. Vandiver*, 115 Ala. 328, 22 South. 154; *Pinney v. Newton*, 66 Conn. 141, 33 Atl. 591; *McElrath v. Haley*, 48 Ga. 641; *Turner v. Hallowell Sav. Inst.*, 76 Me. 527; *Wadsworth v. Ruggles*, 6 Pick. (Mass.) 63; *Thomson v. Thomson*, 115 Mo. 56, 21 S. W. 1085, 1128; *South New Market Methodist Seminary v. Peaslee*, 15 N. H. 317; *Ackerman v. Crouter*, 68 N. J. Eq. 49, 59 Atl. 574; *Griscom v. Evens*, 40 N. J. L. 402, 29 Am. Rep. 251; *Burnet v. Burnet*, 30 N. J. Eq. 595; *Matter of Wheeler*, 32 App. Div. 183, 52 N. Y. Supp. 943; *Keith v. Scales*, 124 N. C. 497, 32 S. E. 809; *In re Robb*, 37 S. C. 19, 16 S. E. 241; *Gass v. Ross*, 3 Sneed (Tenn.), 211; *Wootton v. Redd*, 12 Gratt. (Va.) 196; *French v. French*, 14 W. Va. 458; *Scott v. Neeves*, 77 Wis. 305, 45 N. W. 421; *Morgan v. Burrows*, 45 Wis. 211, 30 Am. Rep. 717; *In re Wolverton Mortgaged Estates*, 7 Ch. Div. 197; *Reynolds v. Whelan*, 16 L. J. Ch. 434; *Doe v. Allen*, 12 Ad. & E. 451, 113 Eng. Reprint, 882; *Grant v. Grant*, 39 L. J., N. S., 17, L. R. 5 C. P. 727. See elaborate note to *Chambers v. Watson*, 46 Am. Rep. 72.

⁴⁹ *Price v. Page*, 4 Ves. Jr. 680, 31 Eng. Reprint, 351. Applied where the bequest was to "W. R., my farming man," and it appeared that the testator had two farming men answering to the description: *Reynolds v. Whelan*, 16 L. J. Ch. 434; where a bequest was made for the benefit of the "children in G. S. District": *Gass v. Ross*, 3 Sneed (Tenn.), 211; the declarations of the testator made at the time of the execution of the will that he intended to include in one of the devises the land upon which a certain barn was situated: *Morgan v. Burrows*, 45 Wis. 211, 30 Am. Rep. 717; where the will might mean either five dollars or five hundred dollars, evidence of testatrix's instructions was received to explain which was intended: *Schlottman v. Hoffman*, 73 Miss. 188, 55 Am. St. Rep. 527, 18 South. 893; to a bequest to the Franklin Seminary of Literature and Science, Newmarket, N. H., where the testator had declared his intention of making it to the South Newmarket Methodist Seminary: *Trustees v. Peaslee*, 15 N. H. 317.

result in making more or less of the will than its terms import. Where a testatrix devised all of her property to whoever should take care of her, at her request, providing that the person so selected should have a written statement to that effect signed by her, a letter written by her to her granddaughter after the execution of the will, informing the latter that the testatrix was sick and requesting her to come and take care of her, that she had made her will, and that she desired the granddaughter to have all of her estate, was admitted in evidence, in a controversy over the will, for the purpose of identifying the devisee.⁵⁰ So where a testator devised land to "the four boys," it was held that parol evidence that he had seven sons, three of whom were adults living in their own homes, and the other four were minors living with him, and his declarations before, at and after the execution of the will, were competent to show that the devise was intended for the minors.⁵¹

§ 480 (490). Where there is no latent ambiguity, declarations of testator rejected—Where doubt as to nature of instrument, whether testamentary or not.—So far as parol evidence is offered to show the situation and circumstances of the parties, at the time the will was made, with a view to showing the meaning and intent of the testator, in any particular clause, or in the whole will together, it is always admissible. But where the object of the parol evidence is to show by the declarations of the testator that he intended something different from what he has expressed by the terms used in his will—for instance, that what is expressed to be absolute was intended to be conditional,—its admission for such a purpose would be contrary to the well-settled rule that in the construction of a will, the intent must be ascertained by the will itself, and the circumstances under which it was made. It would not only be a violation of the very important rule of evidence and con-

⁵⁰ *Dennis v. Holsapple*, 148 Ind. 297, 62 Am. St. Rep. 526, 46 L. R. A. 168, 47 N. E. 631.

⁵¹ *Bradley v. Rees*, 113 Ill. 327, 55 Am. Rep. 422.

struction in relation to written instruments generally, but would be equally opposed to the plain provision of the statute, requiring all wills to be in writing. Where the will is plain and clear, his declarations are inadmissible,⁵² whether verbal or written,⁵³ regardless of the particular time at which he made them.⁵⁴ Chief Justice Shaw has furnished a very apt illustration of the rule when he suggests the consideration of what would be the effect, should a testator declare formally, in presence of witnesses, that it was his intent and meaning that a provision in his will should have a particular effect. If the declared intent were conformable to the will, it would be nugatory and immaterial; but if it altered or controlled the provisions of the will, it would be to make the bequest by parol, and to substitute a verbal in place of a written will, contrary to

⁵² Crocker v. Crocker, 11 Pick. (Mass.) 252. See, also, McAleer v. Schneider, 2 App. Cas. (D. C.) 461; Scott v. Scott, 137 Iowa, 239, 126 Am. St. Rep. 277, 23 L. R. A., N. S., 716, 114 N. W. 881; Farrar v. Ayres, 5 Pick. (Mass.) 404; Mersman v. Mersman, 136 Mo. 244, 37 S. W. 909; Mann v. Mann, 1 Johns. Ch. (N. Y.) 231; Thomas v. Lines, 83 N. C. 191; Hennegar v. Deadrick (Tenn. Ch.), 54 S. W. 138; Wootton v. Redd, 12 Gratt. (Va.) 196.

⁵³ Alexander v. Bates, 127 Ala. 328, 28 South. 415; Bryan v. Bigelow, 77 Conn. 604, 107 Am. St. Rep. 64, 60 Atl. 266; Welman v. Neufville, 75 Ga. 124; Pocock v. Redinger, 108 Ind. 573, 58 Am. Rep. 71, 9 N. E. 473; Best v. Berry, 189 Mass. 510, 109 Am. St. Rep. 651, 75 N. E. 743; Magee v. McNeil, 41 Miss. 17, 90 Am. Dec. 354; Zabriskie v. Huyler, 62 N. J. Eq. 697, 51 Atl. 197; Chamberlee v. Broughton, 120 N. C. 170, 27 S. E. 111; Asay v. Hoover, 5 Pa. 21, 45 Am. Dec. 713; Peet v. Commerce etc. St. R. Co., 70 Tex. 522, 8 S. W. 203; App v. App, 106 Va. 253, 55 S.

E. 672; Bertie v. Falkland, 1 Salk. 231, 91 Eng. Reprint, 205. The rule does not apply to a *donatio mortis causa*: Dawson v. Waggaman, 23 App. Cas. (D. C.) 428. Where a testator made what appeared in his will as an absolute legacy but in reality a trust, parol evidence of his statements to the legatee with reference to the trust were admitted on the ground of the fraud the legatee was committing, in repudiating the trust, on the *cestui que* trust. This, however, cannot be regarded as an exception: Williams v. Vreeland, 32 N. J. Eq. 734.

⁵⁴ Foscoe v. Lyon, 55 Ala. 440; In re Snowball, 157 Cal. 301, 107 Pac. 598; Peet v. Peet, 229 Ill. 341, 11 Ann. Cas. 492, 13 L. R. A., N. S., 780, 82 N. E. 376; Turner v. Hallowell Sav. Inst., 76 Me. 527; Walton v. Draper, 206 Mass. 20, 91 N. E. 884; Lehnhoff v. Theine, 184 Mo. 346, 83 S. W. 469; Patterson v. Wilson, 101 N. C. 594, 8 S. E. 341; Wells v. Wells, 37 Vt. 483; Stevens v. Vancleve, 23 Fed. Cas. No. 13,412, 4 Wash. 262.

the express provision of the statute.⁵⁵ It has been put with equally cogent force by other lawyers. "If there is anything in the words of the will which renders the bequest obviously more applicable to one object or subject than to any other, that must prevail; and no case for the admission of extrinsic evidence exists."⁵⁶ In other words, the rule that direct evidence to prove the intention of the testator should be excluded, unless there appears to be a latent ambiguity, should be applied with some strictness. In the absence of such latent ambiguity, the declarations of the testator cannot be proved by the scrivener who drew the will to show that the will does not accord with the instructions given.⁵⁷ The question sometimes arises *whether a given document is to be construed as a will or as a deed*, or other disposition of property; that is to say, whether extrinsic evidence is admissible to show that an unambiguous instrument, on its face a will, was not intended as such, or that an instrument not on its face of a testamentary character and not ambiguous by like evidence be shown and take effect as a will. This is a question to be settled, not by the declarations of the testator, but *by the language of the document*,⁵⁸ although when such doubt of the nature

⁵⁵ Crocker v. Crocker, *supra*.

⁵⁶ Redf. Wills, 565; Doe v. Westlake, 4 Barn. & Ald. 57, 106 Eng. Reprint, 859; Doe v. Hiscocks, 5 Mees. & W. 363; Jefferies v. Mitchell, 20 Beav. 15, 52 Eng. Reprint, 507.

⁵⁷ Canfield v. Bostwick, 21 Conn. 550; Kaiser v. Brandenburg, 16 App. Cas. (D. C.) 310; Tucker v. Seaman's Aid Society, 7 Met. (Mass.) 188; Wheeler v. Wood, 104 Mich. 414, 62 N. W. 577; Zabriskie v. Huyler, 64 N. J. Eq. 794, 56 Atl. 1133; Jackson v. Sill, 11 Johns. (N. Y.) 201, 6 Am. Dec. 363; Lewis v. Douglass, 14 R. I. 604; Hunt v. White, 24 Tex. 643; Button v. American Tract Soc., 23 Vt. 336; Dew v. Kuehn, 64 Wis. 293, 25 N. W. 212. Such declarations are inadmissible to prove the reason for

the *striking out* of certain words which were in the original draft of the will: Canfield v. Bostwick, 21 Conn. 550; to show that in a gift to "*children*" testator did not intend to include "*daughters*": Den v. Baskerville, 11 How. (U. S.) 329, 13 L. Ed. 717; to show that a bequest of property described with legal certainty was intended to cover *other property*, not included in such description: Crosby v. Mason, 32 Conn. 482; that testator intended to *charge legacies* upon land: Massaker v. Massaker, 13 N. J. Eq. 264; to show the *extent* of the *interest* given to a devisee: Kirkland v. Conway, 116 Ill. 438, 6 N. E. 59.

⁵⁸ Burlington University v. Barrett, 22 Iowa, 60, 92 Am. Dec. 376,

of the instrument is raised, the situation of the parties and the surrounding circumstances may be shown as in other cases.⁵⁹ In all such cases, there being no latent ambiguity, the admission of the declarations of the testator would be repugnant to the general rule of evidence that the written instrument must be interpreted according to its terms. It has been well said that "if an unambiguous deed, which on its face purports to convey a present interest, can be converted into a will by proving an *animo testandi* in the maker by parol evidence, the effect is not only to change the legal character of the instrument, but to ingraft upon it one of the essentials of a will by parol, in the face of our statute, which requires all wills to be in writing."⁶⁰ As to the inadmissibility of evidence to show that an unambiguous instrument, on its face a will, was not intended as such, notwithstanding the English decisions, there can be no doubt. It is true there is a Massachusetts decision apparently to the contrary.⁶¹ That case, following the English decisions,⁶² held that: 1. It is competent by parol evidence to contradict solemn statements contained in an instrument that it is a will and has been signed as such by the person named therein as testator and attested and subscribed by the persons signing as witnesses. 2. If a testator first executes what purports to be a will before a witness and causes its subscription by him as such, and

and note; *Jordan v. Jordan*, 65 Ala. 301; *Patterson v. English*, 71 Pa. 454; *Hester v. Young*, 2 Ga. 31; *Walke v. Jones*, 23 Ala. 448; *Robertson v. Dunn*, 2 Murph. (6 N. C.) 133, 5 Am. Dec. 525; *Edwards v. Smith*, 35 Miss. 197; *Habergham v. Vincent*, 2 Ves. Jr. 204; *Gage v. Gage*, 12 N. H. 371. See valuable note to *Burlington University v. Barrett*, 92 Am. Dec. 383-389.

⁵⁹ *Evans v. Smith*, 28 Ga. 98, 73 Am. Dec. 751; *Gage v. Gage*, 12 N. H. 371; *Robertson v. Smith*, L. R. 2

Pro. & Div. 43, 39 L. J. P. 41, 22 L. T. 417.

⁶⁰ *Clay v. Layton*, 134 Mich. 317, 96 N. W. 458. See notes on this subject to *Noble v. Fickes*, 13 L. R. A., N. S., 1203, 12 Ann. Cas. 287.

⁶¹ *Fleming v. Morrison*, 187 Mass. 120, 105 Am. St. Rep. 386, 72 N. E. 499. (Three witnesses to the acknowledgment of a will were necessary in Massachusetts.)

⁶² *Lister v. Smith*, 3 Swab. & T. 282, 33 L. J. P. 29, 10 Jur., N. S., 107, 9 L. T. 578; *Nichols v. Nichols*, 2 Phill. 180.

then tells him before they part that it is a fake will, to accomplish a purpose, but afterward changes his mind, and then, with testamentary intent, acknowledges it before, and causes it to be subscribed by, two other witnesses, it cannot operate as a will, because it is necessary that a testamentary intent exist at the time of acknowledging the will and having it subscribed by each of the required witnesses. Even under the special circumstances of that case, we think it unsound and entirely opposed in reasoning to the law as laid down by Chief Justice Shaw in the case we have already referred to.⁶³ In the English cases referred to the court saw fit to say that the momentous consequences of permitting parol evidence to outweigh the sanction of a solemn act were obvious, and had a tendency to place wills at the mercy of a parol story that a testator did not mean what he said.⁶⁴ The better law is that parol evidence is inadmissible in any such case. The authorities are not numerous, for the reason that wills so executed are rare. In Indiana it has been laid down that where a writing contains every element of a valid will, and is incapable of operating in any other way, the *animus testandi* must be applied, and the instrument is not subject to be controlled by parol evidence to show a different intent.⁶⁵ In Maryland, speaking of the English decisions referred to, the court said: "These cases go, perhaps, as far as any cited in allowing parol evidence. But in these and in all other cases referred to, the courts have restricted the evidence to the ascertainment of the *animus testandi*, and have never gone beyond that. Even if we were to admit that these cases were well decided (which we do not determine), we consider the parol evi-

⁶³ Crocker v. Crocker, 11 Pick. (Mass.) 252.

⁶⁴ On the other hand, they say that if the fact is plainly and conclusively made out, that the paper which appears to be the record of a testamentary act was in reality the offspring of a jest, or the result

of a contrivance to effect some collateral object, and never seriously intended as a disposition of property, it is not reasonable that the court should turn it into an effective instrument.

⁶⁵ Heaston v. Krieg, 167 Ind. 101, 119 Am. St. Rep. 475, 77 N. E. 805.

dence offered in this case inadmissible. If it were in any such case admissible, we would be unwilling to reject it in this, as the straightforward testimony and disinterested conduct of the husband of the testatrix presents a strong case, and one with many equitable features, strongly appealing to our sense of justice. But we must take the law as we find it; and as in all the long period that has elapsed since the passage of the act of 29 Charles II, no court has permitted such testimony to be received, we cannot do so now.”⁶⁶ In Michigan, the court reviewed the whole of the cases, and recognized that the execution of an instrument in testamentary form, with the statutory formalities completed the testamentary act.⁶⁷ In Alabama the court has said that when the statutory formalities are observed, “if the writing be testamentary,—if it imports a posthumous destination of property,—the statute in itself and of itself attaches, and conclusively attaches, the *animus testandi*. The requisition of extrinsic or additional evidence of its existence is to add to the requirements of the statute; and to receive such evidence to repel the existence of the intent would be to receive evidence against the statute. . . . When a sane testator, not subject to coercion or restraint, intentionally executes, with the formalities required by the statute, a writing which in form and substance is testamentary, the writing of itself imports, and conclusively imports, the *animus testandi*, i. e., the mind to dispose, the firm and advised determination to make a testament,—closing all inquiry as to the existence and manifestation of the intent.”⁶⁸ A further limitation in respect to the admission of the declarations of a testator has been thus declared: “If the description of the person or thing be *partly applicable* and *partly inapplicable* to each of the several subjects, though

⁶⁶ Sewell v. Slingsluff, 57 Md. 537 (where it was held that parol evidence was not admissible to prove that a paper, in form a valid will, was intended to be used only if the testatrix died without issue).

⁶⁷ In re Kennedy, 159 Mich. 548, 134 Am. St. Rep. 743, 28 L. R. A., N. S., 417, and note, 18 Ann. Cas. 897, and note, 124 N. W. 516.

⁶⁸ Barnewall v. Murrell, 108 Ala. 366, 18 South. 831.

extrinsic evidence of the surrounding circumstances may be received for the purpose of ascertaining to which of such subjects the language applies, yet evidence of the author's declarations of intention will be admissible."⁶⁹ In some of the states there are statutes making provision for children unintentionally omitted from the will. It has been held by several courts that the declarations of the testator may be received when this question is raised to show whether the omission was intentional or not.⁷⁰

§ 481 (491). Proof of declarations of testator—Time of making.—We have now to deal with the time at which declarations were made by the testator, when it is sought to use them for the purpose of aiding the construction of his will. The earlier cases intimated that declarations of this class by the testator were not admissible, unless *contemporaneous* with the execution of the will.⁷¹ But the

⁶⁹ Tayl. Ev., 10th ed., § 1226.

⁷⁰ *Converse v. Wales*, 4 Allen (Mass.), 512; *Ramsdill v. Wentworth*, 101 Mass. 125, 106 Mass. 320; *Buckley v. Gerard*, 123 Mass. 8; *Lorings v. Marsh*, 6 Wall. (U. S.) 337, 18 L. Ed. 802; *Geer v. Winds*, 4 Desaus. (S. C.) 85; *Lorieux v. Keller*, 5 Iowa, 196, 68 Am. Dec. 696; *Wilson v. Fosket*, 6 Met. (Mass.) 400, 39 Am. Dec. 736; *Coulam v. Doull*, 133 U. S. 216, 33 L. Ed. 596, 10 Sup. Ct. Rep. 253; *Atwood's Estate*, 14 Utah, 1, 60 Am. St. Rep. 878, 45 Pac. 1036. See valuable note to *Wilson v. Fosket*, 39 Am. Dec. 740-744. See, also, *Hawke v. Railway Co.*, 165 Ill. 561, 46 N. E. 240; *In re O'Connor*, 21 R. I. 465, 79 Am. St. Rep. 814, 44 Atl. 591, where evidence of surrounding circumstances was admitted to show intention. A different rule is adopted under the statutes of other states: *Garraud's Estate*, 35 Cal. 336; *In re Salmon's Estate*,

107 Cal. 614, 48 Am. St. Rep. 164, 40 Pac. 1030; *Bradley v. Bradley*, 24 Mo. 311; *Estate of Stevens*, 83 Cal. 322, 17 Am. St. Rep. 252, and note, 23 Pac. 379; *Pounds v. Dale*, 48 Mo. 270; *Chace v. Chace*, 6 R. I. 407, 78 Am. Dec. 446; *Callaghan's Estate*, 119 Cal. 571, 39 L. R. A. 689, 51 Pac. 860. On the admissibility of parol evidence to show whether living child was intentionally omitted from will, see note to *Brown v. Brown*, 8 Ann. Cas. 637. On the admissibility of extrinsic circumstances in ascertaining intention of testator in respect to disinheritance of an after-born child, see note to *Peet v. Peet*, 13 L. R. A., N. S., 780.

⁷¹ *Thomas v. Thomas*, 6 Term Rep. 671, 101 Eng. Reprint, 764; *Wagner's Appeal*, 43 Pa. 102; *Langham v. Sanford*, 19 Ves. Jr. 649, 34 Eng. Reprint, 654; *Whitaker v. Tatham*, 7 Bing. 637, 131 Eng. Reprint, 243. See note to *Lomax v.*

later cases have rejected this distinction; and although contemporaneous declarations may be entitled to greater weight than those made before or after, they are admissible in evidence on the same principle.⁷² In a well-known English case it was held after the consideration of former cases that declarations made by the testatrix ten months after the execution of the will should not be rejected on the ground that they were not contemporaneous with the will;⁷³ and the same rule applies where the declarations are made *prior to the execution* of the will.⁷⁴ "Neither will the admissibility of declarations rest on the *manner* in which they were made, or on the *occasions* which called them forth, for whether they consist of statements gravely made to the parties chiefly interested, or of instructions to professional men, or of light conversations, or of angry answers to impertinent inquiries of strangers, they will be alike received in evidence, though the credit due to them will, of course, vary materially according to the time and circumstances."⁷⁵ Just as we have shown in the preced-

Lomax, 6 L. R. A., N. S., 966. So evidence may be given of declarations showing testator's intention to revise a former will by canceling one made subsequently: *Pickens v. Davis*, 134 Mass. 252, 45 Am. Rep. 322; *Couch v. Eastham*, 27 W. Va. 796, 55 Am. Rep. 346.

⁷² *Doe v. Allen*, 12 Ad. & E. 455, 113 Eng. Reprint, 882; *Doe v. Hiscocks*, 5 Mees. & W. 369.

⁷³ *Doe v. Allen*, 12 Ad. & E. 455, 113 Eng. Reprint, 882. Lord Denman, C. J., in this case said: "The only remaining point is, whether the time when those declarations were made, viz., some months after the will was executed, makes any difference. Cases are referred to in the books to shew that declarations contemporaneous with the will are alone to be received; but, on examination, none of them establish such a distinction. Neither has any

argument been adduced which convinces us that those subsequent to the will ought to be excluded whenever any evidence of declarations can be received. They may have more or less weight according to the time and circumstances under which they were made, but their admissibility depends entirely on other considerations."

⁷⁴ *Jarm. Wills*, 756. See note to *Lomax v. Lomax*, 6 L. R. A., N. S., 966.

⁷⁵ *Tayl. Ev.*, 10th ed., § 1209; *Trimmer v. Bayne*, 7 Ves. Jr. 508, 32 Eng. Reprint, 205. See the late cases: *In re Womersley's Estate*, 164 Cal. 85, 127 Pac. 645; *O'Donnell v. Murphy*, 17 Cal. App. 625, 120 Pac. 1076; *Coon v. McNelly*, 254 Ill. 39, 98 N. E. 218; *Crabtree v. Dwyer*, 257 Ill. 101, 100 N. E. 510; *Louisville Trust Co. v. Southern etc. Seminary*, 148 Ky. 711, 147 S. W.

ing section that the testator's declarations are inadmissible where the will is plain and unambiguous, so they *are* admissible when there is an ambiguity which his declarations may serve to explain, whether made prior to, at, or subsequent to the execution of the will.⁷⁶

§ 482 (492). **Same—To show mental condition, etc.—** We have hitherto directed attention only to the admissibility of the declarations of the testator, when a will was ambiguous, for the purpose of aiding its construction. Where the issue is whether the will was obtained through *undue influence* or executed while the testator was mentally *incompetent*, the testimony takes a very wide range. The declarations of the testator may then be relevant as to his mental condition.⁷⁷ They may show his mental weakness and inability to resist the influence of others, or his strength, and should be received whenever the fair inference from all the circumstances is that they truly represent the testator's state of mind at the time.⁷⁸ Necessarily in

431; Van Gallow v. Brandt, 168 Mich. 642, 34 N. W. 1018; In re Swartz's Will, 79 Misc. Rep. 388, 139 N. Y. Supp. 1105; Foster v. Clifford (Ohio), 101 N. E. 269; Packard v. De Miranda (Tex. Civ. App.), 146 S. W. 211; In re Pickard's Estate (Utah), 129 Pac. 353; Updike v. Mace, 194 Fed. 1001.

⁷⁶ See § 480, *ante*, note 54.

⁷⁷ Roberts v. Trawick, 17 Ala. 55, 52 Am. Dec. 164, and full note; In re Snowball, 157 Cal. 301, 107 Pac. 598; Comstock v. Hadlyme E. Society, 8 Conn. 254, 20 Am. Dec. 100; Towson v. Moore, 11 App. Cas. (D. C.) 377; Williamson v. Nabers, 14 Ga. 285; Dennis v. Weekes, 51 Ga. 24; Moore v. Gubbins, 54 Ill. App. 163; Westfall v. Wait, 165 Ind. 353, 6 Ann. Cas. 788, 73 N. E. 1089; In re Townsend, 122 Iowa, 246, 97 N. W. 1108; Lucas v. Cannon, 13 Bush (Ky.), 650; Robinson

v. Adams, 62 Me. 369, 16 Am. Rep. 473; Shailer v. Bumstead, 99 Mass. 112; Boylan v. Meeker, 28 N. J. L. 274; Waterman v. Whitney, 11 N. Y. 157, 62 Am. Dec. 71; McTaggart v. Thompson, 14 Pa. 149; Kirkpatrick v. Jenkins, 96 Tenn. 85, 33 S. W. 819; In re Miller, 36 Utah, 228, 102 Pac. 996. See, also, note to Jackson v. Kniffen, 3 Am. Dec. 395-399.

⁷⁸ Canada's Appeal, 47 Conn. 450; Mooney v. Olsen, 22 Kan. 69; McConnell v. McConnell, 138 Ky. 783, 129 S. W. 106; Bush v. Delano, 113 Mich. 321, 71 N. W. 628; Haines v. Hayden, 95 Mich. 332, 35 Am. St. Rep. 566, 54 N. W. 911; Wall v. Dimmitt, 114 Ky. 923, 72 S. W. 300; *acts showing weakness*: Robinson v. Robinson, 203 Pa. 400, 53 Atl. 253; Bryant v. Pierce, 95 Wis. 331, 70 N. W. 297; *state of feeling*: Zibble v. Zibble, 131 Mich. 655, 92 N. W. 348;

this case the declarations are *not confined to the time of the execution of the will*, but those both before and after may be received, provided these are not too remote to throw light upon the mental condition of the testator at the time of the execution of the will.⁷⁹ Declarations showing the former state of mind of the testator, his long-settled purposes, his affections or dislike, and the execution and contents of former wills, are all admitted when they may fairly be deemed to throw light upon his state of mind at the time of the execution of the will.⁸⁰ Such declarations are admissible when the competency of the testator is in issue, not only for the purpose of attacking the will, but also *in support of it*.⁸¹ In the Alabama case cited in the last note, the court, with reference to the rejection of such declarations by the trial court, said: "We are, however, clearly of opinion that the court below erred in rejecting the evidence of the declarations of the testator made before the execution of the will, that he intended to disinherit his daughters, as offered in proof by the witnesses. Now, it is said that undue influence, such as will avoid a will, must be an influence obtained by flattery, excessive importunity, or threats, or in some other mode by which dominion is ac-

Gordon v. Burris, 141 Mo. 602, 43 S. W. 642; Coghill v. Kennedy, 119 Ala. 641, 24 South. 459.

⁷⁹ Waterman v. Whitney, 11 N. Y. 157, 62 Am. Dec. 71; Shailer v. Bumstead, 99 Mass. 112; Boylan v. Meeker, 28 N. J. L. 274; McTaggart v. Thompson, 14 Pa. 149; Dennis v. Weekes, 51 Ga. 24; Robinson v. Hutchinson, 26 Vt. 38, 60 Am. Dec. 298. See note on "Admissibility of Declarations of Testator not Made at Time of Execution of Will on Question of Undue Influence," to Hobson v. Moorman, 5 Ann. Cas. 608; Linebarger v. Linebarger, 10 Ann. Cas. 600.

⁸⁰ Shailer v. Bumstead, 99 Mass. 112; In re Goldthorp's Estate, 94 Iowa, 336, 58 Am. St. Rep. 400, 62 N. W. 845; *affections*: Staser v.

Hogan, 120 Ind. 207, 21 N. E. 911, 22 N. E. 990; Perkin's Estate, 109 Iowa, 216, 80 N. W. 335; *contents of former wills*: Taylor v. Pegram, 151 Ill. 106, 37 N. E. 837; *intention before execution*, to show continued intention: Harp v. Parr, 168 Ill. 459, 48 N. E. 113; Kaenders v. Montague, 180 Ill. 300, 54 N. E. 321; Sheehan v. Kearney (Miss.), 21 South. 41; Perret v. Perret, 184 Pa. 131, 39 Atl. 33; Hill v. Bahrs, 158 Ill. 314, 41 N. E. 912.

⁸¹ Doe v. Palmer, 16 Ad. & E., N. S., 758, 117 Eng. Reprint, 1070; Denison's Appeal, 29 Conn. 399; Neel v. Potter, 40 Pa. 483; Roberts v. Trawick, 17 Ala. 55, 52 Am. Dec. 164, and useful note.

quired over the will of the testator, destroying his free agency, and constraining him to do against his free will what he is unable to refuse. The will before us conforms substantially to the declarations attempted to be proved. It gives to the daughters only a small, we might say a nominal, sum. This proof conduced to establish that the testator, many years previous to the execution of the will in controversy, had a fixed and settled purpose to make a will similar to the one he is alleged to have executed. It was then proper, as rebutting the evidence on the part of the contestants, that the will was not the deliberate act of the deceased, but was obtained fraudulently or by the overpersuasion of his wife or others. It tends to show that the provisions in the will which exclude the daughters were not the result of any suggestion made at or near the time when the will was drafted, but that some ten years anterior thereto the testator declared his intention then to disinherit his daughters, which intention was repeated five years afterward. This proof should have gone to the jury to be weighed by them in determining whether in fact the will in question was procured fraudulently, or by the exercise of improper influence, or was made by the deceased in the exercise of a free volition and in accordance with his intention entertained at a period when we must presume he was less under the imbecility of mind and body resulting from the decrepitude of old age." It will at once be appreciated that when the mental condition of the testator is in issue, the relevancy of his statements becomes apparent. The inquiry is no longer directed to the subject of the testamentary disposition, but to the mental condition of the testator at the time he made the will. Of this limitation of the admissibility we deal in the next section.

§ 483 (493). Same—Declarations—How limited.—It is highly necessary to watch the line which marks the purpose for which declarations of the testator may be admitted. We have demonstrated that under ordinary circumstances

they are not admissible at all where the will is clear—that in cases of ambiguity they are admissible for explanatory purposes—that in cases where the mental condition of the testator is challenged, they are part of the *res gestae*, the making of the will. It now becomes necessary to emphasize that declarations of the character treated in the last section are admissible *only for the purpose of proving the condition of the testator*. They afford *no substantive proof of fraud, duress or undue influence*, and are admissible for no such purpose.⁸² There must be independent proof and evidence exclusive of such declarations.⁸³ If the statements are mere recitals of facts, and there is no such independent proof of undue influence, they are, of course, pure hearsay and inadmissible.⁸⁴ Of course, if the decla-

⁸² Coghill v. Kennedy, 119 Ala. 641, 24 South. 459; Leslie v. McMurry, 60 Ark. 301, 30 S. W. 33; Matter of Arnold, 147 Cal. 583, 82 Pac. 252; Canada's Appeal, 47 Conn. 450; Manogue v. Herrell, 13 App. Cas. (D. C.) 455; Mallery v. Young, 94 Ga. 804, 22 S. E. 142; Moore v. Gubbins, 54 Ill. App. 163; Goodbar v. Lidikey, 136 Ind. 1, 43 Am. St. Rep. 296, 35 N. E. 691; In re Townsend, 122 Iowa, 246, 97 N. W. 1108; Lucas v. Cannon, 13 Bush (Ky.), 650; Jones v. McLellan, 76 Me. 49; Griffith v. Diffenderfer, 50 Md. 466; May v. Bradlee, 127 Mass. 414; Roberts v. Bidwell, 136 Mich. 191, 98 N. W. 1000; In re Hess, 48 Minn. 504, 31 Am. St. Rep. 665, 51 N. W. 614; Garland v. Smith, 127 Mo. 583, 28 S. W. 196, 29 S. W. 836; Boylan v. Meeker, 28 N. J. L. 274; Cudney v. Cudney, 68 N. Y. 148; Howell v. Barden, 3 Dev. (N. C.) 442; McTaggart v. Thompson, 14 Pa. 149; Kirkpatrick v. Jenkins, 96 Tenn. 85, 33 S. W. 819; Patterson v. Lamb, 21 Tex. Civ. App. 512, 52 S. W. 98; Crocker v. Chase, 57 Vt. 413; Thompson v. Updegraff, 3 W.

Va. 629; Loennecker's Will, 112 Wis. 461, 88 N. W. 215. As to "Ante-testamentary Declarations as Evidence of Undue Influence," see note to Hobson v. Moorman, 3 L. R. A., N. S., 749.

⁸³ Jackson v. Kniffen, 2 Johns. (N. Y.) 31, 3 Am. Dec. 390, and note; Bryant v. Pierce, 95 Wis. 331, 70 N. W. 297; Gordon v. Burris, 141 Mo. 602, 43 S. W. 642; Zibble v. Zibble, 131 Mich. 655, 92 N. W. 348; Comstock v. Hadlyme Ecclesiastical Society, 8 Conn. 254, 20 Am. Dec. 100; In re Hess' Will, 48 Minn. 504, 31 Am. St. Rep. 665, and elaborate note on "Undue Influence," 51 N. W. 614. See note to Lomax v. Lomax, 6 L. R. A., N. S., 965. The declarations may be used corroboratively: Schouler, Wills, 3d ed.; In re Townsend, 128 Iowa, 621, 105 N. W. 110.

⁸⁴ Matter of Arnold, 147 Cal. 583, 82 Pac. 252; Calkins' Estate v. Calkins, 112 Cal. 296, 44 Pac. 577; Donovan's Estate, 140 Cal. 390, 73 Pac. 1081; Comstock v. Hadlyme Ecclesiastical Soc., 8 Conn. 254, 20 Am. Dec. 100; Towson v. Moore, 11 App.

rations are made at the time the fraud or undue influence is being effected, they might be admissible on other grounds,—that is, as part of the *res gestae*.⁸⁵ These declarations may, it is true, so far as they show the mental condition of the testator, constitute a part of the proof of undue influence, but standing alone they furnish no proof of the alleged undue influence. As was said in a New York case:⁸⁶ “The difference certainly is very obvious between receiving the declarations of a testator to prove a distinct

Cas. (D. C.) 377; Underwood v. Thurman, 111 Ga. 325, 36 S. E. 788; Gwin v. Gwin, 5 Idaho, 271, 48 Pac. 295; Compher v. Browning, 219 Ill. 429, 109 Am. St. Rep. 346, 76 N. E. 678; Westfall v. Wait, 165 Ind. 353, 6 Ann. Cas. 788, 73 N. E. 1089; In re Townsend, 122 Iowa, 246, 97 N. W. 1108; Powers v. Powers (Ky.), 78 S. W. 152; Schierbaum v. Schemme, 157 Mo. 1, 80 Am. St. Rep. 604, 57 S. W. 526; Griffith v. Diffenderffer, 50 Md. 466; Shailer v. Bumstead, 99 Mass. 112; Harring v. Allen, 25 Mich. 505; Matter of Storer, 28 Minn. 9, 8 N. W. 827; Crowson v. Crowson, 172 Mo. 691, 72 S. W. 1065; Middleditch v. Williams, 45 N. J. Eq. 726, 4 L. R. A. 738, 17 Atl. 826; In re Jones (Surr. Ct.), 85 N. Y. Supp. 294; Herster v. Herster, 122 Pa. 239, 9 Am. St. Rep. 95, 16 Atl. 342; Kirkpatrick v. Jenkins, 96 Tenn. 85, 33 S. W. 819; Barry v. Graciette (Tex. Civ. App.), 71 S. W. 309; Richardson v. Richardson, 35 Vt. 238; Thompson v. Updegraff, 3 W. Va. 629; Loennecker's Will, 112 Wis. 461, 88 N. W. 215; Smith v. Fenner, Fed. Cas. No. 13,046, 1 Gall. (U. S.) 170; Provis v. Reed, 5 Bing. 435, 15 E. C. L. 490, 130 Eng. Reprint, 1129. See note on “Admissibility of Declaration of Testator not Made at Time of Execution of Will on Question of Undue Influence,” to

Hobson v. Moorman, 5 Ann. Cas. 608; Linebarger v. Linebarger, 10 Ann. Cas. 600.

⁸⁵ Whenever the declarations of the testator constitute narratives of the exercise of the undue influence or of the effect of such influence upon him, they are inadmissible for that purpose, whether made before or after the execution of the will. If made at the time of its execution, they may be admissible, if they are so made as to constitute a part of the *res gestae*; but, if not, although made at the time, they are no more competent than if made subsequently. If they are of such character that they also reveal his condition of mind, they may be admissible for that purpose, though not of the *res gestae*; but their effect must be carefully limited to the question of his condition of mind, and they must not be considered as narrations of the exercise or effect of the undue influence: In re Arnold, 147 Cal. 583, 82 Pac. 252. See, also, Coghill v. Kennedy, 119 Ala. 641, 24 South. 459; Lorieux v. Keller, 5 Iowa, 196, 6 Am. Dec. 696; Haines v. Hayden, 95 Mich. 332, 35 Am. St. Rep. 566, 54 N. W. 911; Smith v. Fenner, Fed. Cas. No. 13,046, 1 Gall. 170.

⁸⁶ Waterman v. Whitney, 11 N. Y. 157, 62 Am. Dec. 71, and note.

external fact, such as duress or fraud, for instance, and as evidence merely of the mental condition of the testator. In the former case, it is mere hearsay, and liable to all the objections to which the mere declarations of third persons are subject. While in the latter, it is the most direct and appropriate species of evidence." The same general rule was applied in a Massachusetts case where the declarations were received subsequent to the will, but the proper limitations of the rule were stated, and the authorities reviewed.⁸⁷ In that case, Colt, J., said: "Intention, purpose, mental peculiarity and condition are mainly ascertainable through the medium afforded by the power of language. Statements and declarations, when the state of the mind is the fact to be shown, are therefore received as mental acts or conduct. The truth or falsity of the statement is of no consequence."⁸⁸ When such an issue (mental ca-

⁸⁷ *Shailer v. Bumstead*, 99 Mass. 112; *Potter v. Baldwin*, 133 Mass. 427; *Jackson v. Kniffen*, 2 Johns. (N. Y.) 31, 3 Am. Dec. 390, and note; *Reel v. Reel*, 1 Hawks (8 N. C.), 248, 9 Am. Dec. 632; *Rambler v. Tryon*, 7 Serg. & R. (Pa.) 90, 10 Am. Dec. 444; *Davis v. Calvert*, 5 Gill & J. (Md.) 269, 25 Am. Dec. 282; *Irish v. Smith*, 8 Serg. & R. (Pa.) 573, 11 Am. Dec. 648; *Comstock v. Hadlyme Ecclesiastical Soc.*, 8 Conn. 254, 20 Am. Dec. 100; *Nelson v. McGiffert*, 3 Barb. Ch. (N. Y.) 158, 49 Am. Dec. 170; *Robinson v. Hutchinson*, 26 Vt. 38, 60 Am. Dec. 298. See note to *Waterman v. Whitney*, 62 Am. Dec. 80. In *Roberts v. Trawick*, 17 Ala. 55, 52 Am. Dec. 164, the contrary rule was held, but that case is not supported by the authorities.

⁸⁸ *Shailer v. Bumstead*, *supra*. Such declarations need not be true. They are not received in evidence as proof of the facts stated, but to show what manner of man it is who

makes them. If those declarations indicate a state of mind which is not in itself transient, upon the principle that a condition of mind once shown to exist is presumed to continue till the contrary is shown, they are admissible, even if made prior to the time of the act of execution: *Shailer v. Bumstead*, *supra*. In *McTaggart v. Thompson*, 14 Pa. 149, declarations by the testator "that he had ruined his family, had been deceived and imposed upon by persons who had procured him to have his will made," and in *Rambler v. Tryon*, 7 Serg. & R. (Pa.) 90, 10 Am. Dec. 444, "that his wife and father plagued him to go to Lebanon, that they wanted him to give her all or he would have no rest, that he did not want to go to Lebanon," were admitted in evidence to show the weakness of mind of the declarants; and declarations by the testator that "I have done something that I ought not to have done, I have made my will, but have not

capacity) is made, it is one which relates to a state of mind which was involuntary and over which the deceased had not the control of the sane individual, and his declarations are admitted, not as any evidence of their truth, but only because he made them, and that is an original fact from which, among others, light is sought to be reflected upon the main issue of testamentary capacity. In the United States supreme court, Mr. Justice Peckham, in the case upon which the text is founded,⁸⁹ said: "The declarations of the sane man are under his control, and they may or may not reflect his true feelings, while the utterances of the man whose mind is impaired from disease or old age are not the result of reflection and judgment, but spontaneous outpourings arising from mental weakness or derangement. The difference between the two, both as to the manner and subject of the declarations, might be obvious. It is quite apparent, therefore, that declarations of the deceased are properly received upon the question of his state of mind, whether mentally strong and capable or weak and incapable, and that from all the testimony, including his declarations, his mental capacity can probably be determined with considerable accuracy. Whether the utterances are true or false cannot be determined from their mere statement, and they are without value as proof of the truth, whether made by the sane or insane, because they are in either case unsworn declarations."

made it as I wanted it," etc., together with conduct on the part of the declarant tending to show his sincerity and uneasiness, were admitted in *Dennis v. Weekes*, 51 Ga. 24, for the same reason. Such declarations must be strictly confined to proof of weakness of mind at the time of making the will, and not to proof of the facts stated, viz., that such influence or importunity was exercised: *Robinson v. Hutchinson*, 26 Vt. 38, 60 Am. Dec. 298; *Todd v. Fenton*, 66 Ind. 25; *Pratte v. Coffin*, 33 Mo. 71. (From

note to *Roberts v. Trawick*, 52 Am. Dec. 167, on declarations of testator to impeach or invalidate his will.)

⁸⁹ *Throckmorton v. Holt*, 180 U. S. 552, 45 L. Ed. 663, 21 Sup. Ct. Rep. 474, followed in *Lipphard v. Humphrey*, 209 U. S. 264, 52 L. Ed. 783, 28 Sup. Ct. Rep. 561, 14 Ann. Cas. 872 (declarations of illiterate testatrix prior and subsequent to date of will, inadmissible, testamentary incapacity not being proved).

§ 484 (494). **Parol proof of declarations as to revocation—Lost wills.**—Generally, statutes require the *revocation* of a will *to be in writing*, with certain formalities, or to be accompanied by some *act amounting to a virtual destruction* of the instrument, such as burning or tearing. Hence, the rule has become settled that no declarations of the testator as to the question of revocation are admissible, except such as accompany the act of revocation. If made contemporaneously with such act, they tend to show the *animus revocandi*, and are part of the *res gestae*.⁹⁰ But standing alone they are of no force or value. A will cannot be revoked by the dying or other declarations of the testator;⁹¹ nor are his declarations ever admissible as evidence of a revocation unless connected with some revocatory act, and tending to show that its purpose was or was not revocatory.⁹² There seems to be no conflict upon this subject, though some of the decisions have assumed its existence. The cases in which evidence of the declarations of the testator have been admitted have generally, if not universally, respected the rule just stated, but have

⁹⁰ *Waterman v. Whitley*, 11 N. Y. 157, 62 Am. Dec. 71; *Will of Ladd*, 60 Wis. 187, 50 Am. Rep. 355, 18 N. W. 734; *Doe ex dem. Perkes v. Perkes*, 3 Barn. & Ald. 489, 106 Eng. Reprint, 740; *Doe ex dem. Reed v. Harris*, 6 Ad. & E. 209, 112 Eng. Reprint, 79; *Bibb v. Thomas*, 2 W. Black. 1044, 96 Eng. Reprint, 613; *Dan v. Brown*, 4 Cow. (N. Y.) 483, 15 Am. Dec. 395; *Gay v. Gay*, 60 Iowa, 415, 46 Am. Rep. 78, 14 N. W. 238; *Eschbach v. Collins*, 61 Md. 478, 48 Am. Rep. 123; *Graham v. Burch*, 47 Minn. 171, 28 Am. St. Rep. 339, and note, 49 N. W. 697; *Jackson v. Kniffen*, 2 Johns. (N. Y.) 31, 3 Am. Dec. 390, and long note; *Kennedy's Will*, 167 N. Y. 163, 60 N. E. 442; *Earp v. Edington*, 107 Tenn. 23, 64 S. W. 40. See very elaborate note on "Revocation of Wills," *Graham v.*

Burch, 28 Am. St. Rep. 344-362. As to admissibility of declarations of testator on issue of his intention in destroying his will, see note to *Managle v. Parker*, 24 L. R. A., N. S., 180.

⁹¹ *Rodgers v. Rodgers*, 6 Heisk. (Tenn.) 489.

⁹² See note to *Jackson v. Kniffen*, 2 Johns. (N. Y.) 31, 3 Am. Dec. 390; *Clark v. Morrison*, 25 Pa. 453; *Dan v. Brown*, 4 Cow. (N. Y.) 483, 15 Am. Dec. 395; *Randall v. Beatty*, 31 N. J. Eq. 643; *Toebe v. Williams*, 80 Ky. 661; *Jones v. Moseley*, 40 Miss. 261, 90 Am. Dec. 327; *Bibb v. Thomas*, 2 W. Black. 1044, 96 Eng. Reprint, 613; *Doe v. Perkes*, 3 Barn. & Ald. 489, 106 Eng. Reprint, 740; *Staines v. Stewart*, 2 Swab. & T. 320, 8 Jur., N. S., 440, 31 L. J. P. D. 10, 5 L. T. 457.

justified the reception of the evidence, upon the ground that some act had been proved by direct or circumstantial evidence from which the revocation, though not necessarily established, might be inferred, and the declarations of the testator so received in evidence were parts of the *res gestae*, or tended to show his purpose in doing the act, when the act itself, though tending to disclose his intention, did not necessarily do so. Thus, when a will is found in a mutilated condition, and there is doubt whether it was put in that condition by the testator with intent to revoke it, evidence of his declarations is admissible, if they are to the effect that he had revoked his will or had no will;⁹³ or where the statute does not permit a partial revocation by mutilation or alteration, but does permit it to be wholly revoked in that mode, the declarations of a testator at the time he erased the name of a legatee in his will by drawing his pen through it are admissible to show whether he intended by that act to revoke the whole will or a part only.⁹⁴ If a will is torn or otherwise mutilated, declarations made by the testator that such mutilation was the act of another person not sanctioned by him may be received in support of the will;⁹⁵ or if the will was destroyed by another, declarations of the testator are admissible to show that he knew of such destruction, and that he did or did not intend to ratify it.⁹⁶ Although there has been considerable discussion of the question and some conflict of opinion, the weight of authority has hitherto been that subsequent declarations of a testator are admissible to prove the *existence and contents of a lost will*, as well as the fact that it had not been canceled,⁹⁷ and this is also the rule

⁹³ *Lawyer v. Smith*, 8 Mich. 411, 77 Am. Dec. 460.

⁹⁴ *Law v. Law*, 83 Ala. 432, 3 South. 752.

⁹⁵ *Tucker v. Whitehead*, 59 Miss. 594; *Collagan v. Burns*, 57 Me. 449.

⁹⁶ *Steele v. Price*, 5 B. Mon. (Ky.) 58.

⁹⁷ *Harring v. Allen*, 25 Mich. 505; *Sugden v. Lord St. Leonards*, 1 Prob. Div. 154; *Weeks v. McBeth*, 14 Ala. 474; *Patterson v. Hickey*, 32 Ga. 156; *Foster's Appeal*, 87 Pa. 67, 30 Am. Rep. 340; *Wilbourn v. Shell*, 59 Miss. 205, 42 Am. Rep. 363; *Schnee v. Schnee*, 61 Kan. 643, 60 Pac. 738; *Muller v. Muller*, 108 Ky.

in England since *Sugden's Case*,⁹⁸ as a special exception to the hearsay rule. It has, however, been disturbed to a certain extent by a late United States supreme court decision,⁹⁹ which challenges the law as laid down in *Sugden's Case*, and refuses to acknowledge the exception to the hearsay rule. It is evidence, said Mr. Justice Peckham, in the case referred to, of the most dangerous character—it is hearsay and nothing else.¹⁰⁰ “We are, however, convinced that the true rule excludes evidence of the kind we are considering. We remain of the opinion that the declarations come within no exception to the law excluding hearsay evidence upon the trial of an action, and we think the exceptions should not be enlarged to admit the evidence.”¹¹ With all the respect that is due to this decision, it must

511, 56 S. W. 802; *Lane v. Hill*, 68 N. H. 275, 73 Am. St. Rep. 591, 44 Atl. 393.

⁹⁸ *Sugden v. St. Leonards*, L. R. 1 Prob. Div. 154; *Steph. Dig.*, art. 29.

⁹⁹ *Throckmorton v. Holt*, 180 U. S. 552, 45 L. Ed. 663, 21 Sup. Ct. Rep. 474.

¹⁰⁰ *Sugden's Case* is referred to in the later English case of *Woodward v. Gouldstone*, in the House of Lords, L. R. 11 App. Cas. 469, in which *Herschell, L. C.*, and *Lords Blackburn and Fitzgerald* said they did not wish to be regarded as approving the views expressed in that case.

¹ In New York the courts are equally emphatic. In *Re Kennedy's Will*, 167 N. Y. 163, 60 N. E. 442, we find: “If the existence of a will may be established by proof of the declarations of the deceased, then it is difficult to say why the execution and contents of the instrument may not be established by like proof, providing two or more witnesses testify to the declarations, and thus testamentary dispositions

of property would be established wholly by oral evidence consisting entirely of the declarations of the deceased. It is true that in the present case there is no dispute with respect to the execution or contents of the will, but if the principle is established that the existence of the will at the time of death may be shown by oral proof of such declarations, it must follow that any other fact required by the statute may be shown in like manner. . . . We think the declarations of the deceased were not competent to prove that the will or codicil was in existence at the time of her death. The whole course of legislation in this state from the earliest times to the present day concerning the execution or revocation of wills discloses a clear purpose to substitute in all cases written for oral proof of the testamentary disposition of property and to sweep away all parol proof of testamentary intentions, and hence to exclude statements or declarations of the deceased.”

be noted that such lawyers as Mr. Justice White and Mr. Justice McKenna dissented from it, and in the face of the authorities cited, while it has undoubtedly affected the preponderance, it may not be taken as having so materially lessened it as to have finally adjusted the balance. It does not outweigh the clear expression of Cockburn, C. J., in *Sugden's Case*.² When a will cannot be found, such declarations may be received to rebut the presumption of revocation.³ But the due and formal execution of the will must be proved according to the statute, although it may be by a single witness.⁴ If a will cannot be found after the death of a testator, a presumption arises that it was destroyed by him with revocatory intent, and to repel or strengthen this presumption, the declarations of the tes-

² "The question before us is whether the statements made by a testator as to the provisions of his will can be received as evidence of the contents of will known to have existed, but which at his death is no longer forthcoming. That, morally, such statements and declarations are entitled, where no doubt exists of their sincerity, to the greatest weight, cannot be denied; and I am at a loss to see why, when such evidence is held to be admissible for the two purposes just referred to, it should not be equally receivable as proving the contents of the will. If the exception to the general rule of law which excludes hearsay evidence is admitted, on account of the exceptional position of a testator, for one purpose, why should it not be for another, where there is an equal degree of knowledge, and an equal absence of motive to speak untruly? Could it be contended that, if the testator had given written instructions for his will, or had first made a draft of the will, and had indorsed on the back of it, 'This is the draft from which I copied my will,' the draft

would not have been admissible to prove the contents of the will? Or suppose he had made a copy of the will, indorsing it as such, is our law this that the copy would be inadmissible to show the contents of the will if it was lost?" *Sugden v. St. Leonards*, *supra*.

³ *In re Page*, 118 Ill. 576, 59 Am. Rep. 395, 8 N. E. 852; *Steinke's Will*, 95 Wis. 121, 70 N. W. 61; *McBeth v. McBeth*, 11 Ala. 596. See *McDonald v. McDonald*, 142 Ind. 55, 41 N. E. 336, an important case citing many others. See, also, *Matter of Kennedy*, 167 N. Y. 163, 60 N. E. 442. There is also a conflict upon this question, but the weight of authority is with the text. See notes on "Admissibility of Declarations of Testator upon Issue of Revocation of Will Which cannot be Found," to *Matter of Colbert*, 3 Ann. Cas. 960, *In re Shelton*, 10 Ann. Cas. 535, and *Miller's Will*, 14 Ann. Cas. 284, which contain the leading cases on both sides.

⁴ *Matter of Page*, 118 Ill. 576, 59 Am. Rep. 395, and note, 8 N. E. 852.

tator are admissible;⁵ and the presumption of revocation arising from a will being torn or otherwise mutilated may be strengthened by evidence of the declarations of the testator that "the laws of the country were as good a will as he wanted, and that he intended his children to share equally in his property."⁶ The rule of the presumption of an instrument shown to have been executed continuing in existence has no application to an ambulatory instrument like a will or codicil. The presumption is the other way. Where no testamentary papers (their execution, of course, having been proved) can be found after a careful and exhaustive search, the presumption arises that the testator destroyed them *animo revocandi*.⁷ The presumption could, of course, be overcome by proper evidence leading to a contrary conclusion.⁸

§ 485 (495, 496). **Parol evidence to explain deeds—Latent ambiguities.**—The general principles which control the introduction of parol evidence to explain writings have been discussed in their application to wills, and to a great extent apply to the explanation of deeds by similar evidence. It is nevertheless expedient to refer to some of the more important exceptions with regard to instruments which are not testamentary in character. The general rule on this subject respecting deeds was long ago stated by Lord Thurlow as follows: "The rule is perfectly clear that, where a deed is in writing, it will admit of no contract that is not part of the deed; whether it adds to or deducts from the contract, it is impossible to introduce it on parol evidence." We will now call attention only to some of the exceptions. A deed is the highest evidence of a contract, and cannot, in the absence of fraud or mistake, be

⁵ Weeks v. McBeth, 14 Ala. 474.

⁶ Patterson v. Hickey, 32 Ga. 156.

⁷ Matter of Kennedy, *supra*.

⁸ Throckmorton v. Holt, 180 U. S. 552, 45 L. Ed. 663, 21 Sup. Ct. Rep. 474. In this case it was held the presumption of revocation did not

arise though the will was received by the register with a local postmark, a year after testator's death, and twenty-two years after its date. In addition, the will was mutilated, torn and burned around the edges and with no seal upon it.

contradicted or varied by parol proof, either at law or in equity.⁹ On the general principles already stated, parol evidence may be received for the purpose of showing that the deed *never had any legal existence*, as that it was invalid on account of *fraud or duress*; or that it was in *vio-*

⁹ *Brassell v. Fiske*, 153 Ala. 558, 45 South. 70; *Wallace v. Meeks*, 99 Ark. 350, 138 S. W. 638; *Riley v. North Star Min. Co.*, 152 Cal. 549, 93 Pac. 194; *Highland Park Co. v. Walker*, 13 Colo. App. 352, 57 Pac. 759; *Elliott v. Weed*, 44 Conn. 19; *Skinner v. Hendrick*, 1 Root (Conn.), 253, 1 Am. Dec. 43; *McCartney v. Fletcher*, 11 App. Cas. (D. C.) 1; *Smith v. Smith*, 130 Ga. 532, 124 Am. St. Rep. 177, 61 S. E. 114; *Potter v. Barringer*, 236 Ill. 224, 86 N. E. 233; *Walton v. Follansbee*, 165 Ill. 480, 46 N. E. 459; *Barnes v. Bartlett*, 47 Ind. 98; *Trullinger v. Webb*, 3 Ind. 198; *Taylor v. Southerland*, 7 Ind. Ter. 666, 104 S. W. 874; *Van Huson v. Omaha Bridge etc. R. Co.*, 118 Iowa, 366, 92 N. W. 47; *McEney v. McEney*, 110 Iowa, 718, 80 N. W. 1071; *Sill v. Sill*, 31 Kan. 248, 1 Pac. 556; *Green River Chemical Co. v. Rockport*, 142 Ky. 609, 134 S. W. 1164; *Marshall v. Dean*, 4 J. J. Marsh. (Ky.) 583; *Jenkins v. Salmen Brick & Lumber Co.*, 120 La. 549, 45 South. 435; *Morrill v. Robinson*, 71 Me. 24; *Kimball v. Morrell*, 4 Me. 368; *Snowden v. Pitcher*, 45 Md. 260; *Timms v. Shannon*, 19 Md. 296, 81 Am. Dec. 632; *Carlisle v. Libby*, 185 Mass. 445, 70 N. E. 423; *Dodge v. Nichols*, 5 Allen (Mass.), 548; *Dye v. Thompson*, 126 Mich. 597, 85 N. W. 1113; *McMurphy v. Walker*, 20 Minn. 382; *Irwin v. Yazoo etc. R. Co.*, 99 Miss. 394, 55 South. 49; *Staed v. Rossier*, 157 Mo. App. 300, 137 S. W. 901; *Stanisics v. McMurtry*, 64 Neb. 761, 90 N. W. 884; *Proctor v. Gilson*, 49

N. H. 62; *Clark v. City of Elizabeth*, 37 N. J. L. 120; *Uihlein v. Matthews*, 172 N. Y. 154, 64 N. E. 792; *Palmer v. Culbertson*, 143 N. Y. 213, 38 N. E. 199; *Jackson v. Sternberg*, 20 Johns. (N. Y.) 49; *Ward v. Gay*, 137 N. C. 397, 49 S. E. 884; *Lowdermilk v. Bostwick*, 98 N. C. 299, 3 S. E. 844; *Stine v. Sherks*, 1 Watts & S. (Pa.) 195; *Merriman v. Bush*, 116 Pa. 276, 9 Atl. 345; *Snyder v. Snyder*, 6 Binn. (Pa.) 483, 6 Am. Dec. 493; *Bernardy v. Colonial etc. Mtg. Co.*, 20 S. D. 193, 105 N. W. 737; *Vance v. Smith*, 2 Heisk. (Tenn.) 343; *Selari v. Selari* (Tex. Civ. App.), 124 S. W. 997; *Smith v. Fitzgerald*, 59 Vt. 451, 9 Atl. 604; *Vermont Cent. R. Co. v. Hills*, 23 Vt. 681; *Harris v. Shield*, 111 Va. 643, 69 S. E. 933; *Cook v. Hensler*, 57 Wash. 392, 107 Pac. 178; *Bradshaw v. Farnsworth*, 65 W. Va. 28, 63 S. E. 755; *Patterson v. Cappon*, 125 Wis. 198, 102 N. W. 1083; *Powers v. Spaulding*, 96 Wis. 487, 71 N. W. 891; *Zimpelman v. Hipwell*, 54 Fed. 848, 4 C. C. A. 609; *Elphinstone, Deeds*, 3. Parol evidence will not be received to *extend or enlarge the estate granted*: *Lothrop v. Foster*, 51 Me. 367; *Miller v. Washburn*, 117 Mass. 371; or to *vary or enlarge covenants of warranty*: *Raymond v. Raymond*, 10 Cush. (Mass.) 134; *Johnson v. Walter*, 60 Iowa, 315, 14 N. W. 325; *MacLeod v. Skiles*, 81 Mo. 595, 51 Am. Rep. 254; *Bever v. North*, 107 Ind. 544, 8 N. E. 576; *Cartier v. Douville*, 98 Mich. 22, 56 N. W. 1045; or to show that an *absolute deed* was only a *conditional one*:

lation of the law of the land, or *contrary to public policy*, or not binding by reason of *coverture, infancy or mistake*,¹⁰ or that it comes within one of the general exceptions already discussed in this chapter. Although a deed is presumed to have been executed and delivered on the day of its date, yet, if it has no date or bears an erroneous or impossible date, parol evidence may be given of *the time of its execution and delivery*.¹¹ So an *erroneous description of a party* to the deed or other person may be corrected by extrinsic evidence which discloses the person intended.¹²

Haworth v. Norris, 28 Fla. 763, 10 South. 18; McGee v. Allison, 94 Iowa, 527, 63 N. W. 322; McClendon v. Brockett, 32 Tex. Civ. App. 150, 73 S. W. 854; Schwalbach v. Chicago etc. Railway Co., 73 Wis. 137, 40 N. W. 579; or that *part* of the land described in a sheriff's deed was intended to be *excepted*: Todd v. Philhower, 24 N. J. L. 796; or *otherwise to vary the description*, if it is unambiguous: Madden v. Tucker, 46 Me. 367; Clark v. Baird, 9 N. Y. 183; Bratton v. Clawson, 3 Strob. (S. C.) 127; Rowland v. McCowan, 20 Or. 538, 26 Pac. 853; or that a *reconveyance* should be made or a life *estate reserved*: Hutchins v. Hutchins, 98 N. Y. 56; or an agreement that the *consideration* should be *refunded* in case of partial failure of title: Putnam v. Russell, 86 Mich. 389, 49 N. W. 147; or *otherwise to change the legal effect*: Holley v. Young, 27 Ala. 203; or that the legal effect was misunderstood: Winslow v. Driskell, 9 Gray (Mass.), 363; Dye v. Thompson, 126 Mich. 597, 85 N. W. 1113.

¹⁰ Ex parte Morgan, 2 Ch. Div. 84; Collins v. Blanton, 2 Wils. 341, 95 Eng. Reprint, 847; Elphinstone, Deeds, 5; Hill v. Freeman, 73 Ala. 200, 49 Am. Rep. 48, and note.

¹¹ Styles v. Wardle, 4 Barn. & C.

908, 107 Eng. Reprint, 1297; Miller v. Hampton, 37 Ala. 342; McComb v. Gilkey, 29 Miss. 146; Draper v. Snow, 20 N. Y. 331, 75 Am. Dec. 408; Elphinstone, Deeds, 6, 125. But see Hill v. Freeman, 73 Ala. 200, 49 Am. Rep. 48.

¹² Robert v. Boulat, 9 La. Ann. 29; Cleveland v. Burnham, 64 Wis. 347, 25 N. W. 407; Wakefield v. Brown, 38 Minn. 361, 8 Am. St. Rep. 671, 37 N. W. 788; Salmer v. Lathrop, 10 S. D. 216, 72 N. W. 570; Keith v. Scales, 124 N. C. 497, 32 S. E. 809. So where there is a *mistake* in the Christian *name* of the grantor or grantee: Doe v. Roe etc., 16 Ga. 520; Peabody v. Brown, 10 Gray (Mass.), 45; or surname of grantor or grantee: Scanlan v. Wright, 13 Pick. (Mass.) 523, 25 Am. Dec. 344; who of two or more persons of the name given in the deed was intended: Avery v. Stites, Wright (Ohio), 56; Coit v. Starkweather, 8 Conn. 289; Christian name of the grantee is left blank, to show who was intended: Dr. Ayray's Case, 11 Coke, 21a, 77 Eng. Reprint 1171; Leach v. Dodson, 64 Tex. 185; where there was an *erasure* in a deed *changing the name* of the grantee from Elizabeth to Eliza, to show that the two names referred to the same person: Hanrick v. Patrick, 119 U. S. 156, 30 L. Ed. 396, 7 Sup. Ct.

There is an important difference between the description of the grantees in a deed which is inherently uncertain and one which is merely imperfect and capable, on that account, of different applications. Extrinsic evidence is not admissible in the former case to make the conveyance effectual in favor of any particular person, while in the latter case, a resort to extraneous facts and circumstances may become necessary; and it is proper in order to ascertain the individual to whom the description was intended to apply.¹³ The *real party in interest*, the person for whose benefit the contract was made, may be shown by parol,¹⁴ and the identification of parties is governed in general by the principles already discussed in this chapter.¹⁵ The *place* where a deed was executed may be established by parol, notwithstanding a venue other than that shown to exist is designated in the date line of the instrument.¹⁶ So parol evidence is admissible to impeach an instrument by proof of a *material alteration*.¹⁷ It is frequently necessary in the construction of deeds to apply the rules already given as to latent ambiguities in order to *identify the land* intended to be conveyed. Thus, where, although the description in a conveyance is sufficiently definite, it appears from extrinsic evidence that the words used are equally applicable to two different pieces of land, a latent ambiguity arises; and it may be shown by parol what land it

Rep. 147. But it cannot be shown by parol that the person named as grantee was *not the one intended*: Whitmore v. Learned, 70 Me. 276.

¹³ Morse v. Carpenter, 19 Vt. 613.

¹⁴ 1 Greenl. Ev., § 282; Eddy v. American Amusement Co., 9 Cal. App. 624, 99 Pac. 1115; Moyers v. Fogarty, 140 Iowa, 701, 119 N. W. 159; Lancey v. Phoenix Fire Ins. Co., 56 Me. 562; Pleins v. Wachenheimer, 108 Minn. 342, 133 Am. St. Rep. 451, 122 N. W. 166; Slade v. Bennett, 118 N. Y. Supp. 278; Schmucker v. Higgins-Roberts Grain Co., 28 Okl.

721, 116 Pac. 184; Battey v. Lunt etc. Co., 30 R. I. 1, 136 Am. St. Rep. 926, 73 Atl. 353; O'Farrell v. O'Farrell, 56 Tex. Civ. App. 51, 119 S. W. 899.

¹⁵ § 451 et seq., *ante*.

¹⁶ Loud v. Collins, 12 Cal. App. 786, 108 Pac. 880; Scates v. Henderson, 44 S. C. 548, 22 S. E. 724; Wells, Fargo & Co. v. Vansickle, 64 Fed. 944.

¹⁷ As to alteration of instruments, see chapter 16, §§ 557-566, *post*.

was intended to convey. Where the legal line between two towns differs from the line universally recognized by the inhabitants of the towns, a deed describing a boundary in terms equally applicable to either line contains a latent ambiguity, which may be cleared up by oral evidence.¹⁸ *In the absence of any latent ambiguity*, it would be a clear violation of the rules of evidence to receive parol proof to show that the grantor intended to convey a different tract from that described in the deed;¹⁹ for example, that when the whole is described, only a moiety was intended.²⁰ But if the lands are vaguely described, such evidence may be received *not to contradict the deed, but to identify the land*;²¹ for ex-

¹⁸ *Hardy v. Matthews*, 38 Mo. 121; *Wharton v. Eborn*, 88 N. C. 344; *Stone v. Clark*, 1 Met. (Mass.) 378, 35 Am. Dec. 370; *Hall v. Davis*, 36 N. H. 569; *Miles v. Barrows*, 122 Mass. 579; *Lanman v. Crooker*, 97 Ind. 163, 49 Am. Rep. 437; *Swayne v. Vance*, 28 Ark. 282; *Elofrson v. Lindsay* 90 Wis. 203, 63 N. W. 89. For an exhaustive discussion of the authorities on parol explanation of ambiguities in deeds, see *Browne, Parol Ev.*, beginning p. 305. See, also, note to *Morton v. Jackson*, 40 Am. Dec. 109-111. When land was described as the "north twenty feet" of a lot, where the northerly line of the lot deflected twenty-five degrees from a due east and west course, it was held proper to prove by parol the general understanding among real estate dealers and conveyancers in that city as to the meaning of the term "north twenty feet," when used and applied to lots in that plat: *Jenkins v. Sharpf*, 27 Wis. 472; when the boundary called for in the plaintiff's deed was the "Shirley line," and the defendant's deed the "Lunenburg line," it was held admissible to explain by parol evidence the latent ambiguity thus dis-

closed: *Putnam v. Bond*, 100 Mass. 58, 1 Am. Rep. 82. See, also, *Chambers v. Ringstaff*, 69 Ala. 140.

¹⁹ *Norwood v. Byrd*, 1 Rich. (S. C.) 135, 42 Am. Dec. 406; *Emerick v. Kohler*, 29 Barb. (N. Y.) 165; *Griffin v. Hall*, 115 Ala. 482, 22 South. 162; *Duggan v. Uppendahl*, 197 Ill. 179, 64 N. E. 289; *King v. New York & C. G. C. Co.*, 204 Pa. 628, 54 Atl. 477, 22 Morr. Min. Rep. 515; *Elofrson v. Lindsay*, 90 Wis. 203, 63 N. W. 89; *Reed v. Shenek*, 2 Dev. (N. C.) 415; *Massengill v. Boyles*, 4 Humph. (Tenn.) 205; *Pride v. Lunt*, 19 Me. 115; *Waugh v. Waugh*, 28 N. Y. 94; *Vosburgh v. Teator*, 32 N. Y. 561; *Ritchie v. Pease*, 114 Ill. 353, 3 N. E. 897; *Bratton v. Clawson*, 3 Strob. (S. C.) 127.

²⁰ *Child v. Wells*, 13 Pick. (Mass.) 121; *Butler v. Gale*, 27 Vt. 739.

²¹ *Alabama Mut. F. Ins. Co. v. Minchener*, 133 Ala. 632, 32 South. 225; *Little Rock Cooperage Co. v. Gunnels*, 82 Ark. 286, 101 S. W. 729; *Ontario Deciduous Fruit Growers' Assn. v. Cutting Fruit Pack. Co.*, 134 Cal. 21, 86 Am. St. Rep. 231, 53 L. R. A. 681, 66 Pac. 28; *Kretsch-*

ample, to show that certain lands are well known in the community by the description given in the deed,²² and to identify land thus indefinitely described, evidence has in some cases been received of *the acts of the parties as tending to show their understanding* and construction of the deed.²³ But *private declarations of the grantor as to boundary lines are not admissible to control the language of the deed.*²⁴ The gen-

mer v. Hard, 18 Colo. 223, 32 Pac. 418; Watson v. New Milford, 72 Conn. 561, 77 Am. St. Rep. 345, 45 Atl. 167; Glover v. Newsome, 132 Ga. 797, 65 S. E. 64; Clayton v. Lemen, 233 Ill. 435, 84 N. E. 691; Halliday v. Hess, 147 Ill. 538, 35 N. E. 380; Ames v. Ames (Ind. App.), 91 N. E. 509; Turner v. Gonzales, 3 Ind. Ter. 649, 64 S. W. 565; Richardson v. Sketchley, 150 Iowa, 393, 130 N. W. 407; Powers v. Scharling, 64 Kan. 339, 67 Pac. 820; Graham v. Botner, 18 Ky. Law Rep. 637, 37 S. W. 583; Young v. Guess, 115 La. 230, 38 South. 975; Eveleth v. Wilson, 15 Me. 109; Barrett v. Murphy, 140 Mass. 133, 2 N. E. 833; Britton v. Smith, 165 Mich. 222, 130 N. W. 599; Eddy v. Caldwell, 7 Minn. 225; Dixon v. Cook, 47 Miss. 220; Miles v. Miles, 78 Miss. 904, 30 South. 2; Wilcox v. Sonka, 137 Mo. App. 54, 119 S. W. 445; Taylor v. Holter, 1 Mont. 688; Keplinger v. Woolsey, 4 Neb. (Unof.) 283, 93 N. W. 1008; Bell v. Woodward, 46 N. H. 315; Bateinan v. Riley, 73 N. J. Eq. 316, 73 Atl. 1006; Morris etc. R. Co. v. Bonnell, 34 N. J. L. 474; Armijo v. New Mexico Town Co., 3 N. M. 244, 5 Pac. 709; Rosen v. Bamberger, 67 Misc. Rep. 181, 122 N. Y. Supp. 240; Pettit v. Shepard, 32 N. Y. 97; Cathay v. Buchanan Lumber Co., 151 N. C. 592, 66 S. E. 580; Peart v. Brice, 152 Pa. 277, 25 Atl. 537; Rapley v. Klugh, 40

S. C. 134, 18 S. E. 680; Farrell v. Edwards, 8 S. D. 425, 66 N. W. 812; Cannon v. Trail, 1 Head (Tenn.), 282; Wilkerson v. Ward (Tex. Civ. App.), 137 S. W. 158; House v. Johnson (Tex. Civ. App.), 36 S. W. 916; O'Hear v. De Goesbriand, 33 Vt. 593, 80 Am. Dec. 653; Sulphur Mines Co. v. Thompson's Heirs, 93 Va. 293, 25 S. E. 232; Manvell v. Weaver, 53 Wash. 408, 102 Pac. 36; Murray Hill Land Co. v. Milwaukee Light etc. Co., 110 Wis. 555, 86 N. W. 199; Tompkins v. Creighton-McShane Oil Co., 160 Fed. 303, 87 C. C. A. 427; Imrie v. Archibald, 25 Can. S. Ct. 368. To locate boundaries: Diggs v. Kurtz, 132 Mo. 250, 53 Am. St. Rep. 488, 33 S. W. 815; Bartlett v. LaRochelle, 68 N. H. 211, 44 Atl. 302; Hanlon v. Union Pacific Ry. Co., 40 Neb. 52, 58 N. W. 590.

²² Shewalter v. Pirner, 55 Mo. 218; Woods v. Sawin, 4 Gray (Mass.), 322; Dougherty v. Chesnutt, 86 Tenn. 1, 5 S. W. 444; Euliss v. McAdams, 108 N. C. 507, 13 S. E. 162; Dorgan v. Weeks, 86 Ala. 329, 5 South. 581.

²³ Moran v. Lezotte, 54 Mich. 83, 19 N. W. 757; Truett v. Adams, 66 Cal. 218, 5 Pac. 96; Lovejoy v. Lowett, 124 Mass. 270; Clark v. Wethey, 19 Wend. (N. Y.) 320; Fletcher v. Phelps, 28 Vt. 257.

²⁴ Gainey v. Hays, 63 N. C. 497; Clark v. Wethey, 19 Wend. (N. Y.)

eral proposition that the declarations of one in possession in disparagement of his own right are admissible as against all who claim through or under him is, of necessity, subordinate to the more important rule that an unambiguous written description, which is the best evidence of the nature of the contract between the parties, and an undisputed location by a survey in accordance with the running from known corners by course and distance cannot be contradicted by more uncertain proof of declarations by a former owner while in possession, which, if acted on, would require an utter disregard of course and distance.²⁵ The rule as to applying a deed or a description contained in it to the subject matter has been already considered.²⁶

§ 486 (497). Parol evidence inadmissible to prove reservation.—It is not competent for a grantor to control or restrain the legal effect of a deed, by proof of a parol agreement made previously to or at the time of the deed. It would be as well contrary to the general rule of the common law, which provides that the terms of an instrument in writing shall not be altered or controlled by a parol agreement, as against the provisions of the statutes, which require that all rights and interests in real estate shall be manifested by some instrument in writing; and that no action shall be brought on any agreement for the sale of lands, or any interest in or concerning the same, unless in writing. A deed passes all the incidents to the land as well as the land itself, and as much when not expressed as when they are. If the parol agreement were made before the execution and delivery of the deed, it is to be regarded as part of the negotiation and discussion respecting the terms of the pur-

320; *Olson v. Keith*, 162 Mass. 485, 39 N. E. 410. Where the description of the land only contained the survey numbers of section, town and range, omitting the state, county and basis meridian, parol evidence was admitted to show that, when the conveyance was made, the

grantor owned and resided upon lands in a given county in Alabama known by the same numbers as those in the conveyance: *Chambers v. Ringstaff*, 69 Ala. 140.

²⁵ *Shaffer v. Gaynor*, 117 N. C. 15, 23 S. E. 154.

²⁶ § 450, *ante*.

chase and sale, which is considered as merged and embodied in the deed itself as the final and authoritative expression of the agreement and determination of the parties on the subject. If it was made at the time of the delivery of the deed, then it must be deemed an exception, reservation or defeasance, and being repugnant to the terms and effect of the deed, it is void.²⁷ Hence it is that no reservation can be ingrafted upon a deed by parol in respect to *fixtures* which have become part of the realty, or in respect to the natural products of the soil, such as growing trees,²⁸ or generally in any way to contradict or vary its express terms.²⁹ There is, however, a decided conflict in the decisions as to whether parol proof may be given of a prior or of a contemporaneous agreement by parol for the *reservation of growing crops* of the grantor, when there is no exception in the deed. It has been held in numerous cases that the admission of such proof is a clear violation of the rule under consideration;³⁰ and on the same principle, it has been held that such evidence cannot be given of a parol contemporaneous agreement that the grantor may

²⁷ Shaw, C. J., in *Noble v. Bosworth*, 19 Pick. (Mass.) 314. It is as much against these rules to admit parol evidence to prevent or restrain the legal inferences and consequences of a deed as to control and alter its express provisions: *Pattison v. Hull*, 9 Cow. (N. Y.) 747.

²⁸ *Backenstoss v. Stahler's Admr.*, 33 Pa. 251, 75 Am. Dec. 592; *Smith v. Crary*, 1 Barb. (N. Y.) 542; *Slocum v. Seymour*, 36 N. J. L. 138, 13 Am. Rep. 432; *Sterling v. Baldwin*, 42 Vt. 306; *Jones v. Timmons*, 21 Ohio St. 596; *Detroit etc. R. Co. v. Forbes*, 30 Mich. 165; *In re Perkins' Estate*, 65 Vt. 313, 26 Atl. 637. On this general subject see extended note to 12 Eng. Rep. (Moak) 241-250.

²⁹ *Burroughs v. Pate*, 166 Ala.

223, 51 South. 978; *Lanier v. Winchester*, 7 Ga. App. 227, 66 S. E. 626; *Smith v. Price*, 39 Ill. 28, 89 Am. Dec. 284; *Sage v. Jones*, 47 Ind. 122; *Wickersham v. Orr*, 9 Iowa, 253, 74 Am. Dec. 348; *Conner v. Coffin*, 22 N. H. 538; *Rathbun v. Rathbun*, 6 Barb. (N. Y.) 98; *Coward v. Boyd*, 79 S. C. 134, 60 S. E. 311; *Ord v. Waller* (Tex. Civ. App.), 107 S. W. 1166; *Oregon etc. R. Co. v. Vulcan Iron Works*, 57 Wash. 372, 106 Pac. 1120; *McMillin v. Neeley*, 66 W. Va. 496, 66 S. E. 635.

³⁰ *Austin v. Sawyer*, 9 Cow. (N. Y.) 39; *Gibbons v. Dillingham*, 10 Ark. 9, 50 Am. Dec. 233; *Smith v. Price*, 39 Ill. 28, 89 Am. Dec. 284; *McIlvaine v. Harris*, 20 Mo. 457, 64 Am. Dec. 196; *Wintermute v. Light*, 46 Barb. (N. Y.) 278.

hold possession until the maturity of another crop,³¹ or that *possession* may be retained until a part of the purchase price has been paid.³² So it has been held that no such proof can be given of the reservation of rent.³³ Whether growing crops are considered personalty or realty, it is a rule asserted by the great weight of authority that they are so incidental to the realty that they pass with a grant of the land, unless they are expressly reserved. The question then arises, May they be reserved by parol? This question is considered, by the majority of the cases presenting it, as one of evidence, rather than one involving the statute of frauds. The weight of authority is apparently to the effect that evidence of a parol reservation of the growing crops by the grantor in a deed is inadmissible under the well-known rule of evidence, that the terms of a written instrument cannot be contradicted or varied by parol.³⁴ On the other hand, the doctrine is declared in other cases that by parol agreement, prior to or contemporaneous with the deed, the grantor may sever and reserve the growing crops, although the deed contain no exception.³⁵ So it has been held admissible to prove an agreement by parol that the

³¹ *Melton v. Watkins*, 24 Ala. 433, 60 Am. Dec. 481. But see *Hamilton v. Clark* (Tex. Civ. App.), 26 S. W. 515; *Willis v. Hulbert*, 117 Mass. 151.

³² *Gilbert v. Bulkley*, 5 Conn. 262, 13 Am. Dec. 57.

³³ *Winn v. Murehead*, 52 Iowa, 64, 2 N. W. 949. See, also, *Omaha etc. Co. v. Tabor*, 13 Colo. 41, 16 Am. St. Rep. 185, 5 L. R. A. 236, 21 Pac. 925, 16 Morr. Min. Rep. 184 (retention of possession till purchase money paid); *Smith v. Price*, 39 Ill. 28, 89 Am. Dec. 284 (reservation of trees and plants even though grown for nursery purposes).

³⁴ From an excellent note on the "Admissibility of Parol Evidence to Show Reservation of Growing Crops

from Deed," appended to the case of *Grabow v. McCracken*, 23 L. R. A., N. S., 1218, and to which the editor adds the following authorities: *Gibbons v. Dillingham*, 10 Ark. 9, 50 Am. Dec. 233; *Gam v. Cordrey*, 4 Penne. (Del.) 143, 53 Atl. 334; *Smith v. Price*, 39 Ill. 28, 89 Am. Dec. 284; *Damery v. Ferguson*, 48 Ill. App. 224; *Chapman v. Long*, 10 Ind. 465; *Turner v. Cool*, 23 Ind. 56, 85 Am. Dec. 449; *Brown v. Thurston*, 56 Me. 126, 96 Am. Dec. 438; *Vanderkarr v. Thompson*, 19 Mich. 82; *Adams v. Watkins*, 103 Mich. 431, 61 N. W. 774; *McIlvaine v. Harris*, 20 Mo. 457, 64 Am. Dec. 196.

³⁵ *Harvey v. Million*, 67 Ind. 90; *Adams v. Watkins*, 103 Mich. 431, 61 N. W. 774; *Flynt v. Conrad*, 61

grantor might remain in possession for a time without the payment of rent;³⁶ that the purchaser should be entitled to the crop, such agreement not being inconsistent with the language of the deed,³⁷ and that a distinct agreement prior to the deed had been made whereby the grantor should have the right to sell the manure on the land sold.³⁸ Decisions of this character rest on the general exception, already stated, that the general rule under discussion does not apply to agreements which are entirely distinct from, and which are *collateral to, the written instrument*; and in some cases on the ground that such proof is admissible as showing the real *consideration*.³⁹ There are a number of respectable authorities supporting the view that the parol reservation is valid;⁴⁰ among them a recent Oklahoma decision, which contains an excellent discussion, which claims that the weight of authority and reason supports the rule, at least that a matured crop of corn and wheat standing ungathered upon a tract of land may be specifically reserved by parol in the sale of the land, as a part of the contract price or consideration of the deed.⁴¹ We think the weight of reasoning inclines the other way, and that in the face of the conceded proposition that such crops pass with the land, any stipulations or reservations concerning them should, as they so easily can, be embodied in the contract of sale and the conveyance which carries out its provisions. A few cases hold that whether evidence of a parol reservation of crops is admissible or not depends upon whether the statute

N. C. 190, 93 Am. Dec. 588; Backenstoss v. Stahler, 33 Pa. 251, 75 Am. Dec. 592; Merrill v. Blodgett, 34 Vt. 480; Simanek v. Nemetz, 120 Wis. 42, 97 N. W. 508.

³⁶ Hersey v. Verrill, 39 Me. 271.

³⁷ Robinson v. Pitzer, 3 W. Va. 335.

³⁸ Strong v. Doyle, 110 Mass. 92.

³⁹ See §§ 439, 468, *ante*.

⁴⁰ Walton v. Jordan, 65 N. C. 170; Baker v. Jordan, 3 Ohio St. 438; Bourne v. Bourne, 12 Ky. Law

Rep. 467; Backenstoss v. Stahler, 33 Pa. 251, 75 Am. Dec. 592; Kluse v. Sparks, 10 Ind. App. 444, 36 N. E. 914, 37 N. E. 1047; Holt v. Holt, 57 Mo. App. 272; Harbold v. Kuster, 44 Pa. 392; Cooper v. Kennedy, 86 Neb. 119, 136 Am. St. Rep. 701, 124 N. W. 1131; Hendrickson v. Ivins, 1 N. J. Eq. 562; Kerr v. Hill, 27 W. Va. 576.

⁴¹ Grabow v. McCracken, 23 Okl. 612, 18 Ann. Cas. 503, 23 L. R. A., N. S., 1218, 102 Pac. 84.

of frauds requires a contract concerning growing crops to be in writing or not.⁴² As a corollary to the rule above stated it has been held that when a reservation is made in a deed, it is not necessary, in order to give it effect, that the grantor should, when he executes the deed, assert verbally his right to the property excepted from the conveyance. Evidence that he made no such assertion is clearly incompetent and inadmissible.⁴³

§ 487 (498). Parol evidence as to warranties.—The question has often arisen whether a *warranty*, prior to or contemporaneous with the deed, can be proved by parol. Where the instrument purports to contain the covenants of the grantor with respect to the property, to admit such evidence would seem a clear violation of the familiar rule that written contracts are not to be changed by parol testimony.⁴⁴ To allow the introduction of parol evidence to prove a warranty which was a part of the prior or contemporaneous agreement, and about which the deed or other writing is silent, is certainly in direct contradiction of that elementary and universally recognized rule of law and of reason, that in the absence of fraud or mistake parol evidence cannot be received to contradict or vary the terms of a written contract. For it is the plain and recognized doctrine, and may be said to be an elementary principle, that upon the execution, delivery and acceptance of a deed or written instrument, all prior or contemporaneous parol

⁴² See *Flynt v. Conrad*, 61 N. C. 190, 93 Am. Dec. 588; *Gibbons v. Dillingham*, 10 Ark. 9, 50 Am. Dec. 233, and other cases collected in the note to *Grabow v. McCracken*, 23 L. R. A., N. S., 1218, *supra*.

⁴³ *Hornbuckle v. Stafford*, 111 U. S. 389, 28 L. Ed. 468, 14 Sup. Ct. Rep. 515. See, also, *Sutton v. Lemen*, 130 Ill. App. 50; *Kansas City v. Banks*, 9 Kan. App. 885, 61 Pac. 333; *Stront v. Harper*, 72 Me. 270; *Stockbridge Iron Co. v. Hud-*

son Iron Co., 107 Mass. 290; *Lear v. Durgin*, 64 N. H. 618, 15 Atl. 128; *Wehrenberg v. Seiferd*, 125 App. Div. 527, 109 N. Y. Supp. 896; *Jacobs v. Mutual Ins. Co.*, 56 S. C. 558, 35 S. E. 221; *Bombarger v. Morrow*, 61 Tex. 417.

⁴⁴ *Stookey v. Hughes*, 18 Ill. 55; *Pole Stock Lumber Co. v. Oakdale Lumber Co.*, 99 Miss. 19, 54 South. 596; *Cabot v. Christie*, 42 Vt. 121, 1 Am. Rep. 313.

stipulations, or understanding as to warranty, or incidents in any way relating to the subject matter, are merged in the deed or writing, and cannot be contradicted or varied by parol. In applying this doctrine it has been held that where a deed contains a covenant of warranty against "all persons claiming under the grantor," parol evidence is not admissible to prove a general warranty against a title from other sources.⁴⁵ So where the grantor covenants against encumbrances generally, parol evidence is not admissible to show, in the absence of fraud or mistake, that certain known encumbrances were excluded;⁴⁶ and where a deed is absolute in form, verbal warranties in the nature of conditions made prior to the execution of the deed are not admissible.⁴⁷ Where a deed contains an express warranty against all claims except certain taxes, parol evidence is not admissible to show that the warrantor agreed to pay such taxes. Under such circumstances a party cannot accept a deed with such a covenant, and escape its form and effect by verbal protestations and stipulations to the contrary. By acceptance of the deed, the parol agreement is waived.⁴⁸ A deed delivered and accepted merely transferring the grantor's right, title and interest in the land described, and containing no express or implied covenants as to title or encumbrances, is, in the absence of actionable deceit, conclusively presumed, in an action at law, to show that the grantor assumed no obligations as to the validity or extent of his title or interest, or as to encumbrances. The grantee who has accepted such a deed cannot recover in an action at law on the grantor's alleged oral promise, made before or at the time the deed was delivered and accepted, to pay certain taxes which were then an encumbrance on the land

⁴⁵ *Raymond v. Raymond*, 10 Cush. (Mass.) 134.

⁴⁶ *Long v. Moler*, 5 Ohio St. 271; *Hunt v. Amidon*, 4 Hill (N. Y.), 345, 40 Am. Dec. 283; *Johnson v. Walter*, 60 Iowa, 315, 14 N. W. 325; *Bever v. North* (N. Y.), 107 Ind. 544, 8 N. E. 576.

⁴⁷ *Marshall County High School v. Iowa E. Synod*, 28 Iowa, 360; *Bryan v. Swain*, 56 Cal. 616.

⁴⁸ *MacLeod v. Skiles*, 81 Mo. 595, 51 Am. Rep. 254; *Gilbert v. Stockman*, 76 Wis. 62, 20 Am. St. Rep. 23, 44 N. W. 845.

conveyed.⁴⁹ It is not permitted to introduce a contract resting in parol varying the terms of a quitclaim deed and making it in effect a warranty deed.⁵⁰ These cases show that when it is offered to prove by oral testimony that at the time when verbal negotiations were being carried on by the parties, with a view to consummating a sale of land, the vendor made some warranty directly affecting such land, and the parties afterward perfected the sale by deed, which is silent as to such warranty, the prior verbal covenant or warranty is merged in the deed, and the evidence is not admissible to prove it, for its only effect, if admitted, would be to vary and contradict the deed, which it is, as before stated, clearly incompetent to do.⁵¹ A deed purports to contain all the covenants of the grantor with respect to the land conveyed, and to add a new covenant by parol would be a palpable violation of the rule that written instruments are not to be varied by parol or oral testimony.⁵² Parol evidence of a verbal warranty of the quantity of land conveyed by deed is inadmissible, as tending to vary and contradict the terms of the instrument.⁵³ Nor will it be admitted to defeat a right to land conveyed by deed, when its object is to establish a condition subsequent in the nature of an oral warranty.⁵⁴

§ 488 (499). *Same, continued.*—On the same general principle, it has been held in an action for breach of covenant against encumbrances in a deed of land that parol evidence is not admissible for the purpose of proving that, prior to the execution of the deed, an oral agreement was

⁴⁹ *Alsterberg v. Bennett*, 14 N. D. 596, 106 N. W. 49.

⁵⁰ *Putnam v. Russell*, 86 Mich. 389, 49 N. W. 147. The grantee, in the absence of fraud, assumes all the risk of the soundness of the title.

⁵¹ From a useful note by the late A. C. Freeman to *Green v. Batson*, 5 Am. St. Rep. 197.

⁵² *Cabot v. Christie*, 42 Vt. 121, 1 Am. Rep. 313.

⁵³ *Cook v. Combs*, 39 N. H. 592, 75 Am. Dec. 241; *Martin v. Hamlin*, 18 Mich. 354, 100 Am. Dec. 181. See, also, § 489, *post*.

⁵⁴ *Galveston etc. R. Co. v. Pfeuffer*, 56 Tex. 66; *East Line etc. R. Co. v. Garrett*, 52 Tex. 133.

made that the grantee would assume a liability growing out of an assessment upon the land for improvements, when such agreement is inconsistent with what was written.⁵⁵ But the courts receive evidence of such agreements *when they are not inconsistent with the deed* itself, and when they will serve to explain it, especially when they are an inducement to the making of the contract. For example, parol evidence has been received of an agreement by vendor of land to pay for filling the same,⁵⁶ or for building a sewer,⁵⁷ as well as an agreement to grade a street which was made an inducement to the grantee to buy a lot bounded by it.⁵⁸ Although the familiar rule that parol evidence cannot be received to vary or contradict instruments in writing is generally recognized as applicable to deeds, there is a *class of decisions* in which evidence of prior and contemporaneous agreements has been received, and in which it has even been *held competent to prove warranties by parol*. Thus, in a Wisconsin case the action arose on a note for a portion of the purchase price; it was held competent for the grantee to prove by parol a warranty on the part of the grantor that the lands were good meadow lands, and also a breach of such warranty. While the general rule of evidence is recognized by the court, the distinction is made that contracts in respect to the sale and conveyance of land do not come within such general rule, as the deed is merely adapted to transfer the title, and generally contains only the ordinary covenants of title; and that *covenants as to quality* constitute a collateral or *independent agreement*.⁵⁹

⁵⁵ *Flynn v. Bourneof*, 143 Mass. 277, 58 Am. Rep. 135, 9 N. E. 650; *Desmond v. McNamara*, 107 Wis. 126, 82 N. W. 701.

⁵⁶ *McCormick v. Cheevers*, 124 Mass. 262. See, also, *Page v. Monks*, 5 Gray (Mass.), 492.

⁵⁷ *Carr v. Dooley*, 119 Mass. 294.

⁵⁸ *Durkin v. Cobleigh*, 156 Mass. 108, 32 Am. St. Rep. 436, 17 L. R. A. 270, 30 N. E. 474, and cases there cited. See, also, note, 32 Am. St.

Rep. 441. See, also, the Canadian cases: *Betts v. Smith*, 16 A. R. 421; *Gordon v. Waterous*, 36 U. C. R. 321; *Watson Mfg. Co. v. Stock*, 6 Man. L. R. 146.

⁵⁹ *Green v. Batson*, 71 Wis. 54, 5 Am. St. Rep. 191, and full note, 36 N. W. 849; *Miller v. Fiehthorn*, 31 Pa. 252; *Carr v. Dooley*, 119 Mass. 294; *McCormick v. Cheevers*, 124 Mass. 262; *Ludeke v. Sutherland*, 87 Ill. 481, 29 Am. Rep. 66; *Buzzell v.*

We do not think this can be taken as sound law or that there is sufficient authority for the broad statement that contracts for the sale of land constitute an exception to the general rule. On the facts of the Wisconsin case, the remedy of the grantee was, if for anything at all, for the misrepresentation of the grantor.⁶⁰ On the same theory, in an action by grantors to restrain the grantee from using the property for the sale of intoxicating liquors, evidence was held admissible to prove a parol agreement that part of the consideration for the grant was that the property should not be used for such purposes.⁶¹ Where a deed of land which included a store building provided with shelving contained this clause, "this grant includes all the shelving in the building," it was held competent to receive the proof of the sale of personal property at the same time in order to show that it did not pass by the terms of the deed.⁶² So parol evidence of an agreement not to carry on the same business within a given area has been held admissible.⁶³ In a Texas case⁶⁴ we find, "a warranty is no part of the conveyance of land. It is a collateral undertaking and may be proved by parol." The facts on which the decision is founded are that the plaintiff and defendant exchanged pieces of land

Willard, 44 Vt. 44; *Ingersoll v. Truebody*, 40 Cal. 603; *Kingsbury v. Moses*, 45 N. H. 222. Opposed to these cases is the opinion of Shaw, C. J., in *Dutton v. Gerrish*, 9 Cush. (Mass.) 89, 55 Am. Dec. 45. See, also, *Martin v. Hamlin*, 18 Mich. 354, 100 Am. Dec. 181.

⁶⁰ As to the suggestion that there was a warranty of quality on the sale of the land, the case of *Eighmie v. Taylor*, 98 N. Y. 288, lays it down authoritatively that a warranty as to the present quality and condition of property sold is so closely connected with the contract of sale that it belongs to it as one of its elements.

⁶¹ *Hall v. Solomon*, 61 Conn. 476, 29 Am. St. Rep. 218, 23 Atl. 876.

⁶² *Bretto v. Levine*, 50 Minn. 168, 52 N. W. 525.

⁶³ *Pierce v. Woodward*, 6 Pick. (Mass.) 206; *Fusting v. Sullivan*, 41 Md. 162. But in these cases it was an agreement not to carry on a specified business, a matter entirely away from the sale of the land, although it formed part of the consideration. In *Zanturjian v. Boornazian*, 25 R. I. 151, 55 Atl. 199, the contract for the sale of the land also included the sale of the business and the goodwill, and hence a parol agreement not to carry could not be said to be collateral. And *Slaughter v. Smither*, 97 Va. 202, 33 S. E. 544, is on similar lines.

⁶⁴ *Graves v. Pflueger*, 26 Tex. Civ. App. 488, 63 S. W. 651.

and they were to execute each to the other warranty deeds. The defendant at the time of the contract did not own the piece he was to convey, but was about to purchase it. The parties agreed that in place of the defendant taking a deed from his vendor and then making one to the plaintiff, the defendant's vendor should convey by warranty deed direct to the plaintiff, the defendant's name not appearing in the deed. This was done. On a breach of the warranty the plaintiff sued the defendant and offered to prove the facts and defendant's admission of his liability, and the evidence, being excluded, was held to have been improperly excluded. It cannot, however, be seriously contended that those facts warranted the reversal on the grounds and in the words we have quoted. Like the Wisconsin case referred to, the decision may have been right but the reason is certainly wrong. In the Texas case the evidence was admissible on entirely different grounds. It was part of the *res gestae* and the defendant was clearly the real party in interest. In a Minnesota case,⁶⁵ similar to the Wisconsin case referred to, McMillan, C. J., said: "It is not claimed that there was a written warranty in respect to the character of the land. The land having been conveyed to the defendant by deed, it would not be competent to add to or vary or contradict the deed by parol."⁶⁶ Evidence of a parol warranty, as such, therefore, was not competent. Parol evidence of what, in some cases, would be an express warranty, could only be received in this case as establishing false and fraudulent representations." In most of the cases where parol evidence has been admitted, it was not done on the ground that the deed could have a warranty not mentioned therein added to it by parol; but it was admitted because it tended to establish a collateral and distinct undertaking, separate and apart from the deed. This was probably justifiable, but when the rule is insidiously attacked and

⁶⁵ *McMurphy v. Walker*, 20 Minn. 382.

⁶⁶ 2 Taylor, Ev., §§ 1035, 1036; *Pickering v. Dowson*, 4 Taunt. 779,

128 Eng. Reprint, 537; *Kain v. Old*, 2 Barn. & C. 627, 107 Eng. Reprint, 517.

cases containing opinions founded on bad reasons, all the more dangerous when the conclusion is correct, pass into law, the student finds himself in a wilderness of discouraging and inaccurate exceptions. While these cases do not profess to depart from the general rule, which rejects parol evidence when offered to vary or enlarge a written contract, they seem to us to proceed to evade that rule, without suggesting any general test by which to determine when such evasion is proper. In fact, while professing to respect the rule, they refuse to apply it; and if they be judicially sound, we know not when the rule may not be held inapplicable, or whether the existence of the rule ought to be affirmed or denied with the more confidence.⁶⁷

§ 489 (500). **As to deficiency of land in deeds.**—The question has frequently arisen whether parol evidence can be received in an action for damages or for money had and received to show that the number of acres designated in the deed in question is incorrect. In the absence of fraud, it has generally been held that, in a court of law, when the deed states by way of description the number of acres in the whole tract, parol evidence cannot be received to show that the land was sold at a given price per acre, and that there is a deficiency in the amount of land;⁶⁸ nor can a ver-

⁶⁷ From the note to *Green v. Batson*, *supra*, which concludes: "They furnish additional proof that hard cases are the quicksands of the law; in which quicksands the law is either hidden from light or smirched beyond recognition."

⁶⁸ *Carter v. Beck*, 40 Ala. 599; *Hogins v. Boggs*, 4 Cal. Unrep. 322, 34 Pac. 653; *Turner v. Rives*, 75 Ga. 606; *Doe v. Swails*, 3 Ind. 329; *Bladen v. Wells*, 30 Md. 577; *Clarke v. Lancaster*, 36 Md. 196, 11 Am. Rep. 486; *Child v. Wells*, 13 Pick. (Mass.) 121; *Nixon v. Porter*, 38 Miss. 401; *Kerr v. Calvit*, 1 Miss. 115, 12 Am. Dec. 537; *Hendricks v.*

Vivion, 118 Mo. App. 417, 94 S. W. 318; *Faure v. Martin*, 7 N. Y. 210, 57 Am. Dec. 515; *Cameron v. Irwin*, 5 Hill (N. Y.), 272; *Howes v. Barker*, 3 Johns. (N. Y.) 506, 3 Am. Dec. 526; *Herring v. Wiggs*, 4 N. C. 474; *Carrington v. Goddin*, 13 Gratt. (Va.) 587. In *See v. Mallonee*, 107 Mo. App. 721, 82 S. W. 557, there was clear proof of an agreed delay in paying portion of the purchase money pending the ascertainment of the true acreage. The case of *White v. Miller*, 22 Vt. 380, holds directly to the contrary of the text and cannot be regarded as of weight. The court expressed them-

bal warranty prior to the conveyance be proved.⁶⁹ In a recent Missouri case,⁷⁰ the various decisions are well discussed and apt illustrations given. In that case the grantee alleged he bought a farm, which, according to description, contained five hundred and fifty-seven acres, by the acre at forty dollars per acre, and only had five hundred and thirty-four acres, but the deed showed a gross sum of twenty-two thousand three hundred and thirty dollars as the consideration. It appeared that the land was subdivided into various parcels, some of which contained an acreage "more or less." The question was whether it was a sale of a given number of acres at a given price per acre or of the tract of land for a sum named. The court said the rule was well settled that where the description is by metes and bounds, or (as here) by divisions and subdivisions, into sections, half sections, quarter sections, etc., according to government survey, the description controls, and the number of acres stated must give way. If plaintiff desired that the deed show a sale by the acre, or that the tract was warranted to contain a certain number of acres, he should have had such provisions inserted. If a person of ordinary intelligence, in full possession of his faculties, knowingly enters into a contract, he will be bound by its terms, and, even if he does not read it, it will yet measure his rights and liabilities. The answer to the claim of purchase by the acre was that the grantee accepted a deed for the land in bulk at a price *in solido* for the entire tract. Parol evidence, therefore, of the survey showing the smaller acreage and of conversations between the parties, wherein the grantor said the land contained five hundred and fifty-seven acres and that he was selling it at forty dollars per acre, was excluded. But

selves in doubt when rendering the decision. In *Ludeke v. Sutherland*, 87 Ill. 481, 29 Am. Rep. 66, there was also a clear agreement as to adjustment of acreage, and the parol evidence was admitted on the

ground of proving the true consideration.

⁶⁹ *Cook v. Combs*, 39 N. H. 592, 75 Am. Dec. 241; *Cabot v. Christie*, 42 Vt. 121, 1 Am. Rep. 313; *Wadhams v. Swan*, 109 Ill. 46.

⁷⁰ *Hendricks v. Vivion*, *supra*.

in a court of equity parol evidence may be received to correct a *mistake* as to the quantity of land named in the deed.⁷¹

§ 490 (501). **Parol proof as to acknowledgments.**—The question of how far parol evidence can be admitted to impeach the acknowledgment of a deed is a very important one. An examination of the cases will disclose the fact that in all of them the law looks upon the acts of the official taking the acknowledgments as the most complete and satisfactory evidence of the facts recorded by them.⁷² Although the acknowledgment of deeds before an officer is, under statutes, generally an act necessary to entitle the deed to record, the fact of such acknowledgment is not in all cases established beyond dispute by the certificate of the officer. It is true, however, that the making of the *official certificate* is generally regarded as a *judicial act*;⁷³ that the certificate itself is the best evidence of the facts stated therein, and that the law imposes upon the officer the duty of ascertaining the truth of the matters stated by him.⁷⁴ But *as between the parties* to the conveyance, it is well settled that the acknowledgment may be impeached by parol proof that the same was never actually made, or that it was obtained by *fraud, duress or collusion* of which the grantee had knowledge.⁷⁵ The certificate of acknowledg-

⁷¹ Paine v. Upton, 87 N. Y. 327, 41 Am. Rep. 371; Hill v. Buckley, 17 Ves. Jr. 394, 34 Eng. Reprint, 153; Darling v. Osborne, 51 Vt. 148.

⁷² Kennedy v. Security Bldg. etc. Assn. (Tenn. Ch.), 57 S. W. 388, which contains a valuable review of the authorities.

⁷³ In New York and several other states it is held to be ministerial in character: Lynch v. Livingston, 6 N. Y. 422.

⁷⁴ Heeter v. Glasgow, 79 Pa. 79, 21 Am. Rep. 46; Lickmon v. Harding, 65 Ill. 505; Cover v. Manaway, 115 Pa. 338, 2 Am. St. Rep. 552, 8

Atl. 393. On the subject of this section, see note to Smith v. Ward, 1 Am. Dec. 81. Further as to acknowledgments, see § 520, *post*. See, also, 1 Ency. of Ev., p. 187 et seq.

⁷⁵ Grider v. American Freehold Land Mtg. Co., 99 Ala. 281, 42 Am. St. Rep. 58, 12 South. 775; Holt v. Moore, 37 Ark. 145; Chivington v. Colorado Springs Co., 9 Colo. 597, 14 Pac. 212; Smith v. Ward, 2 Root (Conn.), 374, 1 Am. Dec. 80, and note; Strauch v. Hathaway, 101 Ill. 11, 40 Am. Rep. 193; Jordan v. Corey, 2 Ind. 385, 52 Am. Dec. 516,

ment is, at the least, *prima facie* evidence of the facts stated therein;⁷⁶ and the proof should be clear and conclusive to overcome the presumption of regularity.⁷⁷ For example, it

and note; *Davis v. Hamblin*, 51 Md. 525; *O'Neil v. Webster*, 150 Mass. 572, 23 N. E. 235; *Allen v. Lenoir*, 53 Miss. 321; *Barrett v. Davis*, 104 Mo. 549, 16 S. W. 377; *Williamson v. Carskadden*, 36 Ohio St. 664; *Barnet v. Barnet*, 15 Serg. & R. (Pa.), 72, 16 Am. Dec. 516; *Schrader v. Decker*, 9 Pa. 14, 49 Am. Dec. 538; *Jamison v. Jamison*, 3 Whart. (Pa.) 457, 31 Am. Dec. 536; *Miller v. Wentworth*, 82 Pa. 280; *Heeter v. Glasgow*, 79 Pa. 79, 21 Am. Rep. 46; *Pierce v. Fort*, 60 Tex. 464; *Pickens v. Kinseley*, 29 W. Va. 1, 6 Am. St. Rep. 622, and note, 11 S. E. 932.

⁷⁶ *Borland v. Walrath*, 33 Iowa, 130; *Hourtienne v. Schnoor*, 33 Mich. 274; *Lickmon v. Harding*, 65 Ill. 505; *Van Orman v. McGregor*, 23 Iowa, 300. In *Heacock v. Lubuke*, 107 Ill. 396, the court held that the certificate of acknowledgment must prevail over the testimony of the grantor that it was false and forged. It will be noticed that in Illinois the court holds the act of the certifying officer to be a judicial act. In *Shields v. Netherland*, 5 Lea (Tenn.), 193, the court says: "The taking of the probate of an instrument under the authority of law is in the nature of a judicial act, an essential part of the conveyance, and cannot be contradicted by parol proof. The policy of the law requires that the official's certificate should be conclusive. If it were otherwise, and the certificate only *prima facie* evidence of the facts intended to be verified, the title to land would lose in great measure that security

which the registration laws were designed to insure. The probate can only be attacked for fraud."

⁷⁷ *Freeman v. Blount*, 172 Ala. 655, 55 South. 293, 296; *Bell v. Castelberry*, 96 Ark. 564, 132 S. W. 649; *Banning v. Banning*, 80 Cal. 271, 13 Am. St. Rep. 156, 22 Pac. 210; *Chivington v. Colorado Springs Co.*, 9 Colo. 597, 14 Pac. 212; *Gray v. Law*, 6 Idaho, 559, 96 Am. St. Rep. 280, 57 Pac. 435; *Ross v. Harney*, 139 Ill. App. 513; *Berdel v. Egan*, 125 Ill. 298, 17 N. E. 709; *Currier v. Clark*, 145 Iowa, 613, 124 N. W. 622; *Van Orman v. McGregor*, 23 Iowa, 300; *Duff v. Virginia Iron etc. Co.*, 136 Ky. 281, 124 S. W. 309; *Oriol v. His Creditors*, 22 La. Ann. 32; *Shelden v. Freeman*, 116 Mich. 646, 74 N. W. 1004; *Goulet v. Dubreuille*, 84 Minn. 71, 86 N. W. 779; *Albright v. Stevenson*, 227 Mo. 333, 126 S. W. 1027; *Rouse v. Witte*, 81 Neb. 368, 116 N. W. 43; *Hallohan v. Rempe*, 66 Misc. Rep. 27, 120 N. Y. Supp. 901; *Albany Bank v. McCarty*, 149 N. Y. 71, 43 N. E. 427 (full discussion and expressions of various learned judges indicating the nature of the proof required); *Greenleaf-Johnson Lumber Co. v. Leonard*, 145 N. C. 339, 59 S. E. 134; *Feagles v. Tanner*, 20 Ohio C. C. 86, 11 O. C. D. 172; *Cover v. Manaway*, 115 Pa. 338, 2 Am. St. Rep. 552, 8 Atl. 393; *Northwestern L. & B. Co. v. Jonasen*, 11 S. D. 566, 79 N. W. 840; *Kennedy v. Building etc. Assn.* (Tenn. Ch. App.), 57 S. W. 388; *Western Loan etc. Co. v. Waisman*, 32 Wash. 644, 73 Pac. 703; *Rollins v. Menager*, 22 W. Va. 461; *Smith v. Allis*, 52 Wis. 337, 9 N. W.

may always be shown by parol that the party by whom the acknowledgment is alleged to have been made did *not* appear before the officer and acknowledge the instrument. When a deed of property in Virginia, recorded nineteen years after its date and after the death of all the parties, purported to have been acknowledged in Kentucky, parol evidence of the children of one of the grantors, whose wife appeared to have joined in the conveyance, was admitted to show that their parents had never been in Kentucky.⁷⁸ But the evidence alone of the party who denies the acknowledgment is not sufficient to overcome the certificate of the officer. If the evidence of the grantor should be held sufficient to overcome the certificate of the acknowledgment, then most real estate would be held by a slender and uncertain tenure. Where the value of the property is large, and the conscience of the grantor weak, it would afford a powerful inducement for him to claim and swear that the signature to his deed was a forgery, and thus recover the land which he had sold, and for which he had been paid.⁷⁹ Not only should it be supported, but its corroboration must be material.⁸⁰ There are strong and manifest reasons for the

155; *Adams v. Smith*, 11 Wyo. 200, 221, 70 Pac. 1043; *Linton v. National Life Ins. Co.*, 104 Fed. 584, 44 C. C. A. 54.

⁷⁸ *Bouvier-Iaeger Coal Land Co. v. Sypher*, 186 Fed. 644.

⁷⁹ *Blackman v. Hawks*, 89 Ill. 512. See, also, *Miller v. Marx*, 55 Ala. 322; *Jansen v. McCahill*, 22 Cal. 563, 83 Am. Dec. 84; *Gray v. Law*, 6 Idaho, 559, 96 Am. St. Rep. 280, 57 Pac. 435; *O'Donnell v. Kelliher*, 62 Ill. App. 641; *Shaw v. Shaw* (Ky.), 24 S. W. 630; *Shelden v. Freeman*, 116 Mich. 646, 74 N. W. 1004; *Goulet v. Dubreuille*, 84 Minn. 72, 86 N. W. 779; *Biggers v. St. Louis Mut. House Bldg. Co.*, 9 Mo. App. 210; *Davis v. Kelly*, 62 Neb. 642, 87 N. W. 347; *Marden v. Dorothy*, 12 App. Div. 176, 188, 42 N. Y.

Supp. 827, 834; *McCardia v. Billings*, 10 N. D. 373, 88 Am. St. Rep. 729, 87 N. W. 1008; *Baldwin v. Snowden*, 11 Ohio St. 203, 78 Am. Dec. 303; *Heeter v. Glasgow*, 79 Pa. 79, 21 Am. Rep. 46; *Earle v. Chace*, 12 R. I. 374; *Kennedy v. Security Bldg. etc. Assn. (Tenn. Ch.)*, 57 S. W. 388; *Summers v. Sheern* (Tex. Civ. App.), 37 S. W. 246; *Morrison v. Morrison*, 27 Gratt. (Va.) 190; *Young v. Duvall*, 109 U. S. 573, 27 L. Ed. 1036, 3 Sup. Ct. Rep. 414. See, also, a compendious note with many illustrations on the evidence requisite to impeach acknowledgments, to the case of *Ford v. Ford*, 7 Ann. Cas. 249.

⁸⁰ *Brady v. Cole*, 164 Ill. 123, 45 N. E. 438; *Herrick v. Musgrove*, 67 Iowa, 63, 24 N. W. 594; *Rogers v.*

rule which has come to prevail that acknowledgments cannot be thus impeached as against *those who purchased subsequently* and in good faith, *without notice* of any irregularity or fraud. Purchasers in a majority of cases are compelled to rely upon the public records in their examination of titles; and there could be no reliance upon such records or upon titles, if the claims of *bona fide* purchasers might be defeated by parol evidence that parties had not in fact acknowledged deeds signed by them and recorded in compliance with every formality of law. The decisions uniformly establish the rule that, in cases where the certificate is regular in form, and the grantor knew that he was in the presence of a competent officer who was making an attempt to take the acknowledgment, it cannot be impeached as against an innocent purchaser on account of any error or omission in its taking.⁸¹ There is authority for saying that, where a perfect deed has been signed and acknowledged by a married woman before the proper officer, an inquiry into the examination of the *feme covert*, embracing the requisites of the statute, as constituting the acknowledgment, with a view to contradict the writing, is inadmissible; that the acts of the officer for this purpose are judicial and conclusive.⁸² The following may be taken

Manley, 46 Minn. 403, 49 N. W. 194; Thams v. Sharp, 49 Neb. 237, 68 N. W. 474; Linde v. Gudden, 109 Wis. 326, 85 N. W. 323.

⁸¹ Giddens v. Bolling, 99 Ala. 319, 13 South. 511; Holt v. Moore, 37 Ark. 145; De Arnaz v. Escandon, 59 Cal. 486; Ladew v. Paine, 82 Ill. 221; Kerr v. Russell, 69 Ill. 666, 18 Am. Rep. 634; McHenry v. Day, 13 Iowa, 445, 81 Am. Dec. 438; Godsey v. Virginia Iron etc. Co., 26 Ky. Law Rep. 657, 82 S. W. 386; Ridgely v. Howard, 3 Har. & McH. (Md.) 321; White v. Graves, 107 Mass. 325, 9 Am. Rep. 38; Kennedy v. Price, 57 Miss. 771; Baldwin v. Snowden, 11 Ohio St. 203, 78 Am.

Dec. 303; Moore v. Fuller, 6 Or. 272, 25 Am. Rep. 524; Singer Mfg. Co. v. Rook, 84 Pa. 442, 24 Am. Rep. 204; Williams v. Baker, 71 Pa. 476; Shields v. Netherlands, 5 Lea (Tenn.), 193; Webb v. Burney, 70 Tex. 322, 7 S. W. 841; Forbes v. Thomas (Tex. Civ. App.), 51 S. W. 1097; Kocourek v. Marak, 54 Tex. 201, 33 Am. Rep. 623; Pickens v. Knisely, 29 W. Va. 1, 11 S. E. 932, 6 Am. Rep. 622, and note. See Ency. of Ev., p. 187 et seq.

⁸² Drury v. Foster, 2 Wall. (U. S.) 24, 17 L. Ed. 780. In Hitz v. Jenks, 123 U. S. 297, 31 L. Ed. 156, 8 Sup. Ct. Rep. 143, Mr. Justice Gray, in delivering the opinion of the court, after quoting from the opinions just cited,

as the established rule: As against a *bona fide* purchaser or mortgagee, who is not a party to the instrument, and who has paid his money in reliance upon the record of a certificate of the acknowledgment of a deed or instrument duly signed and delivered which affects the title to real estate, the grantors are conclusively estopped from denying the existence of the facts stated in the certificate which the officer had jurisdiction to ascertain and certify.⁸³ On the other hand, when the *acknowledgment* is materially *defective* on its face, as where something required by the statute is omitted, such defect cannot be helped out by parol evidence.⁸⁴ So where the record is *irregular* because the person taking the acknowledgment gives himself no official character in his certificate or subscription, it has been held that parol evidence cannot be given to show that the person was in fact duly qualified to take the acknowledgment.⁸⁵ But in aid of such acknowledgment, the court may examine and take into consideration *matters stated in the deed itself* or in any part of it.⁸⁶ When, however, the statute does not

said: "It would be inconsistent with the reasons above stated, as well as with a great weight of authority, to hold that, in the case of a deed actually executed by a married woman of full age and sound mind, a certificate of her separate examination and acknowledgment in the form prescribed by the statute, and duly recorded with the deed, can afterward, except for fraud, be controlled or avoided by extrinsic evidence of the manner in which the examination was conducted by the magistrate."

⁸³ *Linton v. National Life Ins. Co.*, 104 Fed. 584, 44 C. C. A. 54; *Miller v. Wentworth*, 82 Pa. 280; *Whart. Ev.*, § 1052.

⁸⁴ *Watson v. Bailey*, 1 Binn. (Pa.) 470, 2 Am. Dec. 462; *Barnet v. Barnet*, 15 Serg. & R. (Pa.) 72, 16 Am. Dec. 516; *Ennor v. Thompson*, 46 Ill. 214; *Harty v. Ladd*, 3 Or. 353; *Merritt v. Yates*, 71 Ill. 636, 23 Am.

Rep. 128; *Cox v. Holcomb*, 87 Ala. 589, 13 Am. St. Rep. 79, 6 South. 309; *Jourdan v. Jourdan*, 9 Serg. & R. (Pa.) 268, 11 Am. Dec. 724; *Barnett v. Shackleford*, 6 J. J. Marsh. (Ky.) 532, 22 Am. Dec. 100. See note to *Jordan v. Corey*, 52 Am. Dec. 520.

⁸⁵ *Johnston v. Haines*, 2 Ohio, 55, 15 Am. Dec. 533; *Shults v. Moore*, 1 McLean, 520, 22 Fed. Cas. No. 12,824. See, also, *Livingston v. McDonald*, 9 Ohio, 168.

⁸⁶ *Carpenter v. Dexter*, 8 Wall. (U. S.) 513, 19 L. Ed. 426, *Brunswick-Balke-Collender Co. v. Brackett*, 37 Minn. 58, 33 N. W. 214. In a recent case (*Beaty v. Sears*, 132 Ga. 516, 64 S. E. 321) it was held that where a contract purported to have been executed at "Buford, Ga.," but it did not appear from the writing or attestation where the attesting notary resided or received his appointment, the court

call for the description of the official character in the certificate, it may be supplied by parol evidence. It has been laid down by the United States supreme court that whenever it is established by proof that the acknowledgment was made before persons authorized to take it, it must be presumed to have been taken by them in their official capacity; "and when their official characters are sufficiently shown by parol evidence, or by the admissions of the parties, we see no reason for requiring more, where the acts of the legislature have not prescribed it. On the contrary, the soundest principles of justice and policy would seem to demand that every reasonable intendment should be made to support the titles of the *bona fide* purchasers of real property; and this court is not disposed to impair their safety, by insisting upon matters of form, unless they were evidently required by the legislative authority."⁸⁷

§ 491 (502). Parol evidence to explain receipts.—A receipt is a written admission, made by the party signing it, of the fact which it recites, and is evidence against him, at all times, that the fact so admitted is true. In that respect it is like an unwritten or verbal admission of a fact, and derives no greater legal effect from the written form in which it is preserved than attaches to writing in general, as a safer and more enduring memorial than the mere recollection of a witness of what was said and done. It is not of the nature of a written contract, whose tenor and purport cannot be affected by the evidence of what was said or done contrary to its terms. The consequence is, that like a mere verbal admission, it may be contradicted

would take judicial notice of the fact that Buford was an incorporated town in Gwinnett county (Perry v. State, 113 Ga. 936, 39 S. E. 315), and it would be presumed that the attesting notary resided and received his appointment therein, where he had the right to attest such writings. See § 520, *post*.

⁸⁷ Van Ness v. Bank of United

States, 13 Pet. (U. S.) 17, 10 L. Ed. 38. See the discussion of this case in Shults v. Moore, 1 McLean, 520, Fed. Cas. No. 12,824. See, also, Fabian v. Callahan, 56 Cal. 159; Byer v. Etnyre, 2 Gill (Md.), 150, 41 Am. Dec. 410; Bellows v. Copp, 20 N. H. 492; Bennet v. Paine, 7 Watts (Pa.), 334, 32 Am. Dec. 765; Silcock v. Baker, 25 Tex. Civ. App. 508, 61 S. W. 939.

by evidence to show that it was founded in misapprehension or surprise; that it was made for a particular purpose, and that its use was by the understanding of the parties to be limited to special occasions. If it forms a part of a contract, and is embodied in the writing which contains its terms, it may still be contradicted, and the stipulations founded upon the consideration admitted to have been received may fail in such cases for want of consideration.⁸⁸ Hence the rule that a written receipt for the payment of money is not conclusive, and that it is open to explanation by parol.⁸⁹ Receipts are usually general in their expres-

⁸⁸ *Pendexter v. Carleton*, 16 N. H. 482.

⁸⁹ *Jones Cotten Co. v. Snead*, 169 Ala. 566, 53 South. 988; *Lynn v. Bean*, 141 Ala. 236, 37 South. 515; *Cleveland-McCleod Lumber Co. v. McLeod*, 6 Ark. 405, 131 S. W. 878; *California Packers' Co. v. Merritt Fruit Co.*, 6 Cal. App. 507, 92 Pac. 509; *Hawley v. Bader*, 15 Cal. 44; *Schlessinger v. Schlessinger*, 39 Colo. 44, 8 L. R. A., N. S., 863, 88 Pac. 970; *Calhoun v. Richardson*, 30 Conn. 210; *Brinser v. Fidelity Trust Co.*, 1 Boyce (Del.), 220, 75 Atl. 792; *Connell v. Vanderwerken*, 1 Mackey (D. C.), 242; *Williams v. Empire etc. Ins. Co.*, 8 Ga. App. 303, 68 S. E. 1082; *Bigham v. Coleman*, 71 Ga. 176; *Gagnon v. Molden*, 15 Idaho, 727, 99 Pac. 965; *Barghoorn v. Moore*, 6 Idaho, 531, 57 Pac. 265; *Loeb v. Flannery*, 148 Ill. App. 471; *Carr v. Miner*, 24 Ill. 179; *Forde v. Scribner*, 108 Ind. 85, 9 N. E. 122; *Henry v. Henry*, 11 Ind. 236, 71 Am. Dec. 354; *State v. Meier*, 140 Iowa, 540, 118 N. W. 792; *Higley v. Burlington etc. Ry. Co.*, 99 Iowa, 503, 61 Am. St. Rep. 250, 68 N. W. 829; *Ellicott v. Barnes*, 31 Kan. 170, 1 Pac. 767; *Mussellam v. Cincinnati etc. R. Co.*, 126 Ky. 500, 31 Ky. Law Rep. 908, 104 S. W. 337; *Knox v. Barbee*, 3 Bibb (Ky.), 526; *Lee v. Carter*, 52

La. Ann. 1453, 27 South. 739; *Truworthy v. French*, 97 Me. 143, 53 Atl. 1005; *Bladen v. Wells*, 30 Md. 577; *Brown v. South Boston Sav. Bank*, 148 Mass. 300, 19 N. E. 382; *French v. Newberry*, 124 Mich. 147, 82 N. W. 840; *Elsbarg v. Myrman*, 41 Minn. 541, 43 N. W. 572; *Shotwell v. Hamblin*, 23 Miss. 156, 55 Am. Dec. 83; *Anderson v. Root*, 8 Smedes & M. (Miss.) 362; *Anderson v. Cole*, 234 Mo. 1, 136 S. W. 395; *McFadden v. Missouri Pac. Ry. Co.*, 92 Mo. 343, 1 Am. St. Rep. 721, 4 S. W. 689; *Hennessey v. Kennedy Furniture Co.*, 30 Mont. 264, 76 Pac. 291; *Waters v. Phelps*, 81 Neb. 674, 116 N. W. 783; *Morse v. Rice*, 36 Neb. 212, 54 N. W. 308; *Devenenzi v. Cassinelli*, 28 Nev. 222, 81 Pac. 41; *Cass v. Brown*, 68 N. H. 85, 44 Atl. 86; *Edgerly v. Emerson*, 23 N. H. 555, 55 Am. Dec. 207; *Joslin v. Giese*, 59 N. J. L. 130, 36 Atl. 680; *Swain v. Frazier*, 35 N. J. Eq. 326; *Reedy Elevator Co. v. Berman*, 107 N. Y. Supp. 59; *Komp v. Raymond*, 175 N. Y. 102, 67 N. E. 113; *Keaton v. Jones*, 119 N. C. 43, 25 S. E. 710; *Harper v. Dail*, 92 N. C. 394; *Milos v. Covacevich*, 40 Or. 239, 66 Pac. 914; *Gregory v. Huslander*, 227 Pa. 607, 76 Atl. 422; *Shoemaker v. Stiles*, 102 Pa. 549; *Vaughan v. Mason*, 23 R. I. 348, 50 Atl. 390;

sions, and many matters not considered at the time might be controlled by such general expressions contrary to right and to the intention of the parties; hence it is, as we have said, that such instruments are generally treated as *admissions open to explanation, and not as conclusive*.⁹⁰ So it may be shown that a receipt purporting to be for money was in fact given for securities.⁹¹ A receipt in full has been

Rapley v. Klugh, 40 S. C. 134, 18 S. E. 680; Bulwinkle v. Cramer, 27 S. C. 376, 13 Am. St. Rep. 645, 3 S. E. 776; Osborne v. Stringham, 4 S. D. 593, 57 N. W. 776; Stewart v. Phoenix Ins. Co., 9 Lea (Tenn.), 104; Patterson v. Gulf etc. Ry. Co. (Tex. Civ. App.), 126 S. W. 336; McLane v. Johnson, 59 Vt. 237, 9 Atl. 837; Tuley v. Barton, 79 Va. 387; Gronning v. Elliott Bay Mill etc. Co., 61 Wash. 676, 112 Pac. 937; Cushwa v. Improvement Loan etc. Assn., 45 W. Va. 490, 32 S. E. 259; Seegar v. Manitowoc Steam Boiler Wks., 120 Wis. 11, 97 N. W. 485; Fire Ins. Assn. v. Wickham, 141 U. S. 564, 35 L. Ed. 860, 12 Sup. Ct. Rep. 84; The Lady Franklin, 8 Wall. (U. S.) 325, 19 L. Ed. 455; Beall v. Hudson County Water Co., 185 Fed. 179; Skaife v. Jackson, 3 Barn. & C. 421, 107 Eng. Reprint, 790; Wallace v. Kelsall, 7 Mees. & W. 273, 10 L. J. Ex. 12, 4 Jur. 1064; Rambert v. Cohen, 4 Esp. 214, 6 R. R. 854; Lancey v. Brake, 10 Ont. 428. As to the general subject of receipts, see, also, note to Sullivan v. Lear, 11 Am. St. Rep. 393. See the late cases: Barthell v. Hermanston (Iowa), 138 N. W. 1108; Channel Commercial Co. v. Hourihan (Cal. App.), 129 Pac. 947; Paddock v. Hatch, 169 Mich. 95, 134 N. W. 990; Gutierrez v. Garcia, 138 N. Y. Supp. 1079; Richtman v. Watson, 150 Wis. 385, 136 N. W. 797.

⁹⁰ Thus, a *tax receipt* is not conclusive evidence upon the question for whom taxes are paid: Rand v. Sco-

field, 43 Ill. 167; Elston v. Kennicott, 46 Ill. 187; nor that the description of land therein is correct: Paris v. Lewis, 85 Ill. 597; it may be shown that a *receipt for "currency"* is for money: Reading v. Traver, 83 Ill. 372; that a receipt of payment for a bill of goods was given *for a note* of a third person: Johnson v. Weed, 9 Johns. (N. Y.) 310, 6 Am. Dec. 279; that the receipt was given *on condition* that it should not be binding until a certain act should be performed: House v. Low, 2 Johns. (N. Y.) 378; that a recital in *partnership articles* of the amount contributed by a partner is incorrect: Lowe v. Thompson, 86 Ind. 503. A *certificate of deposit* issued by a bank is in the nature of a receipt, and may be explained: Hotchkiss v. Mosher, 48 N. Y. 478; and the same is true of *bankers' pass-books*: Commercial Bank v. Rhind, 1 Macq. (H. L.) 643. A receipt given a *carrier for freight* has been held not conclusive: C. H. Rugg Co. v. Ormrod, 198 N. Y. 119, 91 N. E. 366. The *capacity or character* in which a party is named in a receipt is open to parol explanation: Brinser v. Fidelity Trust Co., 1 Boyce (Del.), 220, 75 Atl. 792. That part of a *bill of lading* which is the receipt may be explained by parol: Alabama etc. R. Co. v. Norris, 167 Ala. 311, 52 South. 891; as also may a *railway ticket*: Levan v. Atlantic etc. R. Co., 86 S. C. 514, 68 S. E. 770.

⁹¹ Trisler v. Williamson, 4 Har. & McH. (Md.) 219, 1 Am. Dec. 396;

held open to parol explanation.⁹² Receipts which are executed in the form of releases under seal purporting to be in full of all demands may be explained by proof of fraud or mistake.⁹³ But *where the receipt purports to be a full settlement* or compromise of a claim, the courts have frequently refused to admit parol proof of the omission of other terms or conditions.⁹⁴ In such case the document is contractual and cannot be varied.⁹⁵ On the other hand, there are cases evincing a tendency to open for explanation any receipts which are not contractual, even though they are in full of all demands. Thus, in an action of covenant defendant pleaded a release, which recited that various disputes were existing between the parties, and that actions had been brought against each other which were still pending, but that it had been agreed between them, that in order to put an end thereto, the defendant should pay the plaintiff one hundred and fifty pounds, and that each should release the other from all actions, causes of action and claims brought by him, or which he had against the other, and the instrument then proceeded to release "all claims, demands, actions whatsoever." It was held that parol evidence was admissible to show that the

Rarden v. Cunningham, 136 Ala. 263, 34 South. 26; *Mounce v. Kurtz*, 101 Iowa, 192, 70 N. W. 119; *Ireland v. Spickard*, 95 Mo. App. 53, 68 S. W. 748; *Twohy Mercantile Co. v. McDonald*, 108 Wis. 21, 83 N. W. 1107.

⁹² *Dewees v. Bostwick Lumber & Mfg. Co.*, 96 Miss. 253, 50 South. 865.

⁹³ *Jones v. Ward*, 10 Yerg. (Tenn.) 160; *Schultz v. Chicago etc. Ry. Co.*, 44 Wis. 638; *Butler v. Regents*, 32 Wis. 124; *Kentucky Cement Co. v. Cleveland*, 4 Ind. App. 171, 30 N. E. 802; *Fire Ins. Assn. v. Wickham*, 141 U. S. 564, 35 L. Ed. 860, 12 Sup. Ct. Rep. 84.

⁹⁴ *State v. Messick*, 1 Houst. (Del.) 347; *Coon v. Knap*, 8 N. Y. 402, 59 Am. Dec. 502; *Squires v. Amherst*, 145 Mass. 192, 13 N. E. 609; *Goodwin*

v. Goodwin, 59 N. H. 548; *Stapleton v. King*, 33 Iowa, 28, 11 Am. Rep. 109; *White v. Richmond Ry. Co.*, 110 N. C. 456, 15 S. E. 197; *Clark v. Mallory*, 185 Ill. 227, 56 N. E. 1099; *Indianapolis U. R. Co. v. Houlihan*, 157 Ind. 494, 60 N. E. 943; *Drumm Flato Commission Co. v. Barnard*, 66 Kan. 568, 72 Pac. 257; *Cassilly v. Cassilly*, 57 Ohio St. 582, 49 N. E. 795.

⁹⁵ *Bofinger v. Tuyes*, 120 U. S. 198, 30 L. Ed. 649, 7 Sup. Ct. Rep. 529; *Cummings v. Baars*, 36 Minn. 350, 31 N. W. 449; *Squires v. Amherst*, 145 Mass. 192, 13 N. E. 609; *Conant v. Kimball*, 95 Wis. 550, 70 N. W. 74; *Pratt v. Castle*, 91 Mich. 484, 487, 52 N. W. 52.

claim upon the covenant was not intended to be included in the release, Littledale, J., saying: "There can be no doubt that the matter contemplated in this release was the actions there referred to, and parol evidence was admissible to show that the subject matter of the present action was not involved in them."⁹⁶ In the United States supreme court it has been held that the circumstances attending the execution of a receipt in full of all demands may be given in evidence to show that by mistake it was made to express more than intended, and that the creditor had in fact claims that were not included.⁹⁷ The ordinary rules for the construction of ambiguous instruments apply, of course, to receipts. Thus, where a party insured against accident so that he should receive a certain sum per month for twenty-four consecutive months, and, having had an accident, was receiving his monthly amount when he met with another accident, and in the receipt for the final payment under the first claim there was included an amount on account of the second injury, and the receipt contained the words "in full settlement for any and all claims under policy No. 109,931 to this date," the court held the receipt open to parol explanation. It was contended that the receipt was a settlement in full for all injuries to date, but the court admitted the construction that it was a partial settlement for sums then due on the second injury.⁹⁸ Some of the authorities would seem to leave it a little in doubt just what force they would give to receipt acknowledging payment "in full" of a specified debt, or "in full of all accounts" or "all demands." Of course, like any

⁹⁶ *Simons v. Johnson*, 3 Barn. & Ad. 175, 110 Eng. Reprint, 65. Other cases to the same effect are: *Lawrence v. Schuykill Nav. Co.*, Fed. Cas. No. 8143, 4 Wash. C. C. 562; *Payler v. Homersham*, 4 Maule & S. 423, 16 R. R. 516; *Jackson v. Stackhouse*, 1 Cow. (N. Y.) 122, 13 Am. Dec. 514; *Grumley v. Webb*, 44 Mo. 111, 100 Am. Dec. 304; *Price v.*

Treat, 29 Neb. 536, 45 N. W. 790; *St. Louis Ft. S. & W. R. Co. v. Davis*, 35 Kan. 464, 11 Pac. 421.

⁹⁷ *Fire Ins. Assn. v. Wickham*, *supra*. See, also, *Ireland v. Spickard*, 95 Mo. App. 53, 68 S. W. 748.

⁹⁸ *Thetford v. General Accident etc. Corp.*, 140 Mo. App. 254, 124 S. W. 39.

other receipt, it may be contradicted by parol evidence that the *payment* was not made as acknowledged in the receipt.⁹⁹ But where it contains anything in the nature of an agreement or stipulation, upon a compromise or settlement of disputed claims or unliquidated damages, that the one party shall receive and accept from the other a certain sum in acquittance and discharge of such claims, it is in the nature of a contract, and cannot be varied or contradicted by parol, but is conclusive upon the parties, in the absence of fraud or mistake.¹⁰⁰

§ 492 (503). Effect of receipts when not explained.—

A written receipt is evidence of a high character. Although it is not conclusive, it is *prima facie* evidence of the truth of the recitals which it contains. It is evidence of so satisfactory a character as *not to be overcome, except by clear and convincing testimony*; and the burden of proof as a matter of course rests upon the one attacking it.¹ But such circumstances of fraud or mistake or suspicion as would lead a court of equity to set aside a contract may be shown, either in an equitable or legal proceeding, to vary or impugn the receipt.² Although an instrument is in form a receipt, if it is in fact a *complete contract*, it is governed, as we have shown in the preceding section, by

⁹⁹ *Morris v. St. Paul etc. Ry. Co.*, 21 Minn. 91.

¹⁰⁰ *Motley v. Motley*, 45 Ala. 555; *Bull v. Bull*, 43 Conn. 455; *Henry v. Henry*, 11 Ind. 236, 71 Am. Dec. 354; *Thompson v. Williams*, 30 Kan. 114, 1 Pac. 47; *Stevens v. Wiley*, 165 Mass. 402, 43 N. E. 177; *Squires v. Amherst* 145 Mass. 192, 13 N. E. 609; *Sloman v. National Exp. Co.*, 134 Mich. 16, 5 N. W. 999; *James v. Bligh*, 11 Allen (Mass.), 4; *Cummings v. Baars*, 35 Minn. 350, 31 N. W. 449; *Sencerbox v. McGrade*, 6 Minn. 484; *Carpenter v. Jamison*, 6 Mo. App. 216; *Morse v. Rice*, 36 Neb. 212, 54 N. W. 308; *Goodwin v. Goodwin*, 59 N. H. 548; *Coon v. Knap*, 8 N. Y. 402, 59

Am. Dec. 502; *Brown v. Brooks*, 7 Jones (N. C.), 93; *Jackson v. Ely*, 57 Ohio St. 450, 49 N. E. 792; *Stone v. Vance*, 6 Ohio, 246; *Vaughan v. Mason*, 23 R. I. 348, 50 Atl. 390; *Kammernmayer v. Hilz*, 107 Wis. 101, 82 N. W. 689; *Harrison v. Juneau Bank*, 17 Wis. 340; *The Cayuga*, 59 Fed. 483, 8 C. C. A. 188.

¹ *Harden v. Gordon*, Fed. Cas. No. 6047, 2 Mason (U. S.), 541; *Winchester v. Grosvenor*, 44 Ill. 425; *Twohy Mercantile Co. v. Estate of McDonald*, 108 Wis. 21, 83 N. W. 1107.

² *Fuller v. Crittenden*, 9 Conn. 401, 23 Am. Dec. 364; *Sessions v. Gilbert*, *Brayt. (Vt.)* 75; *Jones v. Ward*, 10 Yerg. (Tenn.) 160.

the same rules in this respect as are other contracts, and cannot be varied by parol. But if the instrument is of a *dual character*, being both a receipt and a contract, the part which is a receipt may be explained;³ and, if a contract is incorporated in a receipt, or a receipt in a contract, the receipt may be varied, although the contract may not.⁴ Thus, an instrument in the form of a receipt for goods specifying kinds, numbers, prices and total value, which is in the handwriting of the receiver and on which the other party indorses the money paid, is a contract of sale, and cannot be varied by parol.⁵ And an instrument in the following words, "Received of Jacob W. Loeb one thousand dollars to be held by me for him and to be returned to him by me upon ten days' notice in writing," which constitutes both a receipt and a contract, is not open to explanation contradicting the contractual part, while it could be, of course, open to challenge as to the receipt of the

³ *Prairie School Tp. v. Haseleu*, 3 N. D. 328, 55 N. W. 938; *Burke v. Ray*, 40 Minn. 34, 41 N. W. 240; *Gravlee v. Lamkin*, 120 Ala. 210, 24 South. 756.

⁴ *Alabama Great Southern R. Co. v. Norris*, 167 Ala. 311, 52 South. 891; *Warmack v. Askew*, 97 Ark. 19, 132 S. W. 1013; *Barber v. Brace*, 3 Conn. 9, 8 Am. Dec. 149; *Tatman v. Barrett*, 3 Houst. (Del.) 226; *Graham v. Peacock*, 131 Ga. 785, 63 S. E. 348; *Hosack v. Moody*, 35 Ill. App. 17; *Forde v. Scribner*, 108 Ind. 85, 9 N. E. 122; *Alcorn v. Morgan*, 77 Ind. 184; *Marks v. Cass County Mill etc. Co.*, 43 Iowa, 146; *Thompson v. Williams*, 30 Kan. 114, 1 Pac. 47; *Lemaster v. Burekhardt*, 2 Bibb (Ky.), 25; *Young v. Cook*, 15 La. Ann. 126; *Bursley v. Hamilton*, 15 Pick. (Mass.) 40, 25 Am. Dec. 423; *Cohen v. Jackoboice*, 101 Mich. 409, 59 N. W. 665; *Cummings v. Baars*, 36 Minn. 350, 31 N. W. 449; *Johnson v. Johnson*, 74 Miss. 54, 21 South. 147; *Blakely v.*

Bennecke, 58 Mo. 193; *Waters v. Phelps*, 81 Neb. 674, 116 N. W. 783; *Cass v. Brown*, 68 N. H. 85, 44 Atl. 86; *Meyer v. Lathrop*, 73 N. Y. 315; *Smith v. Holland*, 61 N. Y. 635; *Grier v. Mutual L. Ins. Co.*, 132 N. C. 542, 44 S. E. 28; *Prairie School Tp. v. Haseleu*, 3 N. D. 328, 55 N. W. 938; *Stone v. Vance*, 6 Ohio, 246; *Milos v. Covacevich*, 40 Or. 239, 66 Pac. 914; *Wood v. Donahue*, 94 Pa. 128; *Vaughan v. Mason*, 23 R. I. 348, 50 Atl. 390; *Harris v. Dinkins*, 4 Desaus. (S. C.) 60; *Washabaugh v. Hall*, 4 S. D. 168, 56 N. W. 82; *Stewart v. Phoenix Ins. Co.*, 9 Lea (Tenn.), 104; *Bumpass v. Mitchell* (Tex. Civ. App.), 129 S. W. 194; *McGregor v. Bugbee*, 15 Vt. 734; *Tuley v. Barton*, 79 Va. 387; *Harrison v. Juneau Bank*, 17 Wis. 340; *Fire Ins. Assn. v. Wickham*, 141 U. S. 564, 35 L. Ed. 860, 12 Sup. Ct. Rep. 84; *Lancey v. Brake*, 10 Ont. 428.

⁵ *Schultz v. Coon*, 51 Wis. 416, 37 Am. Rep. 839, 8 N. W. 285.

money.⁶ "But when the receipt contains no general or vague expressions, but all is definitely descriptive of what is intended to be effected by it, such a receipt, like other writings in general, must not be assailed with parol testimony, unless on the ground of fraud";⁷ and a receipt "in full of all demands" includes judgments; and parol proof to show the contrary is not admissible.⁸ Obviously, if the *contents* of a receipt are to be proved, the receipt is the best evidence.⁹ Although the rule that receipts may be modified and explained by parol is one of very wide application, yet there are circumstances under which one giving a receipt may be estopped from offering proof of this character. Thus, it has frequently been held that a *receiptor* cannot relieve himself from liability by showing that *attached property* which was receipted for by him was not subject to attachment or not the property of the defendant,¹⁰ al-

⁶ *Loeb v. Flannery*, 148 Ill. App. 471. See, also, *Goodwin v. Goodwin*, 59 N. H. 548; *Prairie School Township v. Haseleu*, 3 N. D. 328, 55 N. W. 938. If a policy of life insurance, which on its face acknowledges the receipt of the first premium, is (without fraud, accident, or mistake) delivered to the insured by the company or its authorized agent, and the first premium is not in fact paid in cash, it will be conclusively presumed that the company intended to waive the payment of the first premium in cash and to extend credit to the insured. But the acknowledgment of the receipt of the premium, as contained in the face of the policy, may be explained by showing that, contemporaneously with the delivery of the policy, the insured executed his promissory note, payable to the company, for the premium, and that, by the terms of the policy, failure to pay the premium note at maturity would forfeit the policy: *Williams v. Empire etc. Ins. Co.*, 8 Ga. App. 303, 68 S. E. 1082.

When the settlement contract of an action set out the actual sum paid on the signing of it and the consideration was, and was stated to be, contractual, parol evidence was not admissible to vary the contract as to payment of attorney's fees: *Hurr v. Metropolitan St. R. Co.*, 141 Mo. App. 217, 124 S. W. 1057. When the acreage of certain land about to be exchanged was in dispute and subsequently a receipt was given covering all demands, and no fraud or mistake was alleged, parol evidence to open up the dispute as to area was inadmissible: *Cache Valley Lumber Co. v. Culver Co.*, 93 Ark. 383, 125 S. W. 430.

⁷ *Raymond v. Roberts*, 2 Aikens (Vt.), 204, 16 Am. Dec. 698.

⁸ *Henry v. Henry*, 11 Ind. 236, 71 Am. Dec. 354.

⁹ *Humphries v. McCraw*, 5 Ark. 61; *Zube v. Weber*, 67 Mich. 52, 34 N. W. 264.

¹⁰ *Cornell v. Dakin*, 38 N. Y. 253; *People v. Reeder*, 25 N. Y. 302; *Bur-*

though there has been much discussion and considerable conflict of opinion on this subject.¹¹ When a receipt from a dentist for a set of teeth warranted them for one year, and that "if on trial they cannot be made useful," they might be returned and the money refunded, the dentist was not permitted to give parol evidence that such was not the original agreement and that the warranty was without consideration.¹² In the settlement of claims for personal injury, it not infrequently happens that one of the matters discussed is the future employment of the plaintiff by the defendant, and if, as contradistinguished from a mere hope of re-employment or a casual statement by the defendant of a promise of chance employment, it becomes one of the specific terms of the settlement, then it is necessary that it should be embodied in the writing evidencing the settlement or the plaintiff will be unable to enforce it. The rule is familiar that conversations or negotiations which result in the execution of a written contract complete on its face are regarded as merged in that instrument. When the writing itself upon its face is couched in such terms as import a complete legal obligation without any uncertainty as to the object or extent of the engagement, it is conclusively presumed that the whole engagement of the parties, and the extent and manner of their undertaking, were reduced to writing.¹³ In a comparatively recent case,¹⁴ such an oral settlement was effected that the plaintiff was to be employed by the defendant, and to receive a sum by way of compensation for his injuries. The settlement was re-

rall v. Acker, 23 Wend. (N. Y.) 606, 35 Am. Dec. 582; Dezell v. Odell, 3 Hill (N. Y.), 215, 38 Am. Dec. 628. See note to Bursley v. Hamilton, 25 Am. Dec. 426-429.

¹¹ Pedobscot Boom Co. v. Wilkins, 27 Me. 345; Learned v. Bryant, 13 Mass. 224; Fisher v. Bartlett, 8 Greenl. (Me.) 122, 22 Am. Dec. 225; Barron v. Cobleigh, 11 N. H. 557, 35 Am. Dec. 505; Parks v. Sheldon, 36 Conn. 466, 4 Am. Rep. 95; Bursley

v. Hamilton, 15 Pick. (Mass.) 40, 25 Am. Dec. 423, and note.

¹² Davis v. Ball, 6 Cush. (Mass.) 505, 53 Am. Dec. 53. In that case, too, it was decided that the words "made useful" were not latently ambiguous.

¹³ Seitz v. Brewers' Refrigerating Co., 141 U. S. 510, 35 L. Ed. 837, 12 Sup. Ct. Rep. 46.

¹⁴ Huntington v. Toledo etc. R. Co., 175 Fed. 532, 99 C. C. A. 154.

duced to writing and executed. The instrument was more than a mere receipt—it was contractual in form and substance—and on its face was explicit and apparently complete. It contained no agreement to employ the defendant in any capacity, nor any reference, direct or indirect, to such employment. Its language was in no particular suggestive of any omission. It was attempted to introduce the parol evidence of the employment on the ground that it affected the consideration mentioned in the agreement. The court, however, met the suggestion by saying that “the difficulty of applying the rule thus suggested to the present instrument is that, under the testimony offered, it would in terms introduce into the agreement covenants creating (aside from any question under the statute of frauds) new and important legal relations between the parties on the very subject of settlement contained in the written agreement. It would fasten a continuing covenant on the company to employ Huntington (the plaintiff), and pay him wages so long as he might choose to remain, and, of course, would invest him with corresponding right so to remain. It therefore needs but to be stated that such testimony would in effect plainly add to the written contract and change it materially as a whole, and so result in permitting a contract to be reformed in a proceeding at law.”¹⁵ Receipts

¹⁵ The following cases involved actions based upon breach of alleged oral agreements of employment, where written releases for injuries had been given and offers of oral testimony were rejected: *Myron v. Union Railroad Co.*, 19 R. I. 125, 32 Atl. 165; *Milich v. Armour Packing Co.*, 60 Kan. 229, 234, 56 Pac. 1; *White v. Richmond etc. R. Co.*, 110 N. C. 456, 460, 15 S. E. 197; *Williams v. Kansas City S. B. Ry. Co.*, 85 Mo. App. 103, 108; *Jessup v. Chicago & N. W. Ry. Co.*, 99 Iowa, 189, 192, 68 N. W. 673; *Jackowski v. Illinois Steel Co.*, 103 Wis. 448, 79 N. W. 757. In *Huntington v. Toledo etc. R. Co.*,

supra, Warrington, J., said that all “the foregoing decisions concern releases which contained provisions of a contractual nature; and the controlling principles of those decisions touching the introduction of secondary evidence are the same as those that forbid the admission of parol evidence to add to or alter or vary written contracts of the ordinary type. The decisions opposed to these, and relied on by plaintiff in error (*Pennsylvania Co. v. Dolan*, 6 Ind. App. 109, 51 Am. St. Rep. 289, 32 N. E. 802; *Usher v. New York C. R. R. Co.*, 76 App. Div. 422, 78 N. Y. Supp. 508; *Galvin v. Boston Elevated Ry.*,

for bills or notes "for collection" are not receipts for money within the rule allowing a receipt to be controlled or explained by parol evidence. The rights of the parties depend upon the legal effect and meaning of the writing given on the receipt of the commercial paper.¹⁶

§ 493 (504). Warehouse receipts.—Receipts given by warehousemen are an exception to the general rule respecting the modification of receipts by parol. As a rule, it will be found that these receipts are scarcely ever mere receipts for the goods stored, but contain the conditions on which they were received and some limitations as to liability. Hence it is that by the weight of authority such instruments are regarded as contracts, and under the familiar rule, parol evidence is inadmissible to vary their terms.¹⁷ Thus a receipt in the following terms, "Received in store from Ed. Doyle, 601 bushels of wheat, grade No. 2, which we will deliver to Ed. Doyle or order, upon presentation of this receipt, properly indorsed, on payment of charges. The property is held for the owner in store at his risk as to fire or depreciation from any cause. This grain may be mixed with grain of like quality, and may be delivered from any bin containing like quality of grain," was, in the absence of mutual mistake, held conclusive. In the absence of mutual mistake as to its contents, the receipt was the contract between the parties. It not only acknowledged the receipt of the wheat, but contained an agreement on the part of the warehousemen to redeliver it. Although called a warehouse receipt, it was more than an ordinary receipt, and was treated as a contract fixing

180 Mass. 587, 62 N. E. 961), are, we think, exceptional, and not in accord with the weight of authority."

¹⁶ Langdon v. Langdon, 4 Gray (Mass.), 186. It has, however, been held permissible to show by parol the character in which the party signed: Foulks v. Falls, 91 Ind. 315; and the purpose to which the money was to

be applied when collected: Mann v. Major, 6 Rob. (La.) 475.

¹⁷ Leonard v. Dunton, 51 Ill. 482, 99 Am. Dec. 568; Tarbell v. Farmers' etc. Co., 44 Minn. 471, 47 N. W. 152; Wadsworth v. Alcott, 6 N. Y. 64; Union Storage Co. v. Speck, 194 Pa. 126, 45 Atl. 48.

the right of the parties as to the matters it related to.¹⁸ By statutes these receipts are generally made negotiable; and when the rights of third persons who have relied upon the receipt are involved, warehousemen are held to be estopped from denying the representations made on their receipts.¹⁹ The stipulation upon the face of the receipt that the articles mentioned will be delivered only upon the return of the receipt, is a contract upon which the assignee has a right to rely, upon the faith of which he has acted and for the breach of which he has his action against the warehouseman. It is, therefore, as between the makers of the receipt and an assignee who has, in good faith, taken it as security for money advanced, not simply a receipt subject to be explained and contradicted by parol proof, but a contract, and subject to the rules applicable to other contracts. This is not upon the ground that they are negotiable security, but they are *sui generis* and stand upon grounds applicable to that class of paper.²⁰ The principle of estoppel does not extend so far as to preclude the warehouseman from showing in all cases that the goods do not correspond with the description in the receipt. This is especially true if the warehouseman has had no opportunity

¹⁸ Offutt v. Doyle (Ky.), 122 S. W. 156.

¹⁹ McNeil v. Hill, 1 Woolw. (U. S.) 96, Fed. Cas. No. 8914; Griswold v. Haven, 25 N. Y. 595, 82 Am. Dec. 380; Adams v. Gorham, 6 Cal. 68; Goodwin v. Scannell, 6 Cal. 541. See note to Robson v. Swart, 100 Am. Dec. 243, and Dean v. Driggs, 19 L. R. A. 302. By custom such receipts have come to be considered as representative of the property, and an assignment equivalent to a delivery of the property to the assignee, and the warehouseman is estopped as against the assignee who has purchased in good faith to deny that he had the articles mentioned in the receipt: See Justice Miller's decision

in McNeil v. Hill, 1 Woolw. 96, Fed. Cas. No. 8914; also, 19 Am. L. R., N. S., 566; also the general principles settled in the case of Gibson v. Stevens, 8 How. (U. S.) 384, 12 L. Ed. 1123. So that as against an assignee who has purchased, or to whom it has been assigned in good faith for advances made, the warehouseman cannot be permitted, by parol, to show that he had not the articles mentioned in the receipt at the time it was given: Stewart v. Phoenix Ins. Co., 9 Lea (Tenn.), 104. It has been so held as between the parties: Thompson v. Thompson, 78 Minn. 379, 81 N. W. 204, 543.

²⁰ Stewart v. Insurance Co., *supra*.

for an *inspection* of the goods.²¹ So far as the document is a receipt merely, it may be varied by parol evidence as to the *quantity and condition* of the goods.²² But those parts of the instrument which are contractual in their nature cannot be changed by parol.²³ A receipt issued by a warehouseman and accepted by the owner of the commodity stored, as expressing the terms and conditions upon which it was delivered and received, is a contract, and, like all other written contracts, cannot be contradicted or varied by parol.²⁴ But, when the receipt is silent as to the terms of the contract, it may be shown by parol,²⁵ and, when its language is ambiguous and uncertain, it must, like any other contract, be interpreted in the light of the surrounding circumstances.²⁶ It sometimes happens that the agreement for storage has been made orally, and has been followed by the warehouseman's receipt which was not in accordance with the verbal contract. This aspect of the agreement has been decided in a Washington case,²⁷ where the plaintiff stored goods until called for, storage to be

²¹ Hale v. Milwaukee Dock Co., 23 Wis. 276, 99 Am. Dec. 169, 29 Wis. 482, 9 Am. Rep. 603.

²² Abbe v. Eaton, 51 N. Y. 410; Witzler v. Collins, 70 Me. 290, 35 Am. Rep. 327; Mears v. New York etc. Ry. Co., 75 Conn. 171, 96 Am. St. Rep. 193, 56 L. R. A. 884, 52 Atl. 610. See the late cases: Southern R. Co. v. Gordon, 11 Ga. App. 234, 75 S. E. 10; Nelson Grain Co. v. Ann Arbor R. Co. (Mich.), 140 N. W. 486; Bettman v. Mobile etc. R. Co., 167 Mo. App. 729, 151 S. W. 169.

²³ Missouri etc. Ry. Co. v. Simonson, 64 Kan. 802, 91 Am. St. Rep. 248, 57 L. R. A. 765, 68 Pac. 653; Morganton Mfg. Co. v. Ohio etc. Ry. Co., 121 N. C. 514, 61 Am. St. Rep. 679, 28 S. E. 474. Rule different if there has been fraud: Sonia Cotton Oil Co. v. The Red

Rover, 106 La. 42, 87 Am. St. Rep. 294, 30 South. 303.

²⁴ Marks v. Cass County Mill & Elevator Co., 43 Iowa, 146; Goodyear v. Ogden, 4 Hill (N. Y.), 104; Thompson v. Thompson, 78 Minn. 379, 81 N. W. 204, 543; Savage v. Salem Mills Co., 48 Or. 1, 10 Ann. Cas. 1065, 85 Pac. 69.

²⁵ State v. Stockman, 30 Or. 36, 46 Pac. 851; Hirsch v. Salem Mills Co., 40 Or. 601, 67 Pac. 949, 68 Pac. 733.

²⁶ McCabe v. McKinstry, Fed. Cas. No. 8667, 5 Dill. 509; Ledyard v. Hibbard, 48 Mich. 421, 42 Am. Rep. 474, 12 N. W. 637; Andrews v. Richmond, 34 Hun (N. Y.), 20; Lyon v. Lenon, 106 Ind. 567, 7 N. E. 311; Bucher v. Commonwealth, 103 Pa. 528; Lonergan v. Stewart, 55 Ill. 44.

²⁷ Windell v. Readman Warehouse Co., 30 Wash. 469, 71 Pac. 56.

paid on redelivery. As he was in haste to catch a train, he did not get the receipt, which the defendant told him he would mail to him. He subsequently received it, but thinking it embodied the oral arrangement did not read it. It was signed by the defendant alone and contained a provision for payment of monthly charges, and these not being paid the defendant sold the goods. It was held that as the receipt was delivered after the oral contract was made, evidence of such oral contract was admissible to rebut the presumption arising from the possession of the receipt, that such receipt must be based upon the agreement of the parties or assented to by the plaintiff, and if an oral contract had preceded it, its terms must be embodied in the receipt.²⁸

§ 494 (505, 506). Parol evidence as to bills and notes.—The same reasons which require that other written contracts should not be contradicted by parol evidence apply to contracts in the form of negotiable paper.²⁹ “Negotia-

²⁸ An almost precisely similar case is *Strohn v. Detroit etc. Ry. Co.*, 21 Wis. 554, 94 Am. Dec. 564. See, also, *Missouri etc. R. Co. v. Beeson*, 30 Kan. 298, 2 Pac. 496; *Swift v. Pacific Mail S. S. Co.*, 106 N. Y. 206, 12 N. E. 583; *Guillaume v. General Transp. Co.*, 100 N. Y. 491, 3 N. E. 489; *Bostwick v. Baltimore etc. R. R. Co.*, 45 N. Y. 712; *King v. Woodbridge*, 34 Vt. 565.

²⁹ *Pearson v. Dancer*, 144 Ala. 427, 39 South. 474; *Featherston v. Wilson*, 4 Ark. 154; *Dollar v. International Banking Corp.*, 13 Cal. App. 331, 109 Pac. 499; *Torbert v. Montague*, 38 Colo. 325, 87 Pac. 1145; *Alsop v. Goodwin*, 1 Root (Conn.), 196; *Randle v. Davis Coal etc. Co.*, 15 App. Cas. (D. C.) 357; *Baumeister v. Kuntz*, 53 Fla. 340, 42 South. 886; *Pidecock v. Crouch*, 7 Ga. App. 299, 66 S. E. 971; *Sinnickson v. Perkins*,

231 Ill. 492, 83 N. E. 194; *American Ins. Co. v. Gallahan*, 75 Ind. 168; *Porter v. Moles*, 151 Iowa, 279, 131 N. W. 23; *Roebuck v. Bank*, 79 Kan. 862, 100 Pac. 621; *Farmers' Bank v. Wickliffe*, 131 Ky. 787, 116 S. W. 249; *Nutter v. Stover*, 48 Me. 163; *Wooldridge v. Royer*, 69 Md. 113, 14 Atl. 681; *Coveney v. Commonwealth Trust Co.*, 200 Mass. 379, 86 N. E. 895; *Lipsett v. Hassard*, 158 Mich. 509, 122 N. W. 1091; *National Citizens' Bank v. Thro*, 110 Minn. 169, 124 N. W. 965; *O'Neal v. McLeod (Miss.)*, 28 South. 23; *First Nat. Bank v. Asel*, 154 Mo. App. 228, 134 S. W. 110; *Benton v. Sikyta*, 84 Neb. 808, 24 L. R. A., N. S., 1057, 122 N. W. 61; *Parsons v. Wentworth*, 73 N. H. 122, 59 Atl. 623; *Kean v. Davis*, 20 N. J. L. 425; *Ryan v. Sullivan*, 128 N. Y. Supp. 632; *Woods v. Finley*, 153 N. C. 497, 69 S. E.

ble notes are written instruments, and as such they cannot be contradicted nor can their terms be varied by parol evidence; and that proposition is universally true where the promissory note is in the hands of an innocent holder."³⁰ There is the additional consideration that the usefulness of commercial paper would be greatly impaired if secret reservations and agreements could be freely ingrafted upon bills and notes by parol testimony. For example, when the *time of payment* is stated in the instrument, a prior or contemporaneous agreement cannot be shown fixing a different time or extending the time.³¹ Such as the con-

502; *Cummings v. Kent*, 44 Ohio St. 92, 58 Am. Rep. 796, 4 N. E. 710; *Smith v. Bayer*, 46 Or. 143, 114 Am. St. Rep. 858, 79 Pac. 497; *Gandy v. Weekerly*, 34 Pa. Sup. Ct. 79; *Parker v. Mayes*, 85 S. C. 419, 137 Am. St. Rep. 912, 67 S. E. 559; *Wallace v. Goodlet*, 93 Tenn. 598, 30 S. W. 27; *Allen v. Herrick Hardware Co.*, 55 Tex. Civ. App. 249, 118 S. W. 1157; *Andrus v. Blazzard*, 23 Utah, 233, 54 L. R. A. 354, 63 Pac. 888; *Norton v. Downer*, 31 Vt. 407; *Martin v. Lewis*, 30 Gratt. (Va.) 672, 32 Am. Rep. 682; *Patlin v. Harris*, 7 Wash. 542, 35 Pac. 385; *Duty v. Sprinkle*, 64 W. Va. 39, 60 S. E. 882; *Hackley Nat. Bank v. Barry*, 139 Wis. 96, 120 N. W. 275; *Burns v. Scott*, 117 U. S. 582, 29 L. Ed. 991, 6 Sup. Ct. Rep. 865; *Hill v. Wilson*, L. R. 8 Ch. 888, 42 L. J. Ch. 817, 29 L. T., N. S., 238, 21 Wkly. Rep. 757; *Smith v. Squires*, 13 Manitoba, 360.

³⁰ *Brown v. Spofford*, 95 U. S. 474, 480, 24 L. Ed. 508; *Bohn Mfg. Co. v. Reif*, 116 Wis. 471, 93 N. W. 466. See, also, notes to *Adams v. Wilson*, 45 Am. Dec. 242; *Hall v. Newcomb*, 42 Am. Dec. 86; *Fullerton v. Hill*, 18 L. R. A. 36; *Goldsmith v. Holmes*, 1 L. R. A. 816; *Ferguson v. Rafferty*, 6 L. R. A. 33, and *Keidan v. Winegar*, 20 L. R. A. 705-713. See, also,

the late cases: *Toller v. Hewitt* (Ga. App.), 77 S. E. 650; *Myers v. Stein*, 139 N. Y. Supp. 762; *Givens v. Carter* (Tex. Civ. App.), 146 S. W. 623.

³¹ *Walker v. Clay*, 21 Ala. 797; *Doss v. Peterson*, 82 Ala. 253, 2 South. 644; *Joyner v. Turner*, 19 Ark. 690; *Dorsey v. Armor*, 10 Colo. App. 255, 50 Pac. 726; *Jones v. Taylor*, 5 Ga. App. 161, 62 S. E. 992; *Murchie v. Peck*, 160 Ill. 175, 43 N. E. 356; *DeLong v. Lee*, 73 Iowa, 53, 34 N. W. 613; *Stucksleger v. Smith*, 27 Iowa, 286; *Allen v. Thompson*, 108 Ky. 476, 22 Ky. Law Rep. 164, 56 S. W. 823; *Kelsey v. Chamberlain*, 47 Mich. 241, 10 N. W. 355; *National Livestock Comm. Co. v. Thero*, 154 Mo. App. 508, 135 S. W. 961; *Inge v. Hance*, 29 Mo. 399; *Van Etten v. Howell*, 40 Neb. 850, 59 N. W. 389; *Block v. Stevens*, 72 App. Div. 246, 76 N. Y. Supp. 213; *Thompson v. Ketchum*, 8 Johns. (N. Y.) 189, 5 Am. Dec. 332; *Mason v. Graff*, 35 Pa. 448; *McClanaghan v. Hines*, 2 Strob. (S. C.) 122; *Campbell v. Upshaw*, 7 Humph. (Tenn.) 185, 46 Am. Dec. 75; *Crooker v. National Phonograph Co.* (Tex. Civ. App.), 135 S. W. 647; *Brown v. Wiley*, 20 How. (U. S.) 442, 15 L. Ed. 965. Parol evidence not admissible to establish an agreement that *payment*

dition that a note was not to be operative nor collected until after the payee had exhausted a security which had been given.³² On the same principle, it is inadmissible to prove an agreement by parol that the instrument should be paid in some other manner than that stated therein.³³

should *not be demanded* on maturity: Hoare v. Graham, 3 Camp. 57, 13 R. 752; Bond v. Worley, 26 Mo. 253; Cairo etc. R. Co. v. Parker, 84 Ill. 613; Lakeside Land Co. v. Droomgole, 89 Ala. 505, 7 South. 444; Payne v. Mutual Life Ins. Co., 141 Fed. 339, 72 C. C. A. 487; or until after the death of the maker: Graves v. Clark, 6 Blackf. (Ind.) 183; Woodbridge v. Spooner, 3 Barn. & Ald. 233, 106 Eng. Reprint, 647; or so long as the interest should be paid: Church, etc., Trustees of, v. Stetson, 5 Pick. (Mass.) 506; that the note should be paid in *installments*: Barton v. Wilkins, 1 Mo. 74; Eaton v. Emerson, 14 Me. 335; Doss v. Peterson, 82 Ala. 256, 2 South. 644; that the payee should foreclose a collateral mortgage and *not hold the maker*: Gillman v. Henry, 53 Wis. 465, 10 N. W. 692; Albuquerque Nat. Bank v. Stewart, 3 Ariz. 293, 30 Pac. 303; that it should not be paid until after the sale of the maker's property: Free v. Hawkins, 8 Taunt. 92, 129 Eng. Reprint, 317; or until after a certain dividend should be paid: Rawson v. Walker, 1 Stark. 361; a draft received: Kincaid v. Higgins, 1 Bibb (Ky.), 396; or certain profits realized: Campbell v. Upshaw, 7 Humph. (Tenn.) 185, 46 Am. Dec. 75; McClanaghan v. Hines, 2 Strob. (S. C.) 122; Litchfield v. Falconer, 2 Ala. 280; De Long v. Lee, 73 Iowa, 53, 34 N. W. 613; or that interest was payable *annually*, the note showing it payable at maturity: Roehring v. Muemminghoff, 61 Mo. 403, 21 Am.

Rep. 402; or not payable *at all*, the instrument being silent on the subject: Milliken v. Southgate, 26 Me. 424; or that the note should *not bear interest*: Stutsman v. Stutsman, 3 Blackf. (Ind.) 231; or that the acceptor was *not to be called upon* until the payees "had prosecuted the drawers to judgment or insolvency and used all proper and lawful means to collect" the debt: Cowles v. Townsend, 31 Ala. 133. But if no time of payment is fixed by the note, the maker may, as between parties, show a parol contemporaneous agreement that it should be *paid only on the happening of a contingency*: Horner v. Horner, 145 Pa. 258, 23 Atl. 141. See, also, § 495, *post*.

³² Moore v. Prussing, 165 Ill. 319, 46 N. E. 184.

³³ Or *in a certain way*, as that a note, payable in "lawful money," is to be paid in silver: Alsop v. Goodwin, 1 Root (Conn.), 196; that a note, payable in "dollars," is to be paid in commonwealth paper or in other money, not recognized by federal law: Williams v. Beazley, 3 J. J. Marsh. (Ky.) 577; Baugh v. Ramsey, 4 T. B. Mon. (Ky.) 155; Thorington v. Smith, 8 Wall. (U. S.) 1, 19 L. Ed. 361; Noe v. Hodges, 3 Humph. (Tenn.) 162; Stewart v. Salamon, 94 U. S. 434, 24 L. Ed. 275; Hair v. La Brouse, 10 Ala. 548; or in bank or individual notes: Noe v. Hodges, 3 Humph. (Tenn.) 162; Pack v. Thomas, 21 Miss. 11, 51 Am. Dec. 135; Baugh v. Ramsey, 4 T. B. Mon. (Ky.) 155; Langen-

A promissory note, executed contemporaneously with a writing showing that the note was given for a scholarship, the course of study to be entered upon at about the date of the note's maturity, and the scholarship to be transferable, cannot be contradicted by parol evidence that it was not to be paid if the maker should not attend the school, and could not sell the scholarship;³⁴ or that it was payable

berger v. Kroeger, 48 Cal. 147, 17 Am. Rep. 418; Clark v. Hart, 49 Ala. 86; or in merchandise or other articles, or indeed, *in any mode different from that stated*: Linville v. Holden, 2 McAr. (D. C.) 329; Rig-gins v. Boyd Mfg. Co., 123 Ga. 232, 51 S. E. 434; Hensley v. Mitchell, 147 Ill. App. 161; Thornburgh v. Newcastle etc. R. Co., 14 Ind. 499; Clement v. Houck, 113 Iowa, 504, 85 N. W. 765; Billings v. Billings, 10 Cush. (Mass.) 178; Pack v. Thomas, 21 Miss. 11, 51 Am. Dec. 135; Vradenburgh v. Johnson, 3 Neb. (Unof.) 326, 91 N. W. 496; Lang v. Johnson, 24 N. H. 302; Fields v. Stunston, 1 Cold. (Tenn.) 40; Crooker v. National Phonograph Co. (Tex. Civ. App.), 135 S. W. 647; Gilman v. Moore, 14 Vt. 457; Watson v. Hurt, 6 Gratt. (Va.) 633; Olshausen v. Lewis, Fed. Cas. No. 10,507, 1 Biss. 419. But a parol agreement between the parties that the maker of the note may offset a claim has been held admissible in an action *inter partes*: Bennett v. Tillmon, 18 Mont. 28, 44 Pac. 80; Bohn Mfg. Co. v. Harrison, 13 Mont. 293, 34 Pac. 313. And where an agreement to discharge the note in another way than payment has been performed, the maker may avail himself of it; in other words, between the parties, the cross-amounts due would be equal: Hagood v. Swords, 2 Bail. (S. C.) 305. See, also, analogous reasoning in Jilson v. Gilbert, 26 Wis. 637, 7 Am. Rep. 100, and Van Valkenburgh v. Stipplebeen, 49

Barb. (N. Y.) 99; that the payment should be made out of a *particular fund*: Rice v. Gilbreath, 119 Ala. 424, 24 South. 421; Mumford v. Tolman, 54 Ill. App. 471; De Long v. Lee, 73 Iowa, 53, 34 N. W. 613; Bowers v. Linn, 14 Ky. Law Rep. 889; Adams v. Wilson, 12 Met. (Mass.) 138, 45 Am. Dec. 240; Currier v. Hale, 8 Allen (Mass.), 47; Smith v. Kemp, 92 Mich. 357; Singer Mfg. Co. v. Potts, 59 Minn. 240, 61 N. W. 23; Ryan v. Sullivan, 143 App. Div. 471, 128 N. Y. Supp. 632; Ellis v. Hamilton, 4 Sneed (Tenn.), 512; Franklin v. Smith, 1 Posey Unrep. Cas. (Tex.) 229; Campbell v. Hodgson, Gow. 74; Brown v. Spofford, 95 U. S. 474, 24 L. Ed. 508; Rawson v. Walker, 1 Stark. 361; that no money should be paid except from the proceeds of certain sales: De Long v. Lee, 73 Iowa, 53, 34 N. W. 613; that an account against the payee should be deducted from the amount stated: Eaves v. Henderson, 17 Wend. (N. Y.) 190; St. Louis Perpetual Ins. Co. v. Homer, 9 Met. (Mass.) 39; that the *amount* due and the rate of interest were *other than that expressed*: Catlin v. Harris, 7 Wash. 542, 35 Pac. 385; but an *ambiguity* as to the kind of funds intended may be explained, as the meaning of "Canada money": Thompson v. Sloan, 23 Wend. (N. Y.) 71, 35 Am. Dec. 546.

³⁴ Jamestown Business College Assn. v. Allen, 172 N. Y. 291, 92 Am. St. Rep. 740, 64 N. E. 952.

at some other place than that written in the instrument.³⁵ But where no place of payment is specified in a note, parol evidence has been admitted to show the place agreed upon.³⁶ It is the general rule in this respect that it cannot be shown by parol, in the absence of fraud or mistake, that an *amount different* from that stated was agreed upon.³⁷ Parol evidence is not admissible to show that a note in the ordinary form was intended as a receipt.³⁸ When the instrument is not in note form and begins with the word "received," as an ordinary receipt, evidence has been admitted to ex-

³⁵ Montgomery R. Co. v. Hurst, 9 Ala. 513.

³⁶ Brent v. Bank, 1 Pet. (U. S.) 89, 7 L. Ed. 65; McKee v. Boswell, 33 Mo. 567. And also where the note was payable in specific articles: Wyman v. Winslow, 11 Me. 398, 26 Am. Dec. 542. Where no place of payment is named in a note, it is presumed to be payable where the maker resides; and, where a bank is named, it will be presumed, in the absence of evidence appearing on the face of the note to the contrary, that it was at the maker's home town: Hartford Bank v. Green, 11 Iowa, 476; Blodgett v. Durgin, 32 Vt. 361; Baily v. Birkhofer, 123 Iowa, 59, 98 N. W. 594. And parol evidence has been admitted to show an agreement made after a note was due that it should be left for collection at a specified place, but the admission was to support a plea of tender: Logan v. Hartwell, 5 Kan. 649.

³⁷ Downs v. Webster, Brayt. (Vt.) 79; Gazoway v. Moore, Harp. (S. C.) 401. When the instrument contains an absolute promise to pay a certain sum, it is inadmissible to show by parol that the *whole amount is not to be paid*, and that in a certain event an indorsement is to be made upon it: Allen v. Young, 62 Ga. 617; Barton

v. Wilkins, 1 Mo. 74; Blakemore v. Wood, 3 Sneed (Tenn.), 470; Sturdivant v. Hull, 59 Me. 172, 8 Am. Rep. 409; Roche v. Roanoke Classical Seminary, 56 Ind. 198; Ziegler v. McFarland, 147 Pa. 607, 23 Atl. 1045; that the value of certain articles should be credited, when ascertained: Featherston v. Wilson, 4 Ark. 154; St. Louis Perpetual Ins. Co. v. Homer, 9 Met. (Mass.) 39; that the maker may return property for which the note is given, provided the same does not prove satisfactory: Isaacs v. Elkins, 11 Vt. 679; Allen v. Furbish, 4 Gray (Mass.), 504, 64 Am. Dec. 87; Henderson v. Thompson, 52 Ga. 149; that, if any *mistake* should be found in a settlement for which a note is given, the mistake should be corrected: Clute v. Frasier, 58 Iowa, 268, 12 N. W. 327.

³⁸ Billings v. Billings, 10 Cush. (Mass.) 178, where it was sought to prove that the amount of the note was a payment of an antecedent debt; followed in Shaw v. Shaw, 50 Me. 94, 79 Am. Dec. 605; but the evidence is admissible when it is conceded that the note is without consideration and the record of the true transaction shows it was given and accepted by the parties, as an acknowledgment: Beals v. Beals, 20 Ind. 163.

plain it.³⁹ But where, in addition to the formal note, the maker had signed an *addendum* that the note was to bear a specified increased interest after maturity and no special defense was set up, the *addendum* could not be varied or contradicted by parol.⁴⁰ In actions on negotiable paper which is absolute on its face, parol evidence is inadmissible to prove an agreement that payment should depend upon some *contingency or condition*.⁴¹ Nor is it admissible, in an *action against a surety*, to prove by parol an agreement that the payee should sue the note when it should become due, and that the surety signed only on that

³⁹ *De Lavallette v. Wendt*, 75 N. Y. 579, 31 Am. Rep. 494.

⁴⁰ *Corley v. McKeag*, 9 Mo. App. 38.

⁴¹ As a condition that the *payee* should furnish certain goods to the maker: *Holzworth v. Koch*, 26 Ohio St. 33; that it was only given as a *matter of form*: *Wright v. Remington*, 41 N. J. L. 48, 32 Am. Rep. 180; *Ziegler v. McFarland*, 147 Pa. 607, 23 Atl. 1045; *First National Bank v. Foote*, 12 Utah, 157, 42 Pac. 205; that a note should be paid *out of commissions* to be earned by the maker as agent of the payee: *Van Vechten v. Smith*, 59 Iowa, 173, 13 N. W. 94; that an acceptance was on the verbal condition of the *completion* of certain work by the drawer: *Heaverin v. Donnell*, 15 Miss. 244, 45 Am. Dec. 302; that the bill should *not be presented* until after a certain other draft was provided for: *Brown v. Wiley*, 20 How. (U. S.) 442, 15 L. Ed. 965; or on other conditions: *Meyer v. Beardsley*, 30 N. J. L. 236; that the note was intended as a *receipt only*: *City Bank v. Adams*, 45 Me. 455; *Dickson v. Harris*, 60 Iowa, 727, 13 N. W. 335; *Billings v. Billings*, 10 Cush. (Mass.) 178, (see note 38, *supra*; *Beals v. Beals*, 20 Ind. 163); that the instrument was *not in-*

tended as a note, but only as a memorandum not to be enforced: *Burnes v. Scott*, 117 U. S. 582, 29 L. Ed. 991, 6 Sup. Ct. Rep. 865; that a *guaranty* was on a *condition* which has not been performed: *Wright v. Morse*, 9 Gray (Mass.), 337, 69 Am. Dec. 291; that a note should not be negotiated: *Knox v. Clifford*, 38 Wis. 651, 20 Am. Rep. 28; *McSherry v. Brooks*, 46 Md. 103; *Waddle v. Owen*, 43 Neb. 489, 61 N. W. 731; that an acceptance of a draft was on the condition that the acceptor should not be called on to pay according to its tenor: *Davis v. Randall*, 115 Mass. 547, 15 Am. Rep. 146; *Robinson v. Kanawha Valley Bank*, 44 Ohio St. 441, 58 Am. Rep. 829, 8 N. E. 586; *Heaverin v. Donnell*, 15 Miss. 244, 45 Am. Dec. 302; see note to *Credit Co. v. Howe Machine Co.*, 1 Am. St. Rep. 134-138. On the admissibility of parol evidence that written instrument for the payment of money was executed in reliance upon parol promise that payment was subject to a condition not incorporated therein, see note to *Gandy v. Weckerly*, 18 L. R. A., N. S., 434. On the admissibility of parol evidence of conditions in notes and bills, see note to *Hughes v. Crooker*, 128 Am. St. Rep. 629.

condition; nor in such case does it vary the rule when the proposed evidence is that of the admissions of the plaintiff. Such testimony would establish nothing more than a verbal agreement, made concurrently with the written contract, ingrafting upon it a new stipulation materially changing the nature of the promise.⁴² The importance of adhering to the general rule with reasonable strictness in respect to commercial paper is everywhere recognized. "It is a firmly settled principle that parol evidence of an oral agreement, alleged to have been made at the time of the drawing, making or indorsing of a bill or note, cannot be permitted to vary, qualify or contradict, to add to or subtract from the absolute terms of the written contract."⁴³ For example, the maker of a negotiable note cannot give parol evidence of an agreement between himself and the payee at the time the note was given that it was not to be negotiated.⁴⁴

§ 495 (507). **Qualifications of the general rule as applied to negotiable paper.**—The exceptions to the general rule which exclude parol evidence to explain written instruments apply in respect to negotiable paper, as well as to other contracts. We have seen in a former section that wide range is given to the proof when the issue of *fraud* is raised.⁴⁵ It is on the same principle that *illegality*,⁴⁶ *alter-*

⁴² *Hanchet v. Birge*, 12 Met. (Mass.) 545; *Altman v. Anton*, 91 Iowa, 612, 60 N. W. 191. Thus in *Clement v. Drybread*, 108 Iowa, 701, 78 N. W. 235, it was held that the maker of a note could not give parol evidence of a promise by the payee that the note was to be used only as collateral.

⁴³ *Specht v. Howard*, 16 Wall. (U. S.) 564, 566, 21 L. Ed. 348. As to the effect of extrinsic promise to sign or indorse a note or bill, see note to *Petty v. Gacking*, in 33 L. R. A., N. S., 175.

⁴⁴ *Knox v. Clifford*, 38 Wis. 651, 20 Am. Rep. 28, in which it was also held that the note being dated on a secular day, the maker was estopped, as against a *bona fide* holder of value, to show that it was made on a Sunday. See, also, *McSherry v. Brooks*, 46 Md. 103, where the law is well discussed.

⁴⁵ See §§ 435, 442, *ante*. See many illustrations and cases cited in 2 Ency. of Ev. 495.

⁴⁶ *Birmingham Trust etc. Co. v. Curry*, 160 Ala. 370, 135 Am. St. Rep. 102, 49 South. 319; *Woods v. Armstrong*, 54 Ala. 150, 25 Am. Rep. 671;

ation,⁴⁷ and *want of consideration*,⁴⁸ or *failure of consideration*⁴⁹ may be shown. The rules as to consideration gener-

Roe v. Kiser, 62 Ark. 92, 54 Am. St. Rep. 288, 34 S. W. 534; Moffatt v. Bulson, 96 Cal. 106, 31 Am. St. Rep. 192, 30 Pac. 1022; Dixon v. Edwards, 48 Ga. 142; McAyeal v. Gullett, 202 Ill. 214, 66 N. E. 1048; Henderson v. Palmer, 71 Ill. 579, 22 Am. Rep. 117; O'Conner v. Kleiman, 143 Iowa, 435, 121 N. W. 1088; Gardner v. Maxey, 9 B. Mon. (Ky.) 90; Soubie v. Beale, 1 Mart. (La.), N. S., 95; Reeve v. Doughty, 19 La. Ann. 164; Wolf v. Troxell's Estate, 94 Mich. 573, 54 N. W. 383; Buck v. First National Bank, 27 Mich. 293, 15 Am. Rep. 189; Newsom v. Thighen, 30 Miss. 414; Von Kamen v. Roes, 20 N. Y. Supp. 548, 48 N. Y. St. 920; Groesbeck v. Marshall, 44 S. C. 538, 22 S. E. 743; Donley v. Tindall, 32 Tex. 43, 5 Am. Rep. 234; Twentieth Century Co. v. Quilling, 136 Wis. 481, 117 N. W. 1007; Bridges v. Smith, 28 N. Brunsw. 137. As to "Admissibility of Parol Evidence to Show Illegality of Contract," see note to Musko-gee Land Co. v. Mullins, 16 Ann. Cas. 388.

⁴⁷ Buck v. Appleton, 14 Me. 284; Brown v. Straw, 6 Neb. 536, 29 Am. Rep. 369; McCauley v. Gordon, 64 Ga. 221, 37 Am. Rep. 68; First Nat. Bank v. Fricke, 75 Mo. 178, 42 Am. Rep. 397; Nicholson v. Combs, 90 Ind. 515, 46 Am. Rep. 229. Parol evidence is admissible to explain how a note had been stamped "paid"; McShan v. Watlington (Tex. Civ. App.), 133 S. W. 722. As to admissibility of parol evidence to show unauthorized alteration of written instrument, see note to Burnette v. Young, 12 Ann. Cas. 985.

⁴⁸ Guice v. Thornton, 76 Ala. 466; West v. Kelly, 19 Ala. 353, 54 Am. Dec. 192; Bunnell v. Butler, 23 Conn. 65; Snowden v. Grice, 62 Ga. 615;

Overstreet v. Dunlap, 56 Ill. App. 436; Smith v. Boruff, 75 Ind. 412; First Nat. Bank v. Nugen, 99 Ind. 160; Davis v. Strohm, 17 Iowa, 421; Dodge v. Oatis, 27 Kan. 762; Kelly v. Ledoux, 11 La. Ann. 689; Wise v. Neal, 39 Me. 422; Folsom v. Mussey, 8 Greenl. (Me.) 400, 23 Am. Dec. 522; Sumwalt v. Ridgely, 20 Md. 107; Dexter v. Clemans, 17 Pick. (Mass.) 175; Stackpole v. Arnold, 11 Mass. 27, 6 Am. Dec. 150; Barker v. Prentiss, 6 Mass. 430; Lewis v. Gray, 1 Mass. 297, 2 Am. Dec. 21; Maltz v. Fletcher, 52 Mich. 484, 18 N. W. 228; Wright v. Irwin, 33 Mich. 32; Voght v. Butler, 105 Mo. 479, 16 S. W. 512; Middleton v. Griffith, 57 N. J. L. 442, 51 Am. St. Rep. 617, 31 Atl. 405; Seymour v. Cowing, 4 Abb. Dec. (N. Y.) 200; Flaum v. Wallace, 103 N. C. 296, 9 S. E. 567; Stinson v. McKeown, 1 Hill (S. C.), 387; First Nat. Bank v. Pearce (Tex. Civ. App.), 126 S. W. 285; Barnes v. McCarthy (Tex. Civ. App.), 132 S. W. 85; Ellis v. Watkins, 73 Vt. 371, 50 Atl. 1105; Ward v. Perrigo, 33 Wis. 143; Coreoran v. Hodges, 2 Cranch C. C. (U. S.) 452. 6 Fed. Cas. No. 3228; Rawson v. Walker, 1 Stark. 361; Solly v. Hinde, 2 Crompt. & M. 516; Bank v. Fish, 32 N. Brunsw. 434. See the late cases. Little v. Arkansas Nat. Bank (Ark.) 152 S. W. 281; Provident etc. Soc. of New York v. Shearer, 151 Ky. 298, 151 S. W. 938; Patt v. Leavel, 161 Mo. App. 242, 143 S. W. 833; Central Bank etc. Co. v. Ford (Tex. Civ. App.), 152 S. W. 700.

⁴⁹ Cuthbert v. Bowie, 10 Ala. 163; Braly v. Henry, 71 Cal. 481, 60 Am. Rep. 543, 11 Pac. 385, 12 Pac. 623; Pettibone v. Roberts, 2 Root (Conn.), 258; Branch v. Wilson, 12 Fla. 543; Johnson County Sav. Bank v. Woot-

ally apply to bills or notes.⁵⁰ As between the original parties, the circumstances under which a bill or note was given may be shown so far as they do not vary the instrument.⁵¹ And the rule applies if the transferee of a note is not a *bona fide* holder.⁵² Where a note had originally been attached to a contract and had been detached from it by perforations in the paper and sued upon, and the note was attacked for fraud, the contract was held admissible, especially as it showed the consideration.⁵³ As between the original parties, or those chargeable with notice, the *conditional de-*

ten, 118 Ga. 927, 45 S. E. 705; Grimes v. Walker, 1 Hawaii, 21; Conway v. Case, 22 Ill. 127; Brown v. Summers, 91 Ind. 151; Blood v. Northup, 1 Kan. 28; Reeve v. Doughty, 19 La. Ann. 164; Wise v. Neal, 39 Me. 422; Sawyer v. Orr, 140 Mass. 234, 5 N. E. 822; Altman v. Fowler, 70 Mich. 57, 37 N. W. 708; Warner v. Schulz, 74 Minn. 252, 77 N. W. 25; Hoyle v. Shirley, 94 Miss. 466, 49 South. 177; Von Kamen v. Roes, 20 N. Y. Supp. 548, 48 N. Y. St. 20; Volkenand v. Drum, 154 Pa. 616, 26 Atl. 611; Morris v. Brown, 38 Tex. Civ. App. 266, 85 S. W. 1015; Foster v. Clifford, 44 Wis. 569, 28 Am. Rep. 603; Fisher v. Archibald, 8 Nova Scotia, 298.

⁵⁰ Stringfellow v. Ivie, 73 Ala. 209; Stretch v. Talmadge, 65 Cal. 510, 4 Pac. 513; Ellison v. Simmons, 6 Penne. (Del.) 200, 65 Atl. 591; Hawkins v. Collier, 101 Ga. 145, 28 S. E. 632; Pembroke v. Hayes, 114 Iowa, 576, 87 N. W. 492; Leighton v. Bowen, 75 Me. 504; Walker v. Haggerty, 30 Neb. 120, 46 N. W. 221; Cross v. Rowe, 22 N. H. 77; Kern v. Voorhies, 3 N. J. L. 557 (1003); Porter v. Havens, 37 Barb. (N. Y.) 343; Flaum v. Wallace, 103 N. C. 296, 9 S. E. 567; Fort v. Orndoff, 7 Heisk. (Tenn.) 167; Labbee v. Johnson, 66 Vt. 234, 28 Atl. 986; Rutland v. Copes,

15 Rich. (S. C.) 84; First Nat. Bank v. Pearce (Tex. Civ. App.), 126 S. W. 285; Bigelow v. Scott, 2 Wash. Ter. 378, 8 Pac. 494; Board of Trustees v. Saunders, 84 Wis. 570, 54 N. W. 1094. See, also, Barnes v. McCarthy (Tex. Civ. App.), 132 S. W. 85, in which questions affecting the consideration on the grounds of excessiveness of charge and fraudulent representation were considered.

⁵¹ Litchfield v. Falconer, 2 Ala. 280; Lovell v. Sneed, 79 Ark. 204, 95 S. W. 157; Fisk v. Reser, 19 Colo. 88, 34 Pac. 572; Heitmann v. Commercial Bank, 6 Ga. App. 584, 65 S. E. 590; Chicago etc. R. Co. v. West, 37 Ind. 211; Herrick v. Bean, 20 Me. 51; Councilman v. Towson Nat. Bank, 103 Md. 469, 64 Atl. 358; Levin v. Vannevar, 137 Mass. 532; Sanborn v. Neal, 4 Minn. 126, 77 Am. Dec. 502; Cross v. Rowe, 22 N. H. 77; Duncan v. Gilbert, 29 N. J. L. 521; Bell v. Shibley, 33 Barb. (N. Y.) 610; Johnston County Sav. Bank v. Chase, 151 N. C. 108, 65 S. E. 745; Kirby v. Berguin, 15 S. D. 444, 80 N. W. 856; Woodward v. Foster, 18 Gratt. (Va.) 200.

⁵² Carrington v. Turner, 101 Md. 437, 61 Atl. 324.

⁵³ Ireland v. Scharpenberg, 54 Wash. 558, 103 Pac. 801.

livery of a note may be shown,⁵⁴ as that it was delivered in escrow.⁵⁵ So it may be shown, as between the original parties, that the note had been *discharged* by the performance of an oral agreement,⁵⁶ or that the delivery was conditioned upon a certain event.⁵⁷ So it may be proved by parol that a *mistake* has been made in the writing as to dates.⁵⁸ This would be very clear in an equitable proceeding; and in some cases, the correction of such mistakes by parol has been allowed in legal proceedings.⁵⁹ So the fact of *payment*⁶⁰ or *release* may be established by parol.⁶¹

⁵⁴ Hopper v. Eiland, 21 Ala. 714; Graham v. Remmel, 76 Ark. 140, 6 Am. St. Rep. 167, 88 S. W. 899; New Haven Mfg. Co. v. New Haven Pulp etc. Co., 76 Conn. 126, 55 Atl. 604; Heitmann v. Commercial Bank, 6 Ga. App. 584, 65 S. E. 590; Ware v. Smith, 62 Iowa, 159, 17 N. W. 459; Robertson v. Rowell, 158 Mass. 94, 35 Am. St. Rep. 466, 32 N. E. 898; Hurt v. Ford (Mo.), 36 S. W. 671; Niblock v. Sprague, 200 N. Y. 30, 93 N. E. 1105; Carpenter v. Hoadley, 138 App. Div. 190, 123 N. Y. Supp. 61; Sweet v. Stevens, 7 R. I. 375; Alexander v. Wilkes, 11 Lea (Tenn.), 221; Ewell v. Turney, 39 Wash. 615, 81 Pac. 1047; Burke v. Dulaney, 153 U. S. 228, 38 L. Ed. 698, 14 Sup. Ct. Rep. 816. On the admissibility of parol evidence to show that bill or note was delivered upon condition, see note to Beach v. Nevins, 18 L. R. A., N. S., 288. On parol evidence of conditional delivery of bill or note, see note to Oakland Cemetery Assn. v. Lakins, 3 Ann. Cas. 560, and on the same subject, to McNight v. Parsons, 15 Ann. Cas. 669.

⁵⁵ Couch v. Meeker, 2 Conn. 302, 7 Am. Dec. 274; Taylor v. Thomas, 13 Kan. 217; Alexander v. Wilkes, 11 Lea (Tenn.), 221; Ricketts v. Pendleton, 14 Md. 320; Goodson v. Johnson, 35 Tex. 622; Foy v. Blackstone, 31 Ill. 538, 83 Am. Dec. 246. As to

"Proof of Escrow Agreement by Parol," see note to Manning v. Foster, 18 L. R. A., N. S., 337. See note on "Escrows," generally, to Wilkins v. Somerville, 130 Am. St. Rep. 910.

⁵⁶ Buchanan v. Adams, 49 N. J. L. 636, 60 Am. Rep. 666, 10 Atl. 662; Howard v. Stratton, 64 Cal. 487, 2 Pac. 263; Crozman v. Fuller, 17 Pick. (Mass.) 171.

⁵⁷ Couch v. Meeker, 2 Conn. 302, 7 Am. Dec. 274; Benton v. Martin, 52 N. Y. 570; McFarland v. Sikes, 54 Conn. 250, 1 Am. St. Rep. 111, 7 Atl. 408; Davis v. Davis, 97 Mich. 419, 56 N. W. 774; Clark v. Ducheneau, 26 Utah, 97, 72 Pac. 331.

⁵⁸ Drake v. Rogers, 32 Me. 524; Barlow v. Buckingham, 68 Iowa, 169, 26 N. W. 58; Bayley v. Taber, 5 Mass. 286, 4 Am. Dec. 57; Towne v. Rice, 122 Mass. 67; Biggs v. Piper, 86 Tenn. 58, 8 S. W. 851; Smith v. Mussetter, 58 Minn. 159, 59 N. W. 995.

⁵⁹ Barlow v. Buckingham, 68 Iowa, 169, 26 N. W. 58; Paysant v. Ware, 1 Ala. 160.

⁶⁰ Mead v. Brooks, 8 Ala. 840; Moran v. Abbey, 58 Cal. 163; Fowles v. Joslyn, 135 Mich. 333, 97 N. W. 790.

⁶¹ Schultz v. Noble, 77 Cal. 79, 19 Pac. 182; Clarke v. Tappin, 32 Conn. 56. Except there is statutory provision to the contrary: Baldwin v. Daly, 41 Wash. 416, 83 Pac. 724.

Under rules already stated, if there is a *latent ambiguity*, and if the instrument is obscurely written or erased in part,⁶² or if the language admits of several meanings,⁶³ or if it is made somewhat uncertain in meaning by the omission of words,⁶⁴ or if the contract is made with reference to a *usage*,⁶⁵ the uncertainty may be explained by parol. It is also admissible to show by parol the capacity and true *relations of the parties*,⁶⁶ such as that a signer of a note is a surety, and that this was known to the plaintiff;⁶⁷ or that the plaintiff and defendant sustain toward each other the relation of surety and cosurety.⁶⁸ But the apparent relation of the parties cannot be changed to the injury of *innocent third persons*.⁶⁹ When no *place of payment*

⁶² Paine v. Ringold, 43 Mich. 341, 5 N. W. 421.

⁶³ 2 Pars. Bills and N. 517.

⁶⁴ Lockhard v. Avery, 8 Ala. 502; Agawam Bank v. Strever, 18 N. Y. 502.

⁶⁵ Renner v. Bank of Columbia, 9 Wheat. (U. S.) 581, 6 L. Ed. 166.

⁶⁶ Heckscher v. Binney, Fed. Cas. No. 6316, 3 Woodb. & M. (U. S.) 333; Lacy v. Lofton, 26 Ind. 324; Germania Nat. Bank v. Mariner, 129 Wis. 544, 109 N. W. 574. In the case of In re Warren, 2 Ware (Dav. 320), 322, Fed. Cas. No. 17,191, in bankruptcy, the court held that where two persons who are partners unite in drawing a bill or making a note, though they signed their several names and not that of the firm, if it is in fact for partnership purposes, it will be treated as a partnership liability. To the same effect are, In re Thomas, Fed. Cas. No. 13886, 8 Biss. 139; Davis v. Turner, 120 Fed. 605, 56 C. C. A. 669 (reversing In re Jones, 116 Fed. 431); Mock v. Stoddard, 177 Fed. 611, 101 C. C. A. 237, which adopts these cases and lays down the admissibility of parol evidence for the purpose of proving the firm liability not-

withstanding the individual signatures of the members.

⁶⁷ Pollard v. Stanton, 5 Ala. 451; Bank of St. Mary's v. Mumford, 6 Ga. 44; Ward v. Stout, 32 Ill. 399; Grafton Bank v. Kent, 4 N. H. 221, 17 Am. Dec. 414; Adams v. Flanagan, 36 Vt. 400; Riley v. Gregg, 16 Wis. 666; Irvine v. Adams, 48 Wis. 468, 33 Am. Rep. 817, 4 N. W. 573; Hubbard v. Gurney, 64 N. Y. 457; Vestal v. Knight, 54 Ark. 97, 15 S. W. 17. But in case of a bond, a principal cannot show that one signing as surety really signed as principal: Coots v. Farnsworth, 61 Mich. 497, 28 N. W. 534.

⁶⁸ Hunt v. Chambliss, 15 Miss. 532; Sweet v. McAllister, 4 Allen (Mass.), 353; Horne v. Bodwell, 5 Gray (Mass.), 457; Bright v. Carpenter, 9 Ohio, 139, 34 Am. Dec. 432; Williams v. Macatee, 86 Va. 681, 10 S. E. 1061. For the rule as between coindorsers, see McPherson v. Weston, 85 Cal. 90, 24 Pac. 733. See note to Grafton Bank v. Kent, 17 Am. Dec. 416.

⁶⁹ Stephens v. Monongahela Nat. Bank, 88 Pa. 157, 32 Am. Rep. 438; Jordan v. Jordan, 10 Lea (Tenn.), 124, 43 Am. Rep. 294; Martin v. Cole, 104 U. S. 30, 26 L. Ed. 647.

is named in the note, a parol agreement as to the place intended may be shown;⁷⁰ and when it is doubtful on the face of the paper whether principal or agent is liable, the intention may be shown by parol.⁷¹ So, in case of *ambiguity*, the parties may be identified by parol proof.⁷² Nor is it any violation of the rule to show by extrinsic evidence an entirely distinct and *collateral contract*;⁷³ or to show whether the instrument was given in satisfaction of a former note, or as security therefor;⁷⁴ or that the note has been *discharged* by the performance of an agreement.⁷⁵ Thus in an action on a joint and several note, parol evidence was admissible that several of the makers had given checks, which were duly honored, to the payee. Each of these checks expressed on its face that it was to pay the drawer's share of the note sued on. The checks were accepted by the plaintiff, and were competent evidence that the plaintiff agreed to receive from the parties such payments in discharge of their liability upon the note.⁷⁶

⁷⁰ See § 494, *ante*.

⁷¹ *Dow v. Moore*, 47 N. H. 419; *Johnson v. Smith*, 21 Conn. 627; *Early v. Wilkinson*, 9 Gratt. (Va.) 68; *Schmittler v. Simon*, 114 N. Y. 176, 11 Am. St. Rep. 621, 21 N. E. 162; *Musser v. Johnson*, 42 Mo. 74, 97 Am. Dec. 316; *Bean v. Pioneer Min. Co.*, 66 Cal. 451, 56 Am. Rep. 106, 6 Pac. 86; *Hardy v. Pileher*, 57 Miss. 18, 34 Am. Rep. 432; *Laffin etc. Powder Co. v. Sinsheimer*, 48 Md. 411, 30 Am. Rep. 472. In *Robinson v. Kanawha Valley Bank*, 44 Ohio St. 441, 58 Am. Rep. 829, 8 N. E. 583, the Kanawha & Ohio Coal Co. was the drawer and its agent Robinson was the drawee, and he accepted the bill adding after his acceptance "agent K. & O. C. Co." In an action by an indorsee, parol evidence was held inadmissible to show that Robinson intended to bind the coal company as his principal. On parol evidence to show whether principal or agent is liable as maker,

see note to *Keidan v. Winegar*, 20 L. R. A. 705.

⁷² *Cork v. Bacon*, 45 Wis. 192, 30 Am. Rep. 712; *Kinney v. Flynn*, 2 R. I. 319; *Jenkins v. Bass*, 88 Ky. 397, 21 Am. St. Rep. 344, 11 S. W. 293; *McCullough v. Wainright*, 14 Pa. 171; *Jackson v. Sill*, 11 Johns. (N. Y.) 201, 6 Am. Dec. 363.

⁷³ *Brent v. Bank*, 1 Pet. (U. S.) 89, 7 L. Ed. 65; *Brook v. Latimer*, 44 Kan. 431, 21 Am. St. Rep. 292, 11 L. R. A. 805, 24 Pac. 946; *Phillips v. Preston*, 5 How. (U. S.) 278, 12 L. Ed. 152.

⁷⁴ *Hale v. Rice*, 124 Mass. 292; *First Nat. Bank v. Nugen*, 99 Ind. 160; *Farnham v. Ingham*, 5 Vt. 514; *Lippincott v. Lawrie*, 119 Wis. 573, 97 N. W. 179.

⁷⁵ *Buchanan v. Adams*, 49 N. J. L. 636, 60 Am. Rep. 666, 10 Atl. 662.

⁷⁶ *Woods v. Finley*, 153 N. C. 497, 69 S. E. 502.

§ 496 (508). **Indorsements on negotiable paper.**—In some cases a distinction has been made in respect to blank indorsements on negotiable paper; and parol evidence has been received to show a contemporaneous verbal agreement that the indorsee should not have recourse on the indorser, and that the instrument was delivered on that condition.⁷⁷ Parol evidence has been received in such cases, not as a variation of the agreement, but to prevent the party from making use of the blank indorsement, contrary to the trust and virtually in fraud of the indorser's rights.⁷⁸ Other decisions to the same effect have been based on the ground that the contract of indorsement is one implied by law from the blank indorsement, and hence is not subject to the rule which excludes parol evidence to vary written instruments, but that the parties may prove an agreement that the blank indorsement should only have the effect to transfer the title.⁷⁹ But by the clear *weight of authority, this distinction*, thus proposed between blank indorsements and those written out in full, is held *untenable*.⁸⁰ The better view is that when the legal effect of a contract is clear and definite, as in the case of a blank in-

⁷⁷ Hill v. Ely, 5 Serg. & R. (Pa.) 363, 9 Am. Dec. 376, and full note; Castrique v. Battigieg, 10 Moore P. C. 94; Smith v. Morrill, 54 Me. 48; Holmes v. First Nat. Bank, 38 Neb. 326, 41 Am. St. Rep. 733, 56 N. W. 1011; Witherow v. Slayback, 158 N. Y. 649, 70 Am. St. Rep. 507, 53 N. E. 681; Susquehanna Bank v. Evans, Fed. Cas. No. 13,635, 4 Wash. C. C. 480; Ross v. Espy, 66 Pa. 481, 5 Am. Rep. 394; Taylor v. French, 2 Lea (Tenn.), 257, 31 Am. Rep. 609; Truman v. Bishop, 83 Iowa, 697, 50 N. W. 278. See cases cited in Browne, Parol Ev., § 84. Also notes to Rose v. Laffan, 42 Am. Dec. 378, Hill v. Ely, 9 Am. Dec. 381, Stack v. Beach, 39 Am. Rep. 116-123, Baxter Nat. Bank v. Talbot, 13 L. R. A. 52, and Fullerton v. Hill, 18 L. R. A. 33.

⁷⁸ Hill v. Ely, 5 Serg. & R. (Pa.), 363, 9 Am. Dec. 376, and note.

⁷⁹ Ross v. Espy, 66 Pa. 481, 5 Am. Rep. 394; Susquehanna Bank v. Evans, Fed. Cas. No. 13,635, 4 Wash. C. C. 480; Barelay v. Weaver, 19 Pa. 396, 57 Am. Dec. 661; Patterson v. Todd, 18 Pa. 426, 57 Am. Dec. 622. See note to Hill v. Ely, 9 Am. Dec. 381-385.

⁸⁰ Alabama Nat. Bank v. Rivers, 116 Ala. 1, 67 Am. St. Rep. 95, 22 South. 580; Jenkins v. Shinn, 55 Ark. 347, 18 S. W. 240; Citizens' Bank v. Jones, 121 Cal. 30, 53 Pac. 354; Doom v. Sherwin, 20 Colo. 234, 38 Pac. 56; Dale v. Gear, 38 Conn. 15, 9 Am. Rep. 353; Thompson v. McKee, 5 Dak. 172, 37 N. W. 367; Perry v. Bray, 68 Ga. 293; Kimmel v. Weil, 95 Ill. App. 15; Smythe v. Scott, 106 Ind. 245, 6

dorsement, the intention of the parties is, in a legal sense, as well understood as if they had expressed in words what the law implies, and that the contract can no more be varied by parol in the one case than in the other.⁸¹ The language of the United States supreme court is clear: "The contract created by the indorsement and delivery of a negotiable note, even between the immediate parties to it, is a commercial contract, and is not, in any proper sense, a contract implied by the law, much less an inchoate or imperfect contract. It is an express contract, and is in writing, some of the terms of which, according to the custom of merchants and for the convenience of commerce, are usually omitted, but not the less, on that account, perfectly understood. All its terms are certain, fixed and definite, and, when necessary, supplied by that common knowledge, based on universal custom, which has made it both safe and

N. E. 145; *Stack v. Beach*, 74 Ind. 571, 39 Am. Rep. 113; *Geneser v. Wissner*, 69 Iowa, 119, 28 N. W. 471; *Doolittle v. Ferry*, 20 Kan. 230, 27 Am. Rep. 166; *Goodwin v. Davenport*, 47 Me. 112, 74 Am. Dec. 478; *Sanborn v. Southard*, 25 Me. 409, 43 Am. Dec. 288, and note; *Harvard Pub. Co. v. Benjamin*, 84 Md. 333, 57 Am. St. Rep. 402, 35 Atl. 930; *Baldwin v. Dow*, 130 Mass. 416; *Prescott Bank v. Caverly*, 7 Gray (Mass.), 217, 66 Am. Dec. 473; *Ortmann v. Canadian Bank of Commerce*, 39 Mich. 518; *Porter v. Winona etc. Grain Co.*, 78 Minn. 210, 80 N. W. 965; *Howser v. Newman*, 65 Mo. App. 367; *Harnett v. Holdrege*, 73 Neb. 570, 119 Am. St. Rep. 905, 103 N. W. 277, 5 Neb. (Unof.) 114, 97 N. W. 443; *Barry v. Morse*, 3 N. H. 132; *Foley v. Emerald etc. Brewing Co.*, 61 N. J. L. 428, 39 Atl. 650; *Chaddock v. Vanness*, 35 N. J. L. 517, 10 Am. Rep. 256; *Bird v. Kay*, 40 App. Div. 533, 58 N. Y. Supp. 170; *Fassin v. Hubbard*, 55 N. Y. 465; *Hill v. Shields*, 81 N. C.

250, 31 Am. Rep. 499; *Farr v. Ricker*, 46 Ohio St. 265, 21 N. E. 354; *Smith v. Caro*, 9 Or. 278; *Hauer v. Patterson*, 84 Pa. 274; *Smith v. Brabham*, 48 S. C. 337, 26 S. E. 651; *Schmitz v. Hawkeye Gold Min. Co.*, 8 S. D. 544, 67 N. W. 618; *Wizig v. Beisert* (Tex. Civ. App.), 120 S. W. 954; *Sanford v. Norton*, 17 Vt. 285; *Riverview Land Co. v. Dancee*, 98 Va. 239, 35 S. E. 720; *Woodward v. Foster*, 18 Gratt. (Va.) 200; *Allen v. Chambers*, 13 Wash. 327, 43 Pac. 57; *Halbach v. Trester*, 102 Wis. 530, 78 N. W. 759; *Charles v. Denis*, 42 Wis. 56, 24 Am. Rep. 383; *Martin v. Cole*, 104 U. S. 30, 26 L. Ed. 647; *Free v. Hawkins*, 8 Taunt. 92, 129 Eng. Reprint, 317; *Hoare v. Graham*, 3 Camp. 57, 13 R. R. 752; *Plough Co. v. Wallace*, 21 Can. S. Ct. 256.

⁸¹ *Charles v. Denis*, 42 Wis. 56, 24 Am. Rep. 383; *Halbach v. Trester*, 102 Wis. 530, 78 N. W. 759; *Stack v. Beach*, 74 Ind. 571, 39 Am. Rep. 113; *Smith v. Bayer*, 46 Or. 143, 114 Am. St. Rep. 858, 79 Pac. 497, and cases last cited.

convenient to rest the rights and obligations of parties to such instruments upon an abbreviation. So that the mere name of the indorser, signed upon the back of a negotiable instrument, conveys and expresses his meaning and intention as fully and completely as if he had written out the customary obligation of his contract in full." After citing a long line of authorities, Mr. Justice Matthews says that in view of that line of decisions the question cannot now be considered an open one.⁸² There has been no conflict of opinion in those cases where the rights of *bona fide* holders are concerned. In such cases, the admission of such testimony would be a palpable violation of legal rules.⁸³ A restrictive indorsement to commercial paper unambiguous in its terms cannot be contradicted or explained by parol evidence. A certificate of deposit indorsed for collection for the account of the indorser is a restrictive indorsement which vests no general property in the paper in the indorsee, but makes him merely a collection agent; and parol evidence is not admissible to show that the transfer of the title was intended to be absolute.⁸⁴ In the United States supreme court, Mr. Justice Miller said: "The language of the indorsement is without ambiguity, and needs no explanation, either by parol proof or by resort to usage. The plain meaning of it is, that the acceptor of the draft is to pay it to the indorsee for the use of the indorser. The indorsee is to receive it on account of the indorser. It does not purport to transfer the title of the paper or the ownership of the money when received. Both these remain, by the reasonable and almost necessary meaning of the language, in the indorser. It seems to us that the court below correctly construed the effect of the indorsement to be to make Mr. White (the plaintiff) the agent of the bank for the collection of the money. If this be a sound view of the

⁸² *Martin v. Cole*, 104 U. S. 30, 26 L. Ed. 647.

⁸³ *Dale v. Gear*, 38 Conn. 15, 9 Am. Rep. 353.

⁸⁴ *United States Nat. Bank v. Geer*, 55 Neb. 462, 70 Am. St. Rep. 390, 41 L. R. A. 444, 75 N. W. 1088.

legal effect of the written indorsement, neither parol proof nor custom can be received to contradict it."⁸⁵

§ 497 (509). **Same — Qualifications.**—In the cases already cited, the question has arisen between the indorser and the indorsee, where the indorser was a party to the note, as a payee. It has been held in numerous cases that a different rule obtains where the note is *non-negotiable*, or where it is *made by one not a party* to the note, and prior to an indorsement by the payee.⁸⁶ So it may be shown by parol that a principal made the blank indorsement *to an agent for a particular purpose*;⁸⁷ or that the indorsement was *for collection* merely,⁸⁸ or that the relation was that of *principal and surety*, and that the indorsement was made for the accommodation of the immediate indorsee.⁸⁹ In order to let in a meritorious defense, the maker of a promissory

⁸⁵ *White v. Miners' Nat. Bank*, 102 U. S. 658, 26 L. Ed. 250. See, also, *Armour Banking Co. v. Riley Co. Bank*, 30 Kan. 163, 1 Pac. 506; *Third Nat. Bank v. Clark*, 23 Minn. 263.

⁸⁶ *Dale v. Gear*, 38 Conn. 15, 9 Am. Rep. 353; *Kingsland v. Koeppel*, 137 Ill. 344, 13 L. R. A. 649, 28 N. E. 48; *Stack v. Beach*, 74 Ind. 571, 39 Am. Rep. 113; *Houck v. Graham*, 106 Ind. 195, 55 Am. Rep. 727, 6 N. E. 594; *Deering v. Creighton*, 19 Or. 118, 20 Am. St. Rep. 800; *Owings v. Baker*, 54 Md. 82, 39 Am. Rep. 353; *Kealing v. Van Sickel*, 74 Ind. 529, 39 Am. Rep. 101; *Barton v. American Nat. Bank*, 8 Tex. Civ. App. 223, 29 S. W. 210; *Burton v. Hansford*, 10 W. Va. 470, 27 Am. Rep. 571, and note.

⁸⁷ *Dale v. Gear*, 38 Conn. 15, 9 Am. Rep. 353; *Chaddock v. Vanness*, 35 N. J. L. 517, 10 Am. Rep. 256.

⁸⁸ *Ricketts v. Pendleton*, 14 Md. 320; *McWhirt v. McKee*, 6 Kan. 412; *Wallis v. Littell*, 11 Com. B., N. S.,

369, 31 L. J. C. P. 100, 8 Jur., N. S., 745; *Bell v. Lord Ingestre*, 12 Q. B. 317, 116 Eng. Reprint, 388; *Stack v. Beach*, 74 Ind. 571, 39 Am. Rep. 113; *Hudson v. Wolcott*, 39 Ohio St. 618. See preceding section as to restrictive indorsement. As to right to show by parol evidence that indorsement unrestricted in form was made for purpose of collection only, see note to *Johnston v. Schnabaum*, 17 L. R. A., N. S., 838. See, also, note on "Admissibility of Parol Evidence to Show that Indorsement of Bill or Note was for Purpose of Collection Only," to *Johnston v. Schnabaum*, 15 Ann. Cas. 877.

⁸⁹ *Dale v. Gear*, 38 Conn. 15, 9 Am. Rep. 353; *Smith v. Carter*, 25 Wis. 283; *Chaddock v. Vanness*, 35 N. J. L. 517, 10 Am. Rep. 256; *Lewis v. Dunlap*, 72 Mo. 174; *Breneman v. Furniss*, 90 Pa. 186, 35 Am. Rep. 651; *Hamburger v. Miller*, 48 Md. 317; *Martin v. Marshall*, 60 Vt. 321, 13 Atl. 420. See note to *Keidan v. Winegar*, 20 L. R. A. 711.

note who is sued thereon may show that the plaintiff is not a *bona fide* holder of the note.⁹⁰ It has become the well-settled rule, in the absence of statutory provisions, that a contemporaneous parol agreement may be shown between indorser and indorsee to the effect that *no demand or notice of nonpayment* need be given, and that, without such demand and notice, the indorser shall be absolutely bound for payment.⁹¹ In many of the cases this rule is based

⁹⁰ *Quinn v. First Nat. Bank of Fitzgerald*, 8 Ga. App. 235, 68 S. E. 1010. That the fraud of the payee of the promissory note in securing its execution was known to his vendee at the time of its purchase before maturity undoubtedly is a good defense at common law. *Per contra* a vendee who purchases a negotiable instrument for value in the ordinary course of business in good faith and without knowledge of fraud in its execution can enforce the note, though voidable as between the parties. The provisions of § 2747, Rev. Laws 1905 of Minnesota, as to instruments obtained by fraud, do not modify or repeal the common law on the subject: *Hinkley v. Freick*, 112 Minn. 239, 127 N. W. 940.

⁹¹ *Andrews v. Simms*, 33 Ark. 771; *Hazard v. White*, 26 Ark. 155; *Stanley v. McElrath*, 86 Cal. 449, 10 L. R. A. 545, 25 Pac. 16; *Farmers' Bank v. Waples*, 4 Harr. (Del.) 429; *Worley v. Johnson*, 60 Fla. 294, 33 L. R. A., N. S., 639, 53 South. 543; *Robinson v. Barnett*, 19 Fla. 670, 45 Am. Rep. 24; *Schmied v. Frank*, 86 Ind. 250; *Creshire v. Taylor*, 29 Iowa, 492; *Markland v. McDaniel*, 51 Kan. 350, 20 L. R. A. 96, 32 Pac. 1114; *Murphy v. Citizens' Sav. Bank*, 110 Ky. 930, 22 Ky. Law Rep. 1872, 62 S. W. 1028; *Maples v. Traders' Deposit Bank*, 15 Ky. Law Rep. 879; *Wall v. Bry*, 1 La. Ann. 312; *Central Bank v. Davis*, 19 Pick. (Mass.) 373;

Taunton Bank v. Richardson, 5 Pick. (Mass.) 436; *Bessenger v. Wenzel*, 161 Mich. 61, 125 N. W. 750; *Allen v. Burgener*, 156 Mo. App. 265, 137 S. W. 616; *Keller v. Home L. Ins. Co.*, 95 Mo. App. 627, 69 S. W. 612; *Edwards v. Tandy*, 36 N. H. 540; *Hibbard v. Russell*, 16 N. H. 410, 41 Am. Dec. 733; *Sheldon v. Horton*, 43 N. Y. 93, 3 Am. Rep. 669; *Porter v. Kembell*, 53 Barb. (N. Y.) 467; *Dye v. Scott*, 35 Ohio St. 194, 35 Am. Rep. 604; *Annville Nat. Bank v. Kettering*, 106 Pa. 531, 51 Am. Rep. 536; *Barclay v. Weaver*, 19 Pa. 396, 57 Am. Dec. 661, and full note; *Deahy v. Choquet*, 28 R. I. 338, 14 L. R. A., N. S., 847, 67 Atl. 421; *Dewey v. Sibert*, 21 S. D. 480, 16 Ann. Cas. 151, 113 N. W. 721; *Taylor v. French*, 2 Lea (Tenn.), 257, 31 Am. Rep. 609; *Stone v. Smith*, 30 Tex. 138, 94 Am. Dec. 299; *Worden v. Mitchell*, 7 Wis. 161. *Daniel in 2 Negotiable Instruments*, section 1093, says it is conceded on all sides that a verbal waiver is as effectual as a written one. "Such evidence is not offered for the purpose of varying the written contract of indorsement which is simply to pay the note after exercise of due diligence against the maker, but to show that the parties have between themselves settled the amount of diligence to be required." He adds that it has been held differently, and cites a few of the older cases. *Far-*

upon the ground that the condition of demand and notice is not a part of the contract, but only a step in the legal remedy which may be waived at any time.⁹² We have already dealt with the declarations of the owner of a chose in action,⁹³ and they apply to negotiable paper. When an indorsee takes a bill or note, by indorsement, before it is due, and without notice of fraud or other matter of defense, he takes it on an independent title by the indorsement, and will not be affected by any payment, setoff, fraudulent consideration, or other matter of defense, which the acceptor or promisor might have had against any previous holder or prior party, but evidence that the indorsee of a note before due took it with notice of fraud in procuring it of the maker, and that payment would be resisted on that ground, is admissible in an action by the indorsee against the maker, and the payee's declarations before indorsement are competent evidence to show the fraud, that is to say, his declarations against interest while he is the owner of the note are admissible against him.⁹⁴ *A fortiori*, the evidence of such declarations is received where the indorsement is after the maturity of the note.⁹⁵ The

well v. St. Paul Trust Co., 45 Minn. 495, 22 Am. St. Rep. 742, 48 N. W. 326, has a persuasive opinion that the paper "shall tell its own story." (Hough, J., in Rodney v. Wilson, 67 Mo. 123, 29 Am. Rep. 499.) On the admissibility of parol evidence, as between indorser and indorsee, that unrestricted indorsement was made merely to transfer title to the owner, see note to First Nat. Bank v. Reinman, 28 L. R. A., N. S., 530.

⁹² Barclay v. Weaver, 19 Pa. 396, 57 Am. Dec. 661; Struthers v. Blake, 30 Pa. 139; Sherer v. Easton Bank, 33 Pa. 134; Pollard v. Bowen, 57 Ind. 232; Airey v. Pearson, 37 Mo. 424; Worden v. Mitchell, 7 Wis. 161. See cases cited in preceding note.

⁹³ § 247, *ante*.

⁹⁴ Fisher v. Leland, 4 Cush. (Mass.) 456, 50 Am. Dec. 805. See, also, Remy v. Duffee, 4 Ala. 365; Jackson v. Jones, 94 Ark. 426, 127 S. W. 710; Hanchett v. Kimbark, 118 Ill. 121, 7 N. E. 491; Whittier v. Vose, 16 Me. 403; Millsaps v. Merchants' etc. Bank, 71 Miss. 361, 13 South. 903; Reed v. Vancleve, 27 N. J. L. 352, 72 Am. Dec. 369; Crayton v. Collins, 2 McCord (S. C.), 457; Barnes v. McCarthy (Tex. Civ. App.), 132 S. W. 85. The exception of the New York cases has been already discussed, § 246, *ante*.

⁹⁵ Fisher v. Leland, *supra*. See, also, Sandifer v. Hoard, 59 Ill. 246; Robb v. Schmidt, 35 Mo. 290; Hollister v. Hunt, 9 Ohio, 8; Sharp v. Smith, 7 Rich. (S. C.) 3; Drennon v. Smith, 3 Head (Tenn.), 389.

admission of these declarations must be based upon the fact that they were made by the holder while he was the owner of the note. Declarations made before or after the ownership are not competent.⁹⁶ In a Texas case, however, an exception was made where the defense was that the plaintiff was not the *bona fide* holder of the note which was given in part payment on a purchase of land to which no title could be made by the payee. In that case a letter written by the payee to the defendant, a considerable time after the transfer of the note to the plaintiff, promising to perfect the title, was admitted under the plea referred to and one of want of consideration.⁹⁷ Parol evidence is admissible to prove that one has been induced by false representations to indorse a note, and generally to prove fraud in obtaining the indorsement.⁹⁸ And it has been held that if the maker of a note payable to himself alleges in defense that his indorsement thereof was procured by a fraudulent trick, without intent on his part to indorse it, evidence of the perpetration of a similar trick on others, by those who obtained his indorsement, is admissible, even against a *bona fide* holder of the note, to show a general scheme to defraud.⁹⁹ From the rule of the best evidence

⁹⁶ Perry v. Graves, 12 Ala. 246; Scripture v. Newcomb, 16 Conn. 588; Proctor v. Cole, 104 Ind. 373, 3 N. E. 106, 4 N. E. 303; Crane v. Gunn, 4 B. Mon. (Ky.) 10; Dowty v. Sullivan, 19 La. Ann. 448; Wheeler v. Rice, 8 Cush. (Mass.) 205; Shoher v. Jack, 3 Mont. 351; Zimmerman v. Kearney County Bank, 57 Neb. 800, 78 N. W. 366; Van Gelder v. Van Gelder, 81 N. Y. 625; De Bruhl v. Patterson, 12 Rich. (S. C.) 363; Hough v. Barton, 20 Vt. 455.

⁹⁷ Morris v. Brown, 38 Tex. Civ. App. 266, 85 S. W. 1015.

⁹⁸ Kirkham v. Boston, 67 Ill. 599; Larrabee v. Fairbanks, 24 Me. 363, 41 Am. Dec. 389; McHay v. Peterson, 52 Tex. Civ. App. 195, 113 S. W.

981; Woodward v. Foster, 18 Gratt. (Va.) 200; Nethercutt v. Hopkins, 38 Wash. 577, 80 Pac. 798.

⁹⁹ Yakima Valley Bank v. McAllister, 37 Wash. 566, 107 Am. St. Rep. 823, 1 L. R. A., N. S., 1075, 79 Pac. 1119. A note, to which the maker's signature has been procured by false representations as to the character of the paper, he being ignorant of its true character, and having no intention to sign such a paper, and being guilty of no negligence in doing so, is regarded by some authorities as void, even in the hands of a *bona fide* purchaser: Keller v. Ruppold, 115 Wis. 636, 95 Am. St. Rep. 974, 92 N. W. 364; Willard v. Nelson, 35 Neb. 651, 37

already discussed,¹⁰⁰ it follows that indorsements cannot be proved by parol evidence, except they are not in the power possession, custody or control of the party by reason of loss or other valid cause preventing their production.¹

§ 498 (510). Bills of lading—Contractual stipulations—Receipts.—We have already seen that, where an instrument in writing partakes both of the qualities of a contract and of a receipt, it is open to explanation or contradiction by parol as to those particulars which constitute a receipt, but that parol evidence is inadmissible to contradict those particulars which import a contract.² Perhaps there is no class of writings which afford so frequent illustration of this principle as bills of lading. A bill of lading is an instrument well known in commercial transactions, and its character and effect have been defined by judicial decisions. In the hands of the holder it is evidence of ownership, special or general, of the property mentioned in it, and of the right to receive said property at the place of delivery. Notwithstanding it is designed to pass from hand to hand, with or without indorsement, and is efficacious for its ordinary purposes in the hands of the holder, it is not a negotiable instrument or obligation in the sense that a bill of exchange or a promissory note is. Its transfer does not preclude, as in those cases, *all* inquiry into the transaction in which it originated, because it has come into hands of persons who have innocently paid value for it. The doctrine of *bona fide* purchasers only applies to it in

Am. St. Rep. 455, 53 N. W. 572. Compare the notes to *Bedell v. Herring*, 11 Am. St. Rep. 309-326; *Willard v. Nelson*, 37 Am. St. Rep. 458-460; and see *Salley v. Terrill*, 95 Me. 553, 85 Am. St. Rep. 433, 55 L. R. A. 730, 50 Atl. 896; *Manhattan Sav. Inst. v. New York Nat. Ex. Bank*, 170 N. Y. 58, 88 Am. St. Rep. 640, 62 N. E. 1079; *Chicago etc. Ry. Co. v. Hamblar*, 215 Ill. 525, 106 Am.

St. Rep. 187, 3 Ann. Cas. 42, 74 N. E. 705.

¹⁰⁰ § 201, *ante*.

¹ *Hammond v. Freeman*, 9 Ark. 62; *De Pusey v. Du Pont*, 1 Del. Ch. 77.

² See § 492, *ante*. On the general subject of this section, see extended notes to *Chandler v. Sprague*, 38 Am. Dec. 409-426; *National Bank v. Baltimore etc. R. R.*, 105 Am. St. Rep. 347 et seq.

a limited sense.³ From the nature of such instruments, they must contain recitals as to the receipts of goods, such as those of the time, quantity, quality and condition of the goods, as well as certain other statements which are rather in the nature of agreements than recitals. The twofold character of the instrument lies in that it is both a receipt and a contract. In the former character it is an acknowledgment of the receipt of property on board his vessel by the owner of the vessel. In the latter it is a contract to carry safely and deliver. The receipt of the goods lies at the foundation of the contract to carry and deliver.⁴ While the *recitals* of the character named are generally *open to explanation* and contradiction,⁵ yet the agreements or promises are not.⁶ For example, the carrier may show, in an action between himself and the one claiming to have shipped the goods, that no goods were received.⁷ This may even be shown as against

³ Pollard v. Vinton, 105 U. S. 7, 26 L. Ed. 998.

⁴ Garden Grove Bank v. Humeston etc. R. Co., 67 Iowa, 526, 25 N. W. 761; Cohen Bros. v. Missouri etc. R. Co., 44 Tex. Civ. App. 381, 98 S. W. 437.

⁵ Bates v. Todd, 1 Moody & R. 106; Berkley v. Watling, 7 Ad. & E. 29, 34 E. C. L. 22, 112 Eng. Reprint, 382; Maryland Ins. Co. v. Woods, 6 Cranch (U. S.), 29, 3 L. Ed. 143; The Lady Franklin, 8 Wall. 325, 19 L. Ed. 455; O'Brien v. Gilchrist, 34 Me. 554, 56 Am. Dec. 676; Richards v. Doe, 100 Mass. 524; Baltimore etc. Steamboat Co. v. Brown, 54 Pa. 77; Chapin v. Chicago Ry. Co., 79 Iowa, 582, 44 N. W. 820; Atwell v. Miller, 11 Md. 348, 69 Am. Dec. 206; Witzler v. Collins, 70 Me. 290, 35 Am. Rep. 327; Williams etc. Co. v. Wilmington & W. Ry. Co., 93 N. C. 42, 53 Am. Rep. 450; Atlantic etc. R. Co. v. Cohn, 6 Ga. App. 572, 65 S. E. 355.

⁶ Cox v. Peterson, 30 Ala. 608, 68 Am. Dec. 145; McElveen v. Southern Ry. Co., 109 Ga. 249, 77 Am. St. Rep. 371, 34 S. E. 281; Indianapolis etc. R. Co. v. Remmy, 13 Ind. 518; Garden Grove Bank v. Humeston etc. R. Co., 67 Iowa, 526, 25 N. W. 761; O'Bryan v. Kinney, 74 Mo. 125; Hill v. Syracuse etc. R. Co., 73 N. Y. 351, 29 Am. Rep. 163; Cincinnati etc. R. Co. v. Pontius, 19 Ohio St. 221, 2 Am. Rep. 391; May v. Babcock, 4 Ohio, 334; The Delaware, 14 Wall. (U. S.) 579, 20 L. Ed. 779, and cases cited; The Wellington, 1 Biss. (U. S.) 279, 29 Fed. Cas. No. 17,384, and cases above cited. As to explaining or contradicting bills of lading, see note on rights and liabilities of assignees of bills of lading to National Bank v. Baltimore etc. R. R., 105 Am. St. Rep. 332.

⁷ Lake Shore etc. R. Co. v. Nat. Livestock Bank, 178 Ill. 506, 53 N. E. 326; Pittsburg etc. R. Co. v. American Tobacco Co., 126 Ky. 582, 104

a *bona fide holder* of the bill of lading, and that the bill of lading was issued fraudulently or by mistake of the issuing agent of the carrier. The text-book writers all agree that this position is supported by an overwhelming weight of authority.⁸ The reasoning by which this doctrine is usually supported is that a bill of lading is not negotiable in the sense in which a bill of exchange or promissory note is negotiable, where the purchaser need not look beyond the instrument itself; that so far as it is a receipt for the goods it is susceptible of explanation or contradiction, the same as any other receipt; that the whole question is one of the law of agency; and that it is not within the scope of the authority of the shipping agent of a carrier to issue bills of lading where no property is in fact received for transportation; that the extent of his authority, either real or apparent, is to issue bills of lading for freight actually received; that his real and apparent authority, that is, the power with which his principal has clothed him in the character in which he is held out to the world, is the same, viz., to give bills of lading for goods received for transportation; and that this limitation upon his authority is known to the commercial world, and therefore any person purchasing a bill of lading issued by the agent of a carrier acts at his own risk as respects the existence of the fact (the receipt of the goods) upon which alone the agent has authority to issue the bill, the rule being that if the authority of an agent is known to be open for exercise

S. W. 377; *Fellows v. The R. W. Powell*, 16 La. Ann. 316, 79 Am. Dec. 581; *Baltimore etc. R. Co. v. Wilkens*, 44 Md. 11, 22 Am. Rep. 26; *Sears v. Wingate*, 3 Allen (Mass.), 103; *National Bank of Commerce v. Chicago etc. R. Co.*, 44 Minn. 224, 20 Am. St. Rep. 566, 9 L. R. A. 263, 46 N. W. 342, 560; *Milne v. Chicago etc. R. Co.*, 155 Mo. App. 465, 135 S. W. 85; *Louisiana Nat. Bank v. Laveille*, 52 Mo. 380; *Williams etc. Co. v. Wilmington & W. Ry. Co.*, 93

N. C. 42, 53 Am. Rep. 450; *Franklin Trust Co. v. Philadelphia etc. R. Co.*, 222 Pa. 96, 22 L. R. A., N. S., 328, 70 Atl. 949; *Schooner Freeman v. Buckingham*, 18 How. (U. S.) 182, 15 L. Ed. 341; *The Willie D. Sandhoval*, 92 Fed. 286; *Berkley v. Watling*, 7 Ad. & E. 29, 112 Eng. Reprint, 382. See note to *Chandler v. Sprague*, 38 Am. Dec. 410-426.

⁸ See note to *Chandler v. Sprague*, 38 Am. Dec. 410.

only in a certain event, or upon the happening of a certain contingency, or the performance of a certain condition, the occurrence of the event or the happening of the contingency, or the performance of the condition must be ascertained by him who would avail himself of the results ensuing from the exercise of the authority.⁹ The authorities are not entirely agreed upon this proposition, and the *contrary rule* has been vigorously asserted in several cases,¹⁰ in New York, Kansas, Nebraska, Illinois and

⁹ Central of Georgia R. Co. v. Cook, 4 Ga. App. 698, 62 S. E. 464; Hunt v. Mississippi Cent. R. Co., 29 La. Ann. 446; Baltimore etc. R. Co. v. Wilkens, 44 Md. 11, 22 Am. Rep. 26; Sears v. Wingate, 3 Allen (Mass.), 103; National Bank of Commerce v. Chicago etc. R. Co., 44 Minn. 224, 20 Am. St. Rep. 566, 9 L. R. A. 263, 46 N. W. 342, 560; Hazard v. Illinois Cent. R. Co., 67 Miss. 32, 7 South. 280; Watkins Nat. Bank v. Cleveland etc. R. Co., 117 Mo. App. 248, 93 S. W. 846; Peele v. Atlantic Coast Line R. Co., 149 N. C. 390, 63 S. E. 66; Williams etc. Co. v. Wilmington etc. Ry. Co., 93 N. C. 42, 53 Am. Rep. 450, and note; Adams v. The Brig Pilgrim, 1 Ohio Dec. 477, 10 West L. J. 141; Grant v. Norway, 10 Com. B. 665, 20 L. J. C. P. 93, 15 Jur. 296; Roy v. Northern Pacific R. Co., 42 Wash. 572, 7 Ann. Cas. 728, 6 L. R. A., N. S., 302, 85 Pac. 53; Pollard v. Vinton, 105 U. S. 7, 26 L. Ed. 998; Sutton v. Kettell, Fed. Cas. No. 13,647, Sprague (U. S.), 309; The Loon, Fed. Cas. No. 8499, 7 Blatchf. (U. S.) 244; Friedlander v. Texas Ry. Co., 130 U. S. 416, 32 L. Ed. 991, 9 Sup. Ct. Rep. 570; Robinson v. Memphis Ry. Co., 9 Fed. 129; Erb v. R. Co., 3 Ont. App. 446, 42 U. C. Q. B. 90, 5 Can. S. Ct. 179. In Henderson v. Louisville etc. R. Co., 116 La. 1047,

114 Am. St. Rep. 582, 41 South. 252, it was held that this rule of commercial law was not abrogated by a statute making it a felony to issue false receipts or bills of lading for property not actually received or delivered. Of course, if the fraud is coupled with the negligence of the defendant the rights of the *bona fide* holder are not affected. Where one of two innocent parties must suffer by the fraud of another, the loss should fall on him who enabled such third person to commit the fraud. For instance, when the bills of lading were transferred as collateral after the goods had been delivered and the bill of lading, instead of being canceled, was transferred with full knowledge, the rights of the transferee without notice were unaffected: Walters v. Western etc. R. Co., 56 Fed. 369, where the same bill of lading was used a second time. See notes to Chandler v. Sprague, 38 Am. Dec. 404, and National Bank v. Baltimore etc. R. R., 105 Am. St. Rep. 332, above referred to.

¹⁰ Sioux City Ry. Co. v. First Nat. Bank, 10 Neb. 556, 35 Am. Rep. 488; Armour v. Michigan Cent. R. Co., 65 N. Y. 111, 22 Am. Rep. 603; Savings Bank v. Atchison, T. & S. F. R. Co., 20 Kan. 519; Bank of Batavia v. New York etc. R. Co., 106 N. Y. 195, 60 Am. Rep. 440, 12 N. E. 433;

Pennsylvania. The reasoning of these cases is, in substance, that the question does not at all depend upon the negotiability of bills of lading, but upon the principle of estoppel *in pais*; that where a principal has clothed an agent with power to do an act in case of the existence or some extrinsic fact, necessarily and peculiarly within the knowledge of the agent, and of the existence of which the act of executing the power is itself a representation, the principal is estopped from denying the existence of the fact, to the prejudice of a third person who has dealt with the agent or acted on his representation in good faith in the ordinary course of business. The acceptance of the rule is, in the face of the strong reasoning referred to, well expressed by Mitchell, J.¹¹ On the broad ground of assimilating state decisions with those of the federal courts on questions of general commercial law, the learned judge said: "The inconvenience and confusion that would follow from having two conflicting rules on the same question in the same state, one in the federal courts and another in the state courts, is of itself almost a sufficient reason why we should adopt the doctrine of the federal courts on this question. To do otherwise, so long as the jurisdiction of those courts so largely depends on the citizenship of suitors, would really result in discrimination against our own citizens. In deference, therefore, to the overwhelming weight of authority, but without committing ourselves to all the reasoning of the decided cases on the subject of agency, we deem it best to hold that a bill of lading issued by a station or a shipping agent of a railroad company or other common carrier, without receiving the goods named in it for transportation,

Brooke v. New York etc. R. Co., 108 Pa. 529, 56 Am. Rep. 235, 1 Atl. 206; St. Louis etc. R. Co. v. Larned, 103 Ill. 293; Browne, Parol Ev., § 107.

¹¹ National Bank of Commerce v. Chicago etc. R. Co., 44 Minn. 224, 20 Am. St. Rep. 566, 9 L. R. A. 263, 46 N. W. 342, 560. In addition to the federal cases cited in note 9, *supra*,

see, also, Schooner Freeman v. Buckingham, 18 How. (U. S.) 182, 15 L. Ed. 341; The Lady Franklin, 8 Wall. (U. S.) 325, 19 L. Ed. 455; St. Louis etc. R. Co. v. Knight, 122 U. S. 79, 30 L. Ed. 1077, 7 Sup. Ct. Rep. 1132, showing that it is the settled doctrine of the federal courts as stated by Mitchell, J., *supra*.

imposes no liability upon the carrier, even to an innocent consignee or indorsee for value, and that the rule is the same whether the act of the agent was fraudulent and collusive, or merely the result of mistake." It has been frequently held that the common carrier may contradict statements in bills of lading as to the *condition* in which the goods are received,¹² as that, owing to some latent defect, they were not in good order, although the bill of lading so imported. But of course the *burden of proof* of this fact in such case is upon the common carrier.¹³ Such statements are construed to imply no more than that the goods are in good condition so far as they are open to inspection.¹⁴ If the goods are in casks or closed packages, the admission in the bill of lading that they are "in good order," or "well conditioned," cannot apply to their internal condition, except so far as it may be inferred from the external appearance.¹⁵ The master is not permitted to open casks for the purpose of inspecting the contents.¹⁶ Undoubtedly, therefore, when it is sought to

¹² Illinois Cent. R. Co. v. Cobb, 72 Ill. 148; Mitchell v. United States Express Co., 46 Iowa, 214; McIntosh v. Gastenhofer, 2 Rob. (La.) 403; Witzler v. Collins, 70 Me. 290, 35 Am. Rep. 327; Richards v. Doe, 100 Mass. 524; Barrett v. Rogers, 7 Mass. 297, 5 Am. Dec. 45; The Missouri v. Webb, 9 Mo. 193; Ellis v. Willard, 9 N. Y. 529; Burwell v. Raleigh etc. R. Co., 94 N. C. 451; Wood v. Perry, Wright (Ohio), 240; St. Louis etc. R. Co. v. Jamieson, 20 Okl. 654, 95 Pac. 417; Missouri Pac. R. Co. v. Fennell, 79 Tex. 448, 15 S. W. 693; Glass v. Goldsmith, 22 Wis. 488; Choate v. Crowninshield, Fed. Cas. No. 2691, 3 Cliff. (U. S.) 184; The Oriflamme, Fed. Cas. No. 10,571, 1 Saw. (U. S.) 176; The Adriatic, Fed. Cas. No. 90, 16 Blatchf. (U. S.) 424.

¹³ Nelson v. Woodruff, 1 Black (U. S.), 156, 17 L. Ed. 97; The Oriflamme, Fed. Cas. No. 10,571, 1 Saw.

(U. S.) 176; Nelson v. Stephenson, 5 Duer (N. Y.), 538; Barrett v. Rogers, 7 Mass. 297, 5 Am. Dec. 45; Clark v. Barnwell, 12 How. (U. S.) 272, 13 L. Ed. 985; Tarbox v. Eastern Steamboat Co., 50 Me. 339; Richards v. Doe, 100 Mass. 524; Price v. Powell, 3 N. Y. 322; Mears v. Railway Co., 75 Conn. 171, 96 Am. St. Rep. 193, 56 L. R. A. 884, 52 Atl. 610; Central of Georgia R. Co. v. Dowe, 6 Ga. App. 858, 65 S. E. 1091.

¹⁴ Hutchinson on Carriers, sec. 125; Choate v. Crowninshield, Fed. Cas. No. 2691, 3 Cliff. 184; The Barl Olbers, Fed. Cas. No. 10,477, 3 Ben. 148; Tarbox v. Eastern Steamboat Co., 50 Me. 339; Witzler v. Collins, 70 Me. 290, 35 Am. Rep. 327; Hastings v. Pepper, 11 Pick. (Mass.) 41.

¹⁵ Keith v. Amende, 1 Bush (Ky.), 455.

¹⁶ Warden v. Greer, 6 Watts (Pa.), 424.

charge the carrier with damage to the goods by leakage or the like, he may, notwithstanding the admission that they were "in good order," prove latent defects in the cases or casks whereby the contents were lost or injured.¹⁷ On the same principle the recitals in the bill of lading as to *quantity* are not conclusive, unless it contains some guaranty or warranty on that subject constituting a contract.¹⁸ As to value, oral testimony may be received to show the circumstances under which a bill of lading was issued, for the purpose of showing whether the value stated was the agreement of the parties fairly entered into for the purpose of fixing rates. Thus when goods of the value of fourteen hundred and thirty-five dollars were shipped and no reference to value was made, but the shipper accepted a receipt without reading it in which the liability for loss was limited to fifty dollars, and on the margin in the space reserved for value there was inserted, "Value asked and not given," it was held that the written contract could not be varied by parol evidence, any more than could any other writing. "But," said the court, "it differs from the ordinary contract in this: That if intended as an arbitrary limitation of liability it is void, and if intended for the purpose of determining rates and apprising defendant of its responsibilities it is valid. It seems very clear that under sufficient pleadings the circumstances under which the contract was made may be proved, in order that its purpose may be determined."¹⁹ As illustrations of the rule that stipulations in bills of lading which constitute a contract

¹⁷ Nelson v. Woodruff, 1 Black (U. S.), 156, 17 L. Ed. 97; The Oriflamme, Fed. Cas. No. 10,571, 1 Saw. 176; Nelson v. Stephenson, 5 Duer (N. Y.), 538; Barrett v. Rogers, 7 Mass. 297, 5 Am. Dec. 45.

¹⁸ Bates v. Todd, 1 Moody & R. 106; The J. W. Brown, Fed. Cas. No. 7590, 1 Biss. (U. S.) 76; Wallace v. Long, 8 Ill. App. 504; The Wisconsin v. Young, 3 G. Greene (Iowa),

268; Sears v. Wingate, 3 Allen (Mass.), 103; Hall v. Mayo, 7 Allen (Mass.), 454; O'Brien v. Gilchrist, 34 Me. 554, 56 Am. Dec. 676; Meyer v. Peck, 28 N. Y. 590; Abbe v. Eaton, 51 N. Y. 410; Chapin v. Chicago, M. & St. P. Ry. Co., 79 Iowa, 582, 44 N. W. 820.

¹⁹ Porteous v. Adams Express Co., 112 Minn. 31, 127 N. W. 429.

cannot be varied by parol, it has been held that *prior parol negotiations* respecting the terms of the contract cannot be given in evidence.²⁰ As a receipt, like other receipts, it is open to explanation or modification by parol evidence; as a contract it, like other contracts, must be construed according to its terms, and in the absence of fraud or mistake it is presumed that all oral negotiations respecting its terms and conditions are merged therein—that it forms the final and sole receptacle of the evidence, and of the agreement between the parties, as to the reception, rate and route.²¹ In a recent case, however, it has been held that evidence of an agreement that the goods shipped should not be reloaded nor removed from the one car, the bill of lading being silent on the subject, was not inadmissible.²² But evidence is inadmissible to show an agreement to deliver the goods at a different place, or to a different person from the one stated,²³ or an agreement to forward them at a different time,²⁴ or to carry the goods in a different mode,²⁵ or on a different part of the vessel from that implied in the contract.²⁶ Although, as a general rule, where a bill of lading is delivered to the shipper before shipment, he is bound by its contents so far as they constitute a con-

²⁰ Southern Ex. Co. v. Dickson, 94 U. S. 549, 24 L. Ed. 285; Colender v. Dinsmore, 55 N. Y. 200, 14 Am. Rep. 224; Long v. New York Cent. R. Co., 50 N. Y. 76; Belger v. Dinsmore, 51 N. Y. 166, 10 Am. Rep. 575; Shaw v. Gardner, 12 Gray (Mass.), 488.

²¹ Tallassee etc. Co. v. Western R. Co., 128 Ala. 167, 29 South. 203.

²² Alabama etc. R. Co. v. Norris, 167 Ala. 311, 52 South. 891.

²³ Wolfe v. Myers, 3 Sand. (N. Y.) 7. But see Baltimore etc. Steamboat Co. v. Brown, 54 Pa. 77; Malpas v. London Ry. Co., 1 C. P. 336, 1 H. & R. 227, 35 L. J. C. P. 166, 12 Jur., N. S., 271, 13 L. T. 710.

²⁴ Indianapolis etc. R. Co. v.

Remmy, 13 Ind. 518. Where the contract was that goods should be sent without unnecessary delay, parol evidence that they were to go at a particular time of the day was inadmissible. It was also held inadmissible to show route where none was specified in the contract: Snow v. Indiana etc. R. Co., 109 Ind. 422, 9 N. E. 702.

²⁵ Simmons v. Law, 3 Keyes (N. Y.), 217 (custom as to transportation over Isthmus of Panama).

²⁶ Barber v. Brace, 3 Conn. 9, 8 Am. Dec. 149; The Wellington, Fed. Cas. No. 17,384, 1 Biss. (U. S.) 279; The Delaware, 14 Wall. (U. S.) 579, 20 L. Ed. 779; Creery v. Holly, 14 Wend. (N. Y.) 26.

tract,²⁷ yet *if there is no bill of lading*, or if the bill is not delivered until after shipment,²⁸ or if it is delivered to a person not authorized to receive it,²⁹ the parol agreement may be shown. And if a contract for shipment is made in one place by the intending consignee with the carrier's agent, and the consignor at another place ships the goods under a bill of lading, the contract is that made by the consignee, and the bill of lading does not constitute the agreement between the parties; and the rule that oral negotiations are merged in the written instruments has no application.³⁰ And if the goods are delivered to the carrier by an unauthorized person, who signs the contract, evidence of an oral contract by the owner of the goods is admissible. Thus where a daughter, having given a horse to her father, who made a verbal contract with the carrier for its delivery, herself delivered the horse to the carrier and signed the contract, the father, on the loss of the horse, was not precluded from giving in evidence his oral agreement.³¹

§ 499 (511). **Parol evidence as to mortgages.**—One important qualification of the general rule excluding parol evidence to vary written instruments has already been discussed in its bearing on mortgages. We have seen that instruments purporting to be deeds may be shown to be mortgages. But the converse of this is not true. An instrument in form a *mortgage cannot be shown by parol to be a deed*.³² Nor is parol evidence inconsistent with the

²⁷ Long v. New York C. R. Co., 50 N. Y. 76; Germania Fire Ins. Co. v. Memphis & C. R. Co., 72 N. Y. 90, 28 Am. Rep. 113.

²⁸ Bostwick v. Baltimore & O. R. Co., 45 N. Y. 712.

²⁹ Mobile Ry. Co. v. Jurey, 111 U. S. 584, 28 L. Ed. 527, 4 Sup. Ct. Rep. 566.

³⁰ Lowenstein v. Lombard, 164 N. Y. 324, 58 N. E. 44.

³¹ Cox v. American Express Co., 147 Iowa, 137, 124 N. W. 202.

³² McClintock v. McClintock, 3 Brewst. (Pa.) 76; Wharf v. Howell, 5 Binn. (Pa.) 499; Reitenbaugh v. Ludwick, 31 Pa. 131; Goon Gan v. Richardson, 16 Wash. 373, 47 Pac. 762; nor a conditional sale: Wing v. Cooper, 36 Vt. 169. See, however, on this point the dissenting opinion in Gilroy v. Everson-Hickok Co., 118 App. Div. 733, 103 N. Y. Supp. 620; nor can a chattel mortgage be shown to have been intended as an assignment generally for creditors with

mortgage admissible either to vary the liability of the mortgagor or the priority of encumbrances,³³ except in cases of fraud or mistake.³⁴ On the principle already discussed, parol evidence is admissible to connect a deed and a defeasance, though in separate instruments, and to show that they were intended as a mortgage;³⁵ it is also admissible *to identify* by parol a note secured by mortgage, although the description of the same in the mortgage may be inaccurate as to date or in other respects.³⁶ This is on the familiar principle that parol evidence may be received *to apply an instrument to its proper subject matter*.³⁷ So parol evidence is admissible to show the true character of a mortgage, and also *for what purpose it was given*; although it be for a definite sum and secures the payment of notes for definite amounts, it may be shown that the mortgage was simply one of indemnity.³⁸ Of course, the

preferences: *Dunham v. McNatt*, 15 Tex. Civ. App. 552, 39 S. W. 1016. See, also, cases cited under § 446 et seq., *ante*, where this general rule is discussed and its application shown in the cases of the various kinds of written instruments.

³³ *Benoit v. Schneider*, 47 Ind. 13; *Schultz v. Plankinton Bank*, 141 Ill. 116, 33 Am. St. Rep. 290, 30 N. E. 346; *McRae v. His Creditors*, 16 La. Ann. 305; *Albright v. Lafayette Bldg. etc Assn.*, 102 Pa. 411; *Wallace v. Langston*, 52 S. C. 133, 29 S. E. 552; *Gillespie v. Brown* (Tex. Civ. App.), 30 S. W. 448.

³⁴ *Hoopes v. Beale*, 90 Pa. 82.

³⁵ *Gay v. Hamilton*, 33 Cal. 686; *Preschbaker v. Feaman*, 32 Ill. 475; *Tilson v. Moulton*, 23 Ill. 648; *Kelly v. Thompson*, 7 Watts (Pa.), 401. Admissible to show that a *bill of sale*, absolute in form, is a *chattel mortgage*: *Parks v. Hall*, 2 Pick. (Mass.) 206; *Coe v. Cassidy*, 72 N. Y. 133; *Laeber v. Langhor*, 45 Md. 477; *Stokes v. Hollis*, 43 Ga. 262;

Parish v. Gates, 29 Ala. 254; *Watson v. James*, 15 La. Ann. 386; *National Ins. Co. v. Webster*, 83 Ill. 470; *Love v. Blair*, 72 Ind. 281; an agreement that the *mortgagor* of chattels *might remain in possession*: *Pierce v. Stevens*, 30 Me. 184.

³⁶ *Clark v. Houghton*, 12 Gray (Mass.), 38; *Johns v. Church*, 12 Pick. (Mass.) 557, 23 Am. Dec. 651; *Hall v. Tufts*, 18 Pick. (Mass.) 455; *Pierce v. Parker*, 4 Met. (Mass.) 80.

³⁷ *Jones v. Guaranty etc. Co.*, 101 U. S. 622, 25 L. Ed. 1030; *Aull v. Lee*, 61 Mo. 160; *Duval v. McLoskey*, 1 Ala. 708; *Bell v. Fleming*, 12 N. J. Eq. 13; *Jackson v. Bowen*, 7 Cow. (N. Y.) 13; *Johns v. Church*, 12 Pick. (Mass.) 557, 23 Am. Dec. 651; *Goddard v. Sawyer*, 9 Allen (Mass.), 78; *Ellis v. Kenyon*, 25 Ind. 134; *Partridge v. Swasey*, 46 Me. 414; *Bourne v. Littlefield*, 29 Me. 302.

³⁸ *Jones v. Guaranty etc. Co.*, 101 U. S. 622, 25 L. Ed. 1030; *Price v. Gover*, 40 Md. 102; *Mayer v. Grotendick*, 68 Ind. 1; *Cutler v. Steele*,

general rules already given which permit proof of the true *consideration*, *illegality*, *ambiguities* and the like apply.³⁹ It may be shown that the mortgage was for future advances;⁴⁰ or that at the date it was given it was agreed that certain claims against the mortgagee by the mortgagor

93 Mich. 204, 53 N. W. 521; Kimball v. Myers, 21 Mich. 276, 4 Am. Rep. 487.

³⁹ *Consideration*: Abbott v. Marshall, 48 Me. 44; Clark v. Houghton, 12 Gray (Mass.), 38; Foster v. Reynolds, 38 Mo. 553; *ambiguity*: Hancock v. Watson, 18 Cal. 137, 10 Morr. Min. Rep. 546; Heaston v. Squires, 9 Ind. 27; Galen v. Brown, 22 N. Y. 37; Merrill v. Cooper, 36 Vt. 314; First Nat. Bank v. North, 2 S. D. 480, 51 N. W. 96; *illegality*: Hangen v. Hackemeister, 114 N. Y. 566, 11 Am. St. Rep. 691, 21 N. E. 1046. Parol evidence cannot be received in the absence of fraud or mistake to contradict or vary the mortgage to show *other conditions* than those expressed: Adair v. Adair, 5 Mich. 204, 71 Am. Dec. 799; Hunt v. Bloomer, 5 Duer (N. Y.), 202; Townsend v. Empire Stone Co., 6 Duer (N. Y.), 208; Kracke v. Homeyer, 91 Iowa, 51; 58 N. W. 1056; Holmes v. Holmes, 129 Mich. 412, 95 Am. St. Rep. 444, 89 N. W. 47; Connersville Buggy Co. v. Lowry, 104 Mo. App. 186, 77 S. W. 771; First Nat. Bank v. Prior, 10 N. D. 146, 86 N. W. 362; as that the mortgage was taken subject to a lease: Sinclair v. Jackson, 8 Cow. (N. Y.) 543; that timber should be removed from the premises before foreclosure: Berthold v. Fox, 13 Minn. 501, 97 Am. Dec. 243; an agreement between mortgagor and mortgagee that two mortgages of the same date, executed to secure notes falling due at different times, should be equal

liens: Isett v. Lucas, 17 Iowa, 503, 85 Am. Dec. 572; that the mortgage should constitute a mere pledge: Whitney v. Lowell, 33 Me. 318; that a discharge was intended as an assignment: Wade v. Howard, 6 Pick. (Mass.) 492; that the mortgagor of chattels may sell or exchange the property: Clark v. Houghton, 12 Gray (Mass.), 38. A policy of fire insurance payable to a mortgagee cannot be altered by parol evidence in a suit by a second mortgagee to show that it was intended he should be therein included, nor to enable a suitor to substitute himself for or in conjunction with the principal in the writing sued on. While evidence *dehors* the record is competent to explain a doubt or uncertainty in the case of a latent ambiguity, it cannot be introduced in a suit at law for the purpose of reconstructing the contract in suit as a basis for the liability alleged in the declaration: Kupferschmidt v. Agricultural Ins. Co., 80 N. J. L. 441, 34 L. R. A., N. S., 508, and useful note thereto, 78 Atl. 225. See, also, the late cases: Kirkbride etc. Oil Co. v. Satterlee, 32 Okl. 22, 121 Pac. 635; Veve y Diaz v. Sanchez, 226 U. S. 234, 57 L. Ed. —, 33 Sup. Ct. Rep. 36.

⁴⁰ Kirby v. Raynes, 133 Ala. 194, 100 Am. St. Rep. 39, 35 South. 118; Johnson v. Bratton, 112 Mich. 319, 70 N. W. 1021; Williams v. Alnutt, 72 Mo. App. 62; McKinster v. Babcock, 26 N. Y. 378; Groos v. First Nat. Bank of Iowa Park (Tex. Civ. App.), 72 S. W. 402; Lawrence v.

should remain in abeyance until the mortgage fell due.⁴¹ And generally parol evidence is admissible so long as it is not offered for the purpose of proving any matter inconsistent with the deed, but rather to show the truth of the facts therein stated. Thus the object of a mortgagee to prove that the mortgagor, at the time of the execution of the deed, actually owed the sum stated and that the debt was of the character and description implied from the deed is entirely unobjectionable.⁴² As we have said, such evidence is admissible to explain latent ambiguities. For instance, where a mortgage omits to name a date of payment, the presumption of an understanding of immediate payment may arise. But where the same instrument provides that interest shall be payable on the principal sum "until paid at the time hereinbefore set forth" (though no time was "set forth" in the deed), and by other provisions contemplates the furnishing of more goods on credit, the continuance of a business, the payment for future purchases at the time when the bills should become due, the insurance and replenishment of the stock, and the right of the mortgagor to the possession of the stock, and to sell from it in the course of trade, it then became competent to show when the same was to become due by parol evidence of the agreement of the parties in relation thereto, it being competent to supply the omitted terms of the contract in that way. Upon the theory that the contract and mortgage were valid and binding, the purpose of the parol evidence

Tucker, 23 How. (U. S.) 14, 16 L. Ed. 474. In *Swedish-American Nat. Bank v. Germania Bank*, 76 Minn. 409, 79 N. W. 399, it was held that "money owing," which was the purport of the deed, could not be varied to "money that may be owing." In *Openshaw v. Dean* (Tex. Civ. App.), 125 S. W. 989, a deed of trust was given to secure a note for four hundred and fifty dollars without provision for future advances. The

mortgagor, however, did not owe four hundred and fifty dollars, and parol evidence of an agreement to advance up to that sum for which the deed was security would have been admissible, but not of advances beyond the sum for which the deed was given.

⁴¹ *Somerset Colliery Co. v. John*, 219 Pa. 380, 68 Atl. 843.

⁴² *Bacon v. Brown*, 19 Conn. 29.

was limited to the subject of the maturity of the mortgage, because that was the only matter that was left uncertain. The parol evidence, however, was limited to that part of the instrument, and the only office of the testimony was to make certain the time of payment.⁴³ If, and so far as, parol evidence tends to vary or conflict with the plain meaning of the written instrument, it is not proper to be considered; but so far as it tends to identify the subject matter referred to by it in general terms, or, by showing the situation, condition, and mutual relations of the parties to it, makes clear their meaning by the language used, which from it alone might be uncertain, it is generally held to be competent.⁴⁴

⁴³ Crowley v. Langdon, 127 Mich. 51, 86 N. W. 391; Mouat v. Montague, 122 Mich. 334, 81 N. W. 112.

⁴⁴ Chambers v. Prewitt, 172 Ill. 615, 50 N. E. 145; Home Nat. Bank v. Waterman's Estate, 30 Ill. App. 535.

CHAPTER 16.

DOCUMENTARY EVIDENCE.

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§ 500 (512). Documentary evidence—Definitions, etc.—
 There is practically no controversy as to the definitions of documentary evidence, not only because most courts and text-writers have agreed upon its signification, but because in most of the states the term will be found to have its interpretation regulated by codes or statutes which vary only inconsequentially either in their classification or definitions. Sir James Stephen defines a document as “any substance having any matter expressed or described upon it by marks capable of being read,” and documentary

evidence as "documents produced for the inspection of the court or the judge."¹ Notwithstanding its brevity, the definition will be found to stand the test of application. Wharton's definition is very satisfying. He defines a document as "an instrument upon which is recorded, by means of letters, figures, or marks, matter which may evidentially be used. In this sense the term applies to writings; to words printed, lithographed, or photographed; to seals, plates, or stones on which inscriptions are cut or engraved; to photographs and pictures; to maps and plans. So far as concerns admissibility, it makes no difference what is the thing on which the words or signs offered may be recorded. They may be on stones, or gems, or on wood, as well as on paper or parchment."² Documents or writings are divisible into two classes, namely, *public and private*. "The former consists of the acts of public functionaries in the executive, legislative, and judicial departments of government, including under this general head

¹ Reynolds' Steph. on Ev., art. 1.

² Wharton, Ev., § 614; Johnson Steel etc. Co. v. North Branch Steel Co., 48 Fed. 191. Other interesting definitions will be found in the law dictionaries, but we are indebted to 3 Words & Phrases, 2153, for bringing into notice the following excerpt from an exhaustive opinion of Hamersley, J., in Curtis v. Bradley, 65 Conn. 99, 48 Am. St. Rep. 177, 28 L. R. A. 143, 31 Atl. 591: "Legal evidence is not confined to the human voice or oral testimony; it includes every tangible object capable of making a truthful statement, such evidence being roughly classified as documentary evidence. In oral evidence the witness is the man who speaks; in documentary evidence the witness is the thing that speaks. In either case the witness must be competent, i. e., must be deemed competent to make a truthful statement; and in either case the compe-

tency of the witness must be proved before the evidence is admitted; the difference being that in oral evidence the competency is proved by a legal presumption, and in documentary evidence the competency must be proved by actual testimony; and the further difference, that in oral evidence the credit of the witness is tested by his own cross-examination, while in documentary evidence the credit of the witness is tested by the cross-examination of those who must be called to prove its competency." A book is, of course, a document. In Arnold v. Pawtuxet Val. Water Co., 18 R. I. 189, 19 L. R. A. 602, 26 Atl. 55, the defendant objected that a book in his possession containing the records of an association afterward formed into a corporation was not a document of which the plaintiff might have production. The court unhesitatingly ruled against him.

the transactions which official persons are required to enter in books or registers in the course of their public duties, and which occur within the circle of their own personal knowledge and observation. To the same head may be referred the consideration of documentary evidence of the acts of state, the laws and judgments of courts of foreign governments. Public writings are susceptible of another division, they being either (1) judicial, or (2) not judicial; and with respect to the means and mode of proving them, they may be classed into (1) those which are of record and (2) those which are not of record."³ All other documents are classed as private. There is added sometimes a third class called documents of a mixed nature, which partake of the public character. They are limited in America practically to the books and records of private corporations which are regarded as public documents in relation with the members, and private for other purposes. It will be found, however, advantageous to keep to the two divisions.

§ 501 (513). **Proof of statutes of the state.**—We have already discussed the subject of judicial notice of public statutes; and it has been seen that, although the public statutes of a state prove themselves within the state, *private statutes must be proved*.⁴ Public statutes are read to the court, but not as evidence. The judges are presumed to know the law, but the statutes are read to refresh their memory.⁵ But private statutes, if relied upon, must be offered in evidence, and appear in the record or bill of exceptions;⁶ and unless they appear, the appellate court

³ Greenl. Ev., § 470.

⁴ Leland v. Wilkinson, 6 Pet. (U. S.) 317, 8 L. Ed. 412; Ellis v. Eastman, 32 Cal. 447; Pearl v. Allen, 2 Tyler (Vt.), 311. See, also, § 112 et seq., *ante*. As to proof of statutes and laws, see note, State v. Twitty, 11 Am. Dec. 780.

⁵ Lincoln v. Battelle, 6 Wend. (N. Y.) 475.

⁶ Pearl v. Allen, 2 Tyler (Vt.), 311; Osborn v. Blackburn, 78 Wis. 209, 23 Am. St. Rep. 400, 10 L. R. A. 367, 47 N. W. 175; Hanley v. Donoghue, 116 U. S. 1, 29 L. Ed. 535, 6 Sup. Ct. Rep. 242.

will ignore such statutes, when produced.⁷ Private statutes are matters of fact, to be proved as such in the ordinary manner.⁸ In the absence of statutory regulation, therefore, it would be necessary to adopt the common-law procedure. Inasmuch as it is generally necessary to specially plead a private statute, the party relying upon it should be aware of the necessity that exists for proving it.⁹ A private act of parliament, although strictly and literally followed, as regards the authority and jurisdiction conferred,¹⁰ is in many respects considered and construed as a mere legal conveyance, in general binding only on those who are parties to it; that is, those who petition for it, or are named in the act itself, and those claiming under them.¹¹ It is never permitted to affect the interests of strangers, or to defeat the rights of *bona fide* purchasers for a valuable consideration; because, as to strangers, a private act is considered only in the light of a private conveyance. Where an act gave the lands of Priory's alien to the king, it was held that it did not extinguish an annuity of a prior, which he had out of a rectory, although there was not any saving in the act; and so, too, where a statute makes a conveyance good against the king or any certain person, it is not allowed to take away the rights of any others, although there be not any saving in the act.¹² Although *recitals in private statutes* may be evidence of the mat-

⁷ *Eastman v. Crosby*, 8 Allen (Mass.), 206; *Haines v. Hanrahan*, 105 Mass. 480.

⁸ *Leland v. Wilkinson*, *supra*.

⁹ *Cochran v. Couper*, 1 Harr. (Del.) 200.

¹⁰ *Ex parte King*, 2 Bro. C. C. 158, 29 Eng. Reprint, 91; *Ex parte Bolton School*, 2 Bro. C. C. 662, 2 Mad. Ch. 719, 29 Eng. Reprint, 367.

¹¹ *The Case of The Chancellor of Oxford*, 10 Co. 57, 77 Eng. Reprint, 1006; *Hesketh v. Lee*, 2 Saund. 96, a, 85 Eng. Reprint, 766; *Boulton v. Bull*, 2 H. Black. 499, 126 Eng. Re-

print, 651; *Perchard v. Heywood*, 8 Term Rep. 472, 101 Eng. Reprint, 1494; *Wallwyn v. Lee*, 9 Ves. 25, 32 Eng. Reprint, 509; *Bullock v. Fladgate*, 1 Ves. & B. 471, 35 Eng. Reprint, 183; *Vauxhall Bridge Co. v. Earl Spencer*, 2 Mad. 355, 4 Cond. Ch. 28, 56 Eng. Reprint, 366; *Moore v. Usher*, 10 Cond. Ch. 107; 2 Bl. Com. 344; 5 Cru. Dig., tit. 33.

¹² *Pomfret v. Windsor*, 2 Ves. Sr. 480, 28 Eng. Reprint, 302; *Sir Francis Barrington's Case*, 8 Co. Rep. 136b, 77 Eng. Reprint, 681; *Provost of Eton v. Bishop of Winton*, 3 Wils. 496, 95

ters recited, as between the person in whose behalf they are enacted and the state, yet they are not evidence against strangers to the act,¹³ not even where the act, though private in its nature, contains a clause declaring it to be a public act.¹⁴ At common law private statutes and resolutions of legislative bodies were proved by *sworn or exemplified copies* authenticated by the great seal.¹⁵ Generally, statutes are enacted providing that *volumes containing the statutes* of the state, whether public or private, which are published by the state authority, are sufficient evidence of such statutes.¹⁶ Such statutes greatly facilitate the proof of private statutes, as they dispense with the necessity of copies authenticated by officers of state, but they do not dispense with proof of the statute.¹⁷ In some states, however, the courts are required to notice judicially private as well as public statutes;¹⁸ and in some it has been held, in the absence of statutes on the subject, that an edition of the laws of the state published under the authority of the legislature is evidence both of public and private laws.¹⁹ A private act obtained by fraud may be relieved against in a court of law or equity, but to authorize it the case must be clearly made out.²⁰ The

Eng. Reprint, 1161, 1169; Townley v. Gibson, 2 Term Rep. 705, 100 Eng. Reprint, 377.

¹³ Elmondorff v. Carmichael, 3 Litt. (Ky.) 472, 14 Am. Dec. 86; Parmelee v. Thompson, 7 Hill (N. Y.), 77.

¹⁴ Brett v. Beals, 1 Moody & M. 416, 31 R. R. 744.

¹⁵ Rex v. Forsyth, Russ. & R. 275; 1 Greenl. Ev., § 480.

¹⁶ See statutes of the forum.

¹⁷ Walker v. Armstrong, 2 Kan. 198; Wilson v. Markley, 133 N. C. 616, 45 S. E. 1023.

¹⁸ Junction R. R. Co. v. Bank of Ashland, 12 Wall. (U. S.) 226, 20 L. Ed. 385; Halbert v. Skyles, 1 A. K. Marsh. (Ky.) 368; Farmers' etc.

Bank v. Jarvis, 1 T. B. Mon. (Ky.) 4.

¹⁹ Biddis v. James, 6 Binn. (Pa.) 321, 6 Am. Dec. 456; Gray v. Monongahela Nav. Co., 2 Watts & S. (Pa.) 156, 37 Am. Dec. 500.

²⁰ Campbell's Case, 2 Bland (Md.), 209, 20 Am. Dec. 360; Williamson v. Williamson, 3 Smedes & M. (Miss.) 715, 41 Am. Dec. 636. It has been held in England that a private act of parliament which had been obtained by fraudulent suggestions, or by a suppression of the truth, might, on that ground alone, be relieved against by any court of law or equity in which the fraud could be fully and clearly shown. This was done in a case in the high court of

Revised Statutes of the United States, printed under the direction of the Secretary of State at the government printing office, and embracing the statutes of the United States, general and permanent in their nature, which were in force on December 1, 1873, as revised and consolidated, and including also the amendatory acts passed by Congress between that date and the year 1878, are legal evidence in all the courts of the United States and of the several states and territories of the laws therein contained, but do not preclude reference to, or control, in case of any discrepancy, the effect of any original act as passed by Congress since December 1, 1873; and copies of the acts of Congress, printed as aforesaid at the close of each session of Congress, are legal evidence in such courts of the laws and treaties therein contained.²¹

§ 502 (514). Proof of foreign laws—Unwritten law.—Similar proof to that which is exacted in the case of domestic private statutes is called for in the case of foreign laws. It is settled beyond doubt that the laws of a foreign country do not prove themselves in our courts, but that they must be proved as facts.²² The common or *unwritten*

chancery in England before our Revolution, in which an act of the legislature of the then province of Pennsylvania was, about the year 1725, set aside on the ground of its having been obtained by fraudulent suggestions: *Penn v. Baltimore*, 1 Ves. Sr. 444, 27 Eng. Reprint, 1132; 5 Cru. Dig., tit. 33, § 50; 2 Chalmer's Opin. Em. Lawyers, 8, 10, 41; *Partidge v. Dorsey*, 3 Har. & J. (Md.) 307, note; *Owings v. Speed*, 5 Wheat. (U. S.) 420, 5 L. Ed. 124. And so, too, in some other cases where private acts have been passed by the parliament of England, upon false suggestions, they were, upon that ground alone, vacated by the court of chancery on a bill filed by the

party aggrieved: 5 Cru. Dig., tit. 33, §§ 51, 53; 2 Bl. Com. 346.

²¹ U. S. Rev. Stats. 1878, Appendix, pp. 1091, 1092.

²² *Innerarity v. Mims*, 1 Ala. 660; *Louisville & N. R. Co. v. Sullivan* (Ky.), 76 S. W. 525; *Owen v. Boyle*, 15 Me. 147, 32 Am. Dec. 143; *De Sobry v. De Laistre*, 2 Har. & J. (Md.) 191, 3 Am. Dec. 535; *Bowditch v. Soltyk*, 99 Mass. 136; *Commonwealth v. Kenney*, 120 Mass. 387; *In re Lando*, 112 Minn. 257, 30 L. R. A., N. S., 940, 127 N. W. 1125; *Phillips v. Gregg*, 10 Watts (Pa.), 158, 36 Am. Dec. 158; *Pierce v. Indseth*, 106 U. S. 546, 27 L. Ed. 254, 1 Sup. Ct. Rep. 418; *Ennis v. Smith*, 14 How. (U. S.) 400, 14 L. Ed. 472; *Talbot*

law of a foreign country may be proved by the testimony of lawyers or jurists of that country whose studies have afforded opportunities of knowledge of the subject. In other words, it is a proper subject for proof by the testimony of *expert witnesses*.²³ It does not necessarily follow that testimony of this character can be given only by jurists or professional lawyers. The unwritten law of a foreign country may also be proved by those who have held such official position or had such business experience that they may be fairly deemed qualified to speak upon the subject.²⁴ Thus, one who had long acted as magistrate in Canada was allowed to testify as to the mode of executing notarial instruments in that country.²⁵ So in an action for breach of promise of marriage, an Italian priest was allowed to testify that a marriage by religious ceremony alone did not constitute a legal marriage in Italy at the time in question, the court having found the witness duly qualified to testify upon the subject.²⁶ So in England, it

v. Seeman, 1 Cranch (U. S.), 1, 2 L. Ed. 15; Church v. Hubbard, 2 Cranch (U. S.), 187, 2 L. Ed. 249; Nashua Savings Bank v. Anglo-American Bank, 189 U. S. 221, 47 L. Ed. 782, 23 Sup. Ct. Rep. 517. See full notes, State v. Twitty, 11 Am. Dec. 779; Knickerbocker Trust Co. v. Iselin, 113 Am. St. Rep. 868.

²³ Kenny v. Clarkson, 1 Johns. (N. Y.) 385, 3 Am. Dec. 336; Brush v. Wilkins, 4 Johns. Ch. (N. Y.) 506; Ennis v. Smith, 14 How. (U. S.) 400, 14 L. Ed. 472; Sussex Peerage Case, 11 Clark & F. 134, 8 Eng. Reprint, 1034; Barber v. Hildebrand, 42 Neb. 400, 60 N. W. 594; State v. Moy Looke, 7 Or. 54. See § 368, *ante*; also valuable discussion in State v. Behrman, 25 L. R. A. 449-468; notes to Hammond v. Woodman, 66 Am. Dec. 233, and Knickerbocker Trust Co. v. Iselin, 113 Am. St. Rep. 882.

²⁴ In re Dost Aly Khan, 6 Frob.

Div. 6; Pickard v. Bailey, 26 N. H. 152; Dauphin v. United States, 6 Ct. of Cl. 221. An American lawyer who had spent six months in England and studied somewhat their corporation laws allowed to testify: Barber v. International Co., 73 Conn. 587, 48 Atl. 758. See note to Knickerbocker Trust Co. v. Iselin, 113 Am. St. Rep. 833.

²⁵ Pickard v. Bailey, 26 N. H. 152.

²⁶ Massuco v. Tomassi, 78 Vt. 188, 62 Atl. 57. See, also, Reg. v. Perry, 14 Eng. Law & Eq. 549; Watson v. Walker, 23 N. H. 471. In the last-named case the court said that the knowledge which the witness has must be of that character which a court could rely upon. Witnesses to be competent to prove unwritten laws must be *instructed* in them: Story's Con. of Laws, 530; 1 Greenl. Ev., § 488.

was held competent for one who had been a stock broker in Brussels to testify concerning the law of negotiable paper in that city.²⁷ But it has been held in several cases that one who has merely studied the laws of a foreign country is not competent to give expert testimony on that subject.²⁸ The obvious objection to parol evidence of foreign statutes is that it is not the best evidence. On this ground it has generally been held that the *written foreign law* should be *proved by a copy* of the law, properly authenticated.²⁹ But if there is no proof that the foreign law is statutory, it may be proved by parol;³⁰ and the party offering such proof is not bound to show that there is no written law on the subject.³¹ Experts in giving evidence as to a foreign law may refresh their memory or confirm their opinion on the subject by referring to law books.³² Where it does not appear

²⁷ *Vander Donckt v. Thellusson*, 8 Com. B. 812, 19 L. J. C. P. 12.

²⁸ *Bristow v. Sequeville*, 5 Ex. 275, 19 L. J. Ex. 289, 14 Jur. 674; In the Goods of Bonelli, 1 Prob. Div. 69, Greater latitude is shown in *Hall v. Costello*, 48 N. H. 176, 2 Am. Rep. 207; *Barrows v. Downs*, 9 R. I. 446, 11 Am. Rep. 283. *Mere general knowledge* as to the history of law and government held not to qualify a witness to testify: *Banco De Sonora v. Bankers' Casualty Co.* (Iowa), 95 N. W. 232.

²⁹ *Ennis v. Smith*, 14 How. (N. C.) 400, 14 L. Ed. 472; *Robinson v. Clifford*, Fed. Cas. No. 11,948, 2 Wash. C. C. 1; *United States v. Ortega*, Fed. Cas. No. 15,971, 4 Wash. C. C. 531; *Watson v. Walker*, 23 N. H. 471; *Kenny v. Clarkson*, 1 Johns. (N. Y.) 385, 3 Am. Dec. 336; *Packard v. Hill*, 2 Wend. (N. Y.) 411; *Chanoine v. Fowler*, 3 Wend. (N. Y.) 173; *Lincoln v. Battelle*, 6 Wend. (N. Y.) 475; *Church v. Hubbard*, 2 Cranch (U. S.), 187, 2 L. Ed. 249; *Talbot v. Seaman*, 1 Cranch (U. S.), 1, 2 L. Ed.

15; *Nashua Savings Bank v. Anglo-American Co.*, 189 U. S. 221, 47 L. Ed. 782, 23 Sup. Ct. Rep. 517, where the testimony of an English solicitor of thirty years' experience was held sufficient authentication of English statutory law; *Lacon v. Higgins*, 3 Starkie, 178, 25 R. R. 779, where similar proof was held sufficient authentication of the French Code. See note to *Knickerbocker Trust Co. v. Iselin*, 113 Am. St. Rep. 883.

³⁰ *Dougherty v. Snyder*, 15 Serg. & R. (Pa.) 84, 16 Am. Dec. 520; *Livingston v. Maryland Ins. Co.*, 6 Cranch (U. S.), 274, 3 L. Ed. 222.

³¹ *Newsom v. Adams*, 2 La. 153, 22 Am. Dec. 126.

³² *Sussex Peerage Case*, 11 Clark & F. 85, 8 Eng. Reprint, 1034; *Nelson v. Bridgport*, 8 Beav. 527, 50 Eng. Reprint, 207. And the works of law-writers of recognized authority are also admissible: *Banco de Sonora v. Bankers' Mut. etc. Co.*, 124 Iowa, 576, 104 Am. St. Rep. 567, 100 N. W. 532; *Chase v. Alliance Ins. Co.*, 9 Allen (Mass.), 311; *Babeock*

that the rate of interest in a foreign country is regulated by statute, the testimony of an attorney of that country is admissible to show what it is.³³ The testimony of a Norwegian lawyer as to the law of negotiable instruments in Norway is admissible under the statute of Minnesota, which provides that "The existence and the tenor or effect of all foreign laws may be proved as facts by parol evidence, but if it appears that the law in question is contained in a written statute or code, the court may, in its discretion, reject any evidence of such law that is not accompanied by a copy thereof." The general rule, as to the proof of foreign laws, is that the law which is written, that is, statute law, must be proved by a copy properly authenticated; and that the unwritten law must be proved by the testimony of experts, that is, by those acquainted with the law.³⁴ Nevertheless, there are extant several authoritative decisions that parol proof of foreign statutes is admissible.³⁵ In a New Hampshire case³⁶ it was held that in proof of the laws of a foreign country, the testimony of any person, whether a professed lawyer or not, who appears to the court to be well informed on the subject, is competent.³⁷ In a well-known English case *Dr.*

v. Marshall, 21 Tex. Civ. App. 145, 50 S. W. 728; *The Maggie Hammond*, 9 Wall. (U. S.) 435, 19 L. Ed. 772.

³³ *Kermott v. Ayer*, 11 Mich. 181. It has been held that a witness is not competent to testify as to the law of a foreign country simply because he has studied it at a university in that country: *Bristow v. Sequeville*, 5 Ex. (Eng.) 275, 19 L. J. Ex. 289; 15 Jur. 674, 3 Car. & K. 64. Followed in *In Goods of Bonelli*, 1 Prob. Div. (Eng.) 69, 34 L. T., N. S., 32, 45 L. J. P. 42, 24 W. R. 255, wherein it appeared that the witness had studied the foreign law in England. Likewise it has been held that an attorney who testifies that he is not acquainted with the

laws of the republic of Mexico, but that he has been a student of its history and government, is not competent to testify as to the unwritten law of that country: *Banco de Sonora v. Bankers' Mut. Casualty Co.*, 124 Iowa, 576, 104 Am. St. Rep. 567, 100 N. W. 532.

³⁴ *Pierce v. Indseth*, 106 U. S. 546, 27 L. Ed. 254, 1 Sup. Ct. Rep. 418.

³⁵ *Canale v. People*, 177 Ill. 219, 52 N. E. 310; *Line v. Mack*, 14 Ind. 330; *The Pawashick*, Fed. Cas. No. 10,851, 2 Low. 142.

³⁶ *Hall v. Costello*, 48 N. H. 176, 2 Am. Rep. 207.

³⁷ *Pickard v. Bailey*, 26 N. H. 152. In the earlier cases it was held that written foreign laws could only be

Wiseman was called as a witness to prove the laws of marriage at Rome, and referred to a book containing the decrees of the council of Trent as regulating them.³⁸ Lord Chief Justice Denman said: "There does not appear to be in fact any real difference of opinion; there is no question raised here as to any exclusive mode of getting at this evidence, for we have both materials of knowledge offered to us. We have the witness, and he states the law, which he says is correctly laid down in these books. The books are produced, but the witness describes them as authoritative, and explains them by his knowledge of the actual practice of the law. A skillful and scientific man must state what the law is, but may refer to books and statutes to assist him in doing so. That was decided after full argument, in the court of queen's bench.³⁹ There was a difference of opinion, but the majority of the judges clearly held, on an examination of all the cases, and after full discussion, that proof of a law itself in a case of a foreign law, could not be taken from the book of the law, but from the witness who described the law. If the witness says: 'I know the law, and this book truly states the law,' then you have the authority of the witness, and of

proved by copies thereof properly authenticated: *Church v. Hubbard*, 2 Cranch (U. S.), 187, 2 L. Ed. 249; *Packard v. Hill*, 2 Wend. (N. Y.) 411; *Chanoine v. Fowler*, 3 Wend. (N. Y.) 173. In *Ennis v. Smith*, 14 How. (U. S.) 400, 14 L. Ed. 472, statute books containing foreign laws, proved to have been published by the authority of the government which made the law, were admitted. In *Kenny v. Clarkson*, 1 Johns. (N. Y.) 385, 3 Am. Dec. 336, and in *Lincoln v. Battelle*, 6 Wend. (N. Y.) 475, it was held that foreign laws could not be proved by parol. In the following cases parol evidence of foreign written laws has been held admissible: *Sussex Peerage Case*, 11

Clark & F. 85, 8 Eng. Reprint, 1034; *De Bode's Case*, 8 Ad. & E., N. S., 208, 115 Eng. Reprint, 854; *Vander Donckt v. Thellusson*, 8 Com. B. 812, 19 L. J. C. P. 12 (in this case the witness was not a lawyer); *Barrows v. Downs*, 9 R. I. 446, 11 Am. Rep. 283.

³⁸ *Sussex Peerage Case*, 11 *Clark & F.* 85, 8 Eng. Reprint, 1034; *De Bode's Case*, 8 Q. B. 208, 8 Ad. & E., N. S., 208, 115 Eng. Reprint, 854; *Nelson v. Lord Bridgport*, 8 Beav. 527, 50 Eng. Reprint, 207; *Cocks v. Purday*, 2 Car. & K. 269; *Bremer v. Freeman*, 10 Moore P. C. 306.

³⁹ *De Bode's Case*, 8 Q. B. 208, 55 E. C. L. 208, 8 Ad. & E., N. S., 208, 115 Eng. Reprint, 854.

the book. You may have to open the question on the knowledge or means of knowledge of the witness, and other witnesses may give a different interpretation to the same matter, in which case you must decide as well as you can on the conflicting testimony; but you must take the evidence from the witness." Lord Campbell concurred, saying: "The foreign law is matter of fact. . . . You ask the witness what the law is; he may from his recollection, or on producing and referring to books, say what it is." Lord Langdale, Master of the Rolls, said: "Foreign law is matter of fact. A witness more or less skilled in it is called to depose to it. He may state it of his own knowledge, or refer to text-books or books of decisions."⁴⁰ *A fortiori*, if such proof is aided by the production of a copy of the statute, it forms, perhaps, the best evidence of the foreign law that can be given.⁴¹

§ 503 (515). **Same, continued.**—In a leading case on this subject in the supreme court of the United States, it was held that foreign statutes "may be verified by an oath, or by an exemplification of a copy under the great seal of the state, or by a copy proved to be a true copy by a witness who has examined and compared it with the original, or by the certificate of an officer, properly authorized by law to give the copy, which certificate must be duly proved."⁴² But such modes of proof are *not exclusive* of others, especially of codes of laws and accepted histories of the law of a country.⁴³ Accordingly, it has frequently

⁴⁰ It is true that in the *Sussex Peerage Case* the judges were not sitting as a court; but they were acting as a committee of privilege, to whom it had been referred by the house of lords to inquire into the validity of a foreign marriage, and the house of lords confirmed their decision. And in the last edition of *Phillips on Evidence* (2428, c. 5, § 4), the law is stated substantially in the words of that decision. See,

also, *Nelson v. Bridport*, 8 Beav. 527, 535, 537, 539, 50 Eng. Reprint, 207.

⁴¹ *Slater v. Mexican etc. R. Co.*, 194 U. S. 120, 48 L. Ed. 900, 24 Sup. Ct. Rep. 581.

⁴² *Ennis v. Smith*, 14 How. (U. S.) 400, 14 L. Ed. 472. See note to *Knickerbocker Trust Co. v. Iselin*, 113 Am. St. Rep. 883.

⁴³ *Ennis v. Smith*, 14 How. (U. S.) 400, 14 L. Ed. 472.

been held admissible to receive as evidence *volumes of foreign statutes*, when authenticated by the oath of a competent person, or by some other method equivalent to the sanction of an oath.⁴⁴ Thus, the printed statutes of Ireland, with the affidavit of an Irish barrister that he had received them from the public printer, and that they were commonly received as evidence in that country, were held admissible.⁴⁵ So it has been held in this country that a volume purporting to be the Civil Code of France, sent by that government to the supreme court of the United States in the course of national exchanges of laws, and so received by our government, was sufficiently authenticated.⁴⁶ In Maine a printed volume of the laws of a foreign province, proved by witnesses to have received the sanction of the executive and judicial officers of that province, was received in evidence;⁴⁷ and where ordinances of France on a subject of common concern to all nations were promulgated by the President of the United States, no further authentication was held necessary.⁴⁸ But a volume purporting to contain the laws of a foreign country, with no authenticating evidence, except that it was purchased in that country, is not admissible.⁴⁹ The same is true of a *nonofficial volume*, although proved to be conformable to the official edition;⁵⁰ and the mere certificate of a consul was held not to be a sufficient authentication of a foreign statute.⁵¹ In his work on Evidence, Taylor says that the old doctrine that foreign written laws must be proved by copies, properly authenticated, is exploded, and that "whenever foreign written law is to be proved, that proof cannot be taken from the book of the

⁴⁴ Jones v. Maffet, 5 Serg. & R. (Pa.) 523; Watson v. Walker, 23 N. H. 471.

⁴⁵ Jones v. Maffet, 5 Serg. & R. (Pa.) 523.

⁴⁶ Ennis v. Smith, 14 How. (U. S.) 400, 14 L. Ed. 472.

⁴⁷ Owen v. Boyle, 15 Me. 147, 32 Am. Dec. 143.

⁴⁸ Talbot v. Seaman, 1 Cranch (U. S.), 1, 2 L. Ed. 15.

⁴⁹ Packard v. Hill, 2 Wend. (N. Y.) 411; Hill v. Packard, 5 Wend. (N. Y.) 375.

⁵⁰ Chanoine v. Fowler, 3 Wend. (N. Y.) 173.

⁵¹ Church v. Hubbart, 2 Cranch (U. S.), 187, 236, 2 L. Ed. 249.

law, but must be derived from some skillful witness who describes the law." But he further says: "The witness may refresh and confirm his recollection of the law, or assist his own knowledge by referring to text-books, decisions, statutes, codes or other legal documents or authorities."⁵² A distinguished federal judge held in an admiralty case that the written laws of England might be proved by printed copies of the statutes, and that the court could determine from an inspection of the volume, as well as from an expert, whether it was genuine. He expressed the view that, as to the English statutes, the same liberal rule should be adopted as that which in some courts prevail relative to the admission of statutes of sister states, but that the old and more rigid rule might properly be continued as to those foreign countries where an entirely different system of law prevails.⁵³ In most of the states statutes now provide that printed statute books of any foreign government purporting to be printed under the authority thereof may be admitted.⁵⁴ There is some controversy whether the proof of foreign laws should be addressed to the court or the jury.⁵⁵ It involves, however, no serious conflict, and depends entirely upon the form in which the foreign law is presented. "If a state law comes to us certified under the seal of the state, it comes as a fact in the first instance; but then we need no jury to establish its existence and its character. There may very often be cases in which a jury is necessary for this purpose, but our knowledge is not necessarily dependent on their verdict."⁵⁶ Although what the foreign law is, is usually denominated a question of fact, yet, when it merely involves the construction of a written statute or the inter-

⁵² Tayl. Ev., 10th ed., § 1423.

⁵³ The Pawashick, Fed. Cas. No. 10,851, 2 Low. (U. S.) 142. See, also, Wilcocks v. Phillips, Fed. Cas. No. 17,639, 1 Wall. Jr. (U. S.) 47.

⁵⁴ See statutes of jurisdiction.

⁵⁵ See note on "Proof of Foreign Law as Properly Made to Court or Jury," to Christiansen v. William Graver Tank Works, 7 Ann. Cas. 74, to which we acknowledge our indebtedness for copious excerpts.

⁵⁶ Bock v. Lauman, 24 Pa. 435.

pretation of judicial opinions, it becomes a question of law. "That when it becomes necessary to establish the law of a foreign country it must be proved as facts are proved, there is no doubt, but when, after such proof is given, the questions involved depend upon the construction and effect of a statute of judicial opinion, we think those questions are for the court and not questions of fact at all."⁵⁷ In Maryland it is held that the *factum* of a foreign law is for the jury.⁵⁸ But this general rule is not applicable to a case in which the foreign laws are introduced for the purpose of enabling the court to determine whether a written instrument is evidence. "In such case the evidence always goes in the first instance to the court, which, if the evidence be clear and uncontradicted, may and ought to decide what the foreign law is, and according to its determination on that subject admit or reject the instrument of writing as evidence to the jury. It is offered to the court to determine a question of law—the admissibility or inadmissibility of certain evidence to the jury. It is true, if what the foreign law is be a matter of doubt, the court may decline deciding it, and may inform the jury that if they believe the foreign law attempted to be proved exists as alleged, then they ought to receive the instrument in evidence; on the contrary, if they should believe that such is not the foreign law, they should reject the instrument as evidence."⁵⁹ In Massachusetts it has been held that where the evidence consists of the parol testimony of experts as to the existence of prevailing construction of a

⁵⁷ *Bank of China etc. v. Morse*, 168 N. Y. 458, 85 Am. St. Rep. 676, 56 L. R. A. 139, 61 N. E. 774. See, also, *Ufford v. Spaulding*, 156 Mass. 65, 30 N. E. 360; *Kline v. Baker*, 99 Mass. 253; *Shoe & Leather Nat. Bank v. Wood*, 142 Mass. 563, 8 N. E. 753; *Molson's Bank v. Boardman*, 47 Hun (N. Y.), 135; *Hanley v. Donoghue*, 116 U. S. 1, 29 L. Ed. 535, 6 Sup. Ct. Rep. 242; *Story on Con-*

dict of Laws, § 638; 1 *Greenleaf on Evidence*, § 486.

⁵⁸ *De Sobry v. De Laistre*, 2 Har. & J. (Md.) 191, 3 Am. Dec. 535; *Cecil Bank v. Barry*, 20 Md. 287, 83 Am. Dec. 553.

⁵⁹ *Trasher v. Everhart*, 3 Gill & J. (Md.) 234. To the same effect see *Gardner v. Lewis*, 7 Gill (Md.), 377; *Wilson v. Carson*, 12 Md. 54.

foreign statute, or as to any point of unwritten law, the jury must determine what the foreign law is, as in the case of any controverted fact depending upon like testimony.⁶⁰ But where the evidence of a foreign law consists entirely of a written document, statute, or judicial opinion, the question of its construction and effect is for the court alone.⁶¹

§ 504 (516). Proof of the laws of sister states—Statutes.—We have already seen that the courts of one state within the United States do not take judicial notice of the laws of another state.⁶² If relied upon they must be pleaded and proved.⁶³ Where a statute of a sister state is to be proved, the *proof should conform to the provisions of the act of Congress* providing for the authentication of the statutes of the several different states or the laws of

⁶⁰ Holman v. King, 7 Met. (Mass.) 384; Kline v. Baker, 99 Mass. 253; Ely v. James, 123 Mass. 36; Wylie v. Cotter, 170 Mass. 356, 64 Am. St. Rep. 305, 49 N. E. 746. See, also, Dyer v. Smith, 12 Conn. 384; Moore v. Gwynn, 5 Ired. (N. C.) 187; Ingraham v. Hart, 11 Ohio, 255.

⁶¹ Kline v. Baker, 99 Mass. 253; Ely v. James, 123 Mass. 36; Hancock Nat. Bank v. Ellis, 172 Mass. 39, 70 Am. St. Rep. 232, 42 L. R. A. 396, 51 N. E. 207. See, also, Church v. Hubbard, 2 Cranch (U. S.), 187, 2 L. Ed. 249; Ennis v. Smith, *supra*; Owen v. Boyle, *supra*; People v. Lambert, 5 Mich. 349, 72 Am. Dec. 49; Bremer v. Freeman, 10 Moore P. C. 306; Di Sora v. Philipps, 10 H. L. Cas. 624, 11 Eng. Reprint, 1168.

⁶² See § 118 et seq., *ante*. As to the presumption of similarity in the absence of proof, see § 83, *ante*.

⁶³ Sidney v. White, 12 Ala. 728; McNeill v. Arnold, 17 Ark. 154; Southern Express Co. v. Hanaw, 134

Ga. 445, 137 Am. St. Rep. 227, 67 S. E. 944; Loyal Mystic Legion of America v. Brewer, 75 Kan. 729, 90 Pac. 247; Nicholson Coal Min. Co. v. Moulden, 143 Ky. 348, 136 S. W. 620; Gardner v. Lewis, 7 Gill (Md.), 377; Ellis v. Maxson, 19 Mich. 186, 2 Am. Rep. 81; Hemphill v. Bank of Alabama, 6 Smedes & M. (Miss.) 44; Lee v. Missouri Pac. R. Co., 195 Mo. 400, 92 S. W. 614; Sells v. Haggard, 21 Neb. 357, 32 N. W. 66; Pomeroy v. Ainsworth, 22 Barb. (N. Y.) 118; Missouri etc. R. Co. v. McLaughlin, 29 Okl. 345, 116 Pac. 811; American Alkali Co. v. Huhn, 209 Pa. 238, 58 Atl. 283; Bryant v. Kelton, 1 Tex. 434; Ward v. Morrison, 25 Vt. 593; Union Cent. L. Ins. Co. v. Pollard, 94 Va. 146, 64 Am. St. Rep. 715, 36 L. R. A. 271, 26 S. E. 421. For illustrations of where the proof was insufficient, see Laub v. De Vault, 139 Ill. App. 398; Mandru v. Ashby, 108 Md. 693, 71 Atl. 312; Atchison etc. R. Co. v. Mills, 49 Tex. Civ. App. 349, 108 S. W. 480.

the state in which the cause is tried.⁶⁴ Under the constitutional provision requiring that full faith and credit shall be given in each state to the public acts, records and judicial proceedings of every other state, and authorizing Congress to prescribe the manner in which such acts and records shall be proved,⁶⁵ a law was long since enacted providing that acts of the legislature of any state or territory or of any country, subject to the jurisdiction of the United States, shall be authenticated by having the *seal of such state, territory or country* affixed thereto.⁶⁶ It will be observed that this statute prescribes *no other authentication* or formality than that the seal of the state be affixed to the copy of the act to be proved. The seal itself is supposed to import absolute verity. The annexation must, in the absence of all contrary evidence, always be presumed to be by a person having the custody thereof and competent authority to do the act.⁶⁷ Another clause of the statute above quoted makes its provisions applicable to the United States courts, as well as the state courts.⁶⁸ It has been held in some states that this mode of authentication is the only one that may be used.⁶⁹ But although the seal of the state may afford the highest evidence of the authenticity of the statute of another state, yet such authentication is not generally deemed the best evidence in such a

⁶⁴ United States v. Amedy, 11 Wheat. (U. S.) 392, 6 L. Ed. 502; Ashley v. Root, 4 Allen (Mass.), 504; State v. Carr, 5 N. H. 367; Warner v. Commonwealth, 2 Va. Cas. 95; Hewitt v. Bank of Indian Territory, 64 Neb. 463, 90 N. W. 250, 92 N. W. 741. See note to Knickerbocker Trust Co. v. Iselin, 113 Am. St. Rep. 868 et seq.

⁶⁵ U. S. Const., art. 4, § 1.

⁶⁶ U. S. Rev. Stats., § 905 (U. S. Comp. Stats. 1901, p. 677, 3 Fed. Stats. Ann. 37).

⁶⁷ United States v. Amedy, 11 Wheat. 392, 6 L. Ed. 502; United States v. Johns, Fed. Cas. No. 15,481,

1 Wash. C. C. 363, 1 L. Ed. 888, 4 Dall. 416; Henthorn v. Doe, 1 Blackf. (Ind.) 157; State v. Carr, 5 N. H. 367; Warner v. Commonwealth, 2 Va. Cas. 95.

⁶⁸ U. S. Rev. Stats., § 905 (U. S. Comp. Stats. 1901, p. 677, 3 Fed. Stats. Ann. 37); Mills v. Duryee, 7 Cranch (U. S.), 481, 3 L. Ed. 411; Calpin v. Page, Fed. Cas. No. 5206, 3 Saw. (U. S.) 93.

⁶⁹ State v. Twitty, 9 N. C. 441, 11 Am. Dec. 779, and note; Craig v. Brown, Fed. Cas. No. 3328, 1 Pet. C. C. 352; Chesapeake etc. Canal Co. v. Baltimore etc. R. R. Co., 4 Gill & J. (Md.) 1.

sense as to exclude other modes of proof; and, indeed, it is believed that the more *common mode is to introduce books* proved to be printed under the authority of the state.⁷⁰ It has been held in many states that the volumes of statutes of another state, purporting to be printed by authority, are admissible as evidence without other authentication.⁷¹ While in other states it has been held that such volumes are not admissible without extrinsic evidence of their authenticity.⁷² In most of the states this subject is regulated by statute.

⁷⁰ Clanton v. Barnes, 50 Ala. 260; Clarke v. Bank of Mississippi, 10 Ark. 516, 52 Am. Dec. 248; Main v. Aukam, 12 App. Cas. (D. C.) 375; Eagan v. Connelly, 107 Ill. 458; Rothrock v. Perkinson, 61 Ind. 39; Biesenthall v. Williams, 1 Duv. (Ky.) 329, 85 Am. Dec. 629; Owen v. Boyle, 15 Me. 147, 32 Am. Dec. 143; Ashley v. Root, 4 Allen (Mass.), 504; Wilt v. Cutler, 38 Mich. 189; Bradley v. West, 60 Mo. 33; Emery v. Berry, 28 N. H. 473, 61 Am. Dec. 622; Title Guarantee etc. Co. v. Trenton Potteries Co., 56 N. J. Eq. 441, 38 Atl. 422; Congregational Unitarian Soc. v. Hale, 29 App. Div. 396, 51 N. Y. Supp. 704; Copeland v. Collins, 122 N. C. 619, 30 S. E. 315; Mullen v. Morris, 2 Pa. 85; Free v. Southern Ry., 78 S. C. 57, 58 S. E. 952; Hobbs v. Memphis etc. R. Co., 9 Heisk. (Tenn.) 873; Beard v. State, 47 Tex. Cr. 183, 83 S. W. 824; State v. Abbey, 29 Vt. 60, 67 Am. Dec. 754; Taylor v. Bank of Alexandria, 5 Leigh (Va.), 471.

⁷¹ Barkman v. Hopkins, 11 Ark. 157; Comparet v. Jernegan, 5 Blackf. (Ind.) 375; Crake v. Crake, 18 Ind. 156; Thomas v. Davis, 7 B. Mon. (Ky.) 227; Merrifield v. Robbins, 8 Gray (Mass.), 150; Stewart v. Swanzy, 23 Miss. 502; Bright v. White, 8 Mo. 421; Mullen v. Morris,

2 Pa. 85; Allen v. Watson, 2 Hill (S. C.), 319; Ellis v. Wiley, 17 Tex. 134; State v. Abbey, 29 Vt. 60, 67 Am. Dec. 754; Simms v. Southern Express Co., 38 Ga. 129; People v. Calder, 30 Mich. 85; Clanton v. Barnes, 50 Ala. 260; Young v. Bank of Alexandria, 4 Cranch (U. S.), 384, 2 L. Ed. 655. In Wilt v. Cutler, 38 Mich. 189, answering an objection that the specific authority under which the statutes were published was not proved, the court said: "The intent of our statute is to prevent mere private or unauthorized publications of the statutes of another state from being admitted in evidence; but the distinct authority for printing and publishing the laws need not appear in any case where they purport to be published under the authority of the government. When published under the authority and sanction of the governor of a state, we must accept them, and cannot treat them as a mere private or unauthorized publication."

⁷² Bailey v. McDowell, 2 Harr. (Del.) 34; Stanford v. Pruet, 27 Ga. 243, 73 Am. Dec. 734; Lord v. Staples, 23 N. H. 448; Van Buskirk v. Mulock, 18 N. J. L. 184; State v. Twitty, 2 Hawks (9 N. C.), 441, 11 Am. Dec. 779; Packard v. Hill, 2 Wend. (N. Y.) 411; Duncan v. Du-

§ 505 (517). **Same, continued.**—It is clear that mere unofficial volumes, purporting to contain the statutes or digests of the statutes of other states, are not admissible.⁷³ In a recent Illinois case⁷⁴ it was sought to introduce certain sections of a Kansas statute. The proof offered was a volume of the General Statutes of Kansas of 1901, published by a firm in Topeka and compiled by a member of the Leavenworth bar. As a basis for the introduction of said sections, there was offered in evidence a certificate signed by the attorney general and Secretary of State of the state of Kansas, in which they stated that they had examined and compared the General Statutes of Kansas of 1901, and were satisfied that they contained all the laws of a general nature now in force. The Illinois statutes provided that "The printed statutes of the United States and of this state, and of the several states, of the territories and late territories of the United States, purporting to be printed under the authority of said United States, any state or territory, shall be evidence in all courts and places in this state of the acts therein contained."⁷⁵ In construing the section the Illinois court had already held that the printed statutes of Iowa purporting to be printed under the authority of said state were admissible in evidence.⁷⁶ The court said: "In this case the title page referred to showed that the statutes offered in evidence were published by Crane & Company, Topeka, Kansas, but there is nothing to show that it was done under the authority of the state of Kansas. Statutes are

boys, 3 Johns. Cas. (N. Y.) 125. See note on "Oral Proof of Foreign Laws," to State v. Behrman, 25 L. R. A. 449.

⁷³ Yarbrough v. Arnold, 20 Ark. 592; Dixon v. Thatcher, 14 Ark. 141; Kinney v. Hosea, 3 Harr. (Del.) 77; Canfield v. Squire, 2 Root (Conn.), 300, 1 Am. Dec. 71; Goodwin v. Provident Sav. Bank, 97 Iowa, 226, 59 Am. St. Rep. 411, 32 L. R. A. 473, 66 N. W. 157.

⁷⁴ Laub v. De Vault, 139 Ill. App. 398.

⁷⁵ Hurd's Rev. Stats. 1905, § 10, c. 51.

⁷⁶ McCraney v. Glos, 222 Ill. 628, 78 N. E. 921. In similar cases parol evidence alone is, of course, insufficient: *Traders' Nat. Bank v. Jones*, 104 App. Div. 433, 93 N. Y. Supp. 768. See, also, *Zimmerman v. Helser*, 32 Md. 274; *People v. Lambert*, 5 Mich. 349, 72 Am. Dec. 49.

sometimes published by private enterprise, but a book so published is not by our statute made competent proof of their due passage or any other formality required to make them admissible. We do not consider that the certificate of the attorney-general and the secretary of state met the requirements of section 10, chapter 51, Hurd's R. S. 1905, and therefore the admission in evidence of the Kansas Statutes was error."⁷⁷ But a volume of laws which has printed upon its page the words "by authority" meets the requirements of this rule of law.⁷⁸ Statutes have been

⁷⁷ See, also, *Canfield v. Squire*, 2 Root (Conn.), 300, 1 Am. Dec. 71; *Magee v. Sanderson*, 10 Ind. 261; *Goodwin v. Provident etc. Assn.*, 97 Iowa, 226, 59 Am. St. Rep. 411, 32 L. R. A. 473, 66 N. W. 157; *Packard v. Hill*, 2 Wend. (N. Y.) 411; *Martin v. Payne*, 11 Tex. 292. In Missouri, however, they are admitted by statute as *prima facie* evidence: *White v. Reitz*, 129 Mo. App. 307, 108 S. W. 601.

⁷⁸ *Merrifield v. Robbins*, 8 Gray (Mass.), 150; *Vaughn v. Griffeth*, 16 Ind. 353; *Crake v. Crake*, 18 Ind. 156; *Cutler v. Wright*, 22 N. Y. 472. See note to *Knickerbocker Trust Co. v. Iselin*, 113 Am. St. Rep. 883. But where the statutes are printed by public authority but private enterprise, the courts will, in case the verity of any part is questioned, resort to the original enactments: *Clagett v. Duluth Tp.*, 143 Fed. 824, 74 C. C. A. 620. And this notwithstanding an act declaring the edition to be competent evidence in all courts, etc. "The provision for a private commission to compile and publish the statutes at the expense of the publisher; the legislative designation of the work as a 'compilation,' the absence of any express enactment or other distinct recognition of the compilation as conclusive

evidence of the laws of the state, such as is generally found in legislation relating to revisions, seem to deny to these statutes the force and effect of a legislative revision of the laws. This conclusion is in harmony with the treatment of this compilation by the supreme court of Minnesota": *Clagett v. Duluth Tp.*, *supra*. In that court they were recognized as competent or *prima facie* evidence, but when their verity was questioned, the court resorted to the original enactments for the truth. The court in the case cited said that if either of these compilations constituted revisions of laws of the state, then (except in cases of doubt or ambiguity) no resort could be had to original statutes to modify them. They would constitute final and conclusive expressions of the law: *United States v. Bowen*, 100 U. S. 508, 25 L. Ed. 631; *Cambria Iron Co. v. Ashburn*, 118 U. S. 54, 30 L. Ed. 60, 6 Sup. Ct. Rep. 929. But the supreme court of Minnesota has in many cases ignored the compilations of 1878 and 1894, and examined original enactments to ascertain, among other things, whether the title of the original act was broad enough to embrace the subject of the enactments: *State ex rel. Keith v. Chapel*, 63 Minn. 535, 65 N. W. 940; *Ham-*

quite generally enacted in the different states controlling this subject. Their general purport is such as to remove doubt on the subject, by providing that printed statutes of other states are admissible, when they purport to be printed by public authority, or when they are proved to be generally admitted as presumptive evidence in the courts of the state where they are in force.⁷⁹ In a Georgia case it has been held where one party offers a section of the code of another state as proof of the law of that state on a given subject, he is not required to introduce all cognate sections. If there are other sections applicable, the opposite party may offer them, but cannot complain that his adversary has not done so.⁸⁰ In a Virginia case it was

ilton v. Minneapolis etc. Co., 78 Minn. 3, 79 Am. St. Rep. 350, 80 N. W. 693; Loper v. State, 82 Minn. 71, 84 N. W. 650.

⁷⁹ Latterett v. Cook, 1 Iowa, 1, 63 Am. Dec. 428; Cummings v. Brown, 31 Mo. 309; Glenn v. Hunt, 120 Mo. 330, 25 S. W. 181; Wilt v. Cutler, 38 Mich. 189; Pacific Pneumatic Gas Co. v. Wheelock, 80 N. Y. 278; Harryman v. Roberts, 52 Md. 64; Eagan v. Connelly, 107 Ill. 458; Meracle v. Down, 64 Wis. 323, 25 N. W. 412; Merrifield v. Robbins, 8 Gray (Mass.), 150; Bride v. Clark, 161 Mass. 130, 36 N. E. 745; Cutler v. Wright, 22 N. Y. 472; Cochran v. Ward, 5 Ind. App. 89, 51 Am. St. Rep. 229, 29 N. E. 795, 31 N. E. 581; State v. Cheek, 13 Ired. (N. C.) 114; Falls v. United States Building Co., 97 Ala. 417, 38 Am. St. Rep. 194, 24 L. R. A. 174, 13 South. 25; Rice v. Rankans, 101 Mich. 378, 59 N. W. 660; Regero v. Zippel, 33 Fla. 625, 15 South. 326. See the statutes of the jurisdiction.

⁸⁰ Southern R. Co. v. Robertson, 7 Ga. App. 154, 66 S. E. 535. This case is interesting, also, for the reason that the cognate sections which

it was sought to compel the plaintiff to introduce limited the right of action to the extent that such action must be brought in some court in the state of Alabama. The *obiter* remarks of the court were: "In the case of Southern R. Co. v. Decker, 5 Ga. App. 21, 62 S. E. 678, we said as to this statute: Our own sense of justice, subject to the guidance of the law-making power of this state, determines solely and alone what laws, domestic or foreign, we will enforce; and this discretion is subject to neither limitation nor extension by the legislature of any other state." Since then the same point was under consideration of the United States supreme court in Atchison etc. R. Co. v. Sowers, 213 U. S. 55, 53 L. Ed. 695, 29 Sup. Ct. Rep. 397. We take the syllabus from the last-named volume: "The full faith and credit demanded by U. S. Rev. Stats., § 906, U. S. Comp. Stats. 1901, p. 678, 3 Fed. Stats. Ann. 39, is given by the Texas courts to N. M. act of March 11, 1903, providing that an action for personal injuries received in that territory will not lie unless certain

held that, when a section of a statute of Maryland was authenticated by the seal of that state, it was admissible, and that other sections of the statute need not be offered in evidence;⁸¹ and where the existence of the statute is proved, such statute is *presumed to continue* in force until the contrary is shown.⁸² In the absence of any statute upon the subject, the careful practitioner will either produce an exemplified copy of the statute or a volume purporting to contain the statutes of the state in question and to be printed by authority, as well as the evidence of some person having knowledge of the subject, to the effect that the volume is official, or that it is generally received in evidence in the courts of the state whose laws are to be proved. A statute may also be proved like other records by a *sworn copy*.⁸³ In some jurisdictions, a mode similar to that sometimes adopted with the laws of foreign countries is called for, the testimony of an expert. The copy of the statute produced, it is said in one case, only shows what the language of the law is, and the court ought to know "what the law is altogether, as shown by exposition, interpretation and adjudication; and this can best be ascertained by the testimony of a professional witness whose special knowledge enables him to speak to that fact."⁸⁴ In some other states statutes exist providing that printed books of *ordinances* purporting to be printed by authority of the city are admissible.

§ 506 (518). Same—Proof of the unwritten law.—So far we have dealt only with proof of the statutes and unwritten

requirements as to the making of an affidavit and the bringing of suit within a specified time are observed, where a recovery is permitted in those courts subject to such restrictions, although the statute also undertakes to make the suit maintainable only in the district court of the territory."

⁸¹ Hunter v. Fulcher, 5 Rand. (Va.) 126, 16 Am. Dec. 738.

⁸² State v. Patterson, 2 Ired. (N. C.) 346, 38 Am. Dec. 699.

⁸³ Ennis v. Smith, 14 How. (U. S.) 400, 14 L. Ed. 472.

⁸⁴ Title Guarantee etc. Co. v. Trenton Potteries Co., 56 N. J. Eq. 441, 38 Atl. 422. See, also, Chattanooga etc. R. Co. v. Jackson, 86 Ga. 676, 13 S. E. 109; Raynham v. Canton, 3 Pick. (Mass.) 293.

law of foreign countries and the statutes of sister states. The common or *unwritten law of a sister state* may be proved by the testimony of witnesses having knowledge of the subject, that is, by *expert testimony*.⁸⁵ In some of the cases cited the rule seems to have been so extended as to allow the opinions of experts, not only as to the common law of the state in question, but also as to the *construction of statutes*.⁸⁶ But the general rule is that the statute law of a sister state, like that of a foreign country, must be proved by a copy authenticated in some of the ways already stated.⁸⁷ In a few instances, it has been held that the common law of a sister state may be proved by printed *reports of decisions* of that state;⁸⁸ and in many of the

⁸⁵ Walker v. Forbes, 31 Ala. 9; McNeill v. Arnold, 17 Ark. 154; Barkman v. Hopkins, 11 Ark. 157; Dyer v. Smith, 12 Conn. 384; McDeed v. McDeed, 67 Ill. 545; Comparet v. Jernegan, 5 Blackf. (Ind.) 375; Crafts v. Clark, 38 Iowa, 237; Greasons v. Davis, 9 Iowa, 219; Taylor v. Swett, 3 La. 33, 22 Am. Dec. 156; Owen v. Boyle, 15 Me. 147, 32 Am. Dec. 143; McRae v. Mattoon, 13 Pick. (Mass.) 53; Mowry v. Chase, 100 Mass. 79; De Sobry v. De Laistre, 2 Har. & J. (Md.) 191, 3 Am. Dec. 535; Hemp-hill v. Bank of Alabama, 6 Smedes & M. (Miss.) 44; Charlotte v. Chouteau, 25 Mo. 465; Barber v. Hildebrand, 42 Neb. 400, 60 N. W. 594; Kenny v. Clarkson, 1 Johns. (N. Y.) 385, 3 Am. Dec. 336; State v. Behrman, 114 N. C. 797, 25 L. R. A. 449, 19 S. E. 220; Hooper v. Moore, 5 Jones (N. C.), 130; Temple v. Board of Commrs., 111 N. C. 36, 15 S. E. 886; State v. Moy Looke, 7 Or. 54; Dougherty v. Snyder, 15 Serg. & R. (Pa.) 84, 16 Am. Dec. 520; City Sav. Bank v. Kensington Land Co. (Tenn. Ch. App.), 37 S. W. 1037; State v. De Leon, 64 Tex. 553; Territt v.

Woodruff, 19 Vt. 182; Woodbridge v. Austin, 2 Tyler (Vt.), 364, 4 Am. Dec. 740. The *testimony of attorneys* skilled in the law of the respective states has been received to show that certain acts would constitute valid service of process in another state: Mowry v. Chase, 100 Mass. 79; the practice of justice courts: Dyer v. Smith, 12 Conn. 384; the sufficiency of the execution of a deed: Wilson v. Carson, 12 Md. 54; and that a certain note was negotiable in another state: Tyler v. Trabue, 8 B. Mon. (Ky.) 306. See note to Knickerbocker Trust Co. v. Iselin, 113 Am. St. Rep. 882. On the "Admissibility and Weight of Testimony by a Lawyer to Prove Foreign Law," see note to Gasaway v. Thomas, 20 Ann. Cas. 1339.

⁸⁶ Dyer v. Smith, 12 Conn. 384; Greasons v. Davis, 9 Iowa, 219; Walker v. Forbes, 31 Ala. 9; Danforth v. Reynolds, 1 Vt. 259; Barkman v. Hopkins, 11 Ark. 157.

⁸⁷ See § 504, *ante*.

⁸⁸ Cragin v. Lamkin, 7 Allen (Mass.), 395; Marguerite v. Chouteau, 3 Mo. 540; Raynham v. Canton, 3 Pick. (Mass.) 293; McRae v. Mat-

states, statutes have been enacted making such reports admissible. The following is a type of code provisions: "The oral testimony of witnesses skilled therein is admissible as evidence of the unwritten law of a sister state or foreign country, as are also printed and published books of reports of decisions of the courts of such state or country, or proved to be commonly admitted in such courts."⁸⁹

§ 507 (519). Proof of acts of state—Proclamations—Legislative journals.—"Acts of state may be proved by production of the original printed documents from a press authorized by the government. Proclamations and other acts and orders of the executive of the like character may be proved by production of the government gazette in which they were authorized to be printed. Printed copies of public documents transmitted to Congress by the President of the United States and printed by the printer to Congress are evidence of those documents."⁹⁰ Thus, it was held that a volume of public documents printed by authority of the senate of the United States, containing letters to and from various officers of state, communicated by the President of the United States to the senate, was as competent evidence as the original documents themselves.⁹¹ The government gazette is admitted as evidence of the public acts of government, or matters of state; but it is not evidence of private titles, or private interests, or to prove a fact of a private nature.⁹² In a New York

toon, 13 Pick. (Mass.) 53; Dougherty v. Snyder, 15 Serg. & R. (Pa.) 84, 16 Am. Dec. 520; Lattimer v. Elgin, 4 Desaus. Eq. (S. C.) 26; Brush v. Scribner, 11 Conn. 388, 29 Am. Dec. 303; Chicago etc. Ry. Co. v. Tuite, 44 Ill. App. 535, but not of a dissenting opinion; Ely v. James, 123 Mass. 36.

⁸⁹ Cal. Code Civ. Proc., § 1902. See statute of forum. On "Opinions of Courts as Evidence," see note to State v. Butler, 19 Ann. Cas. 404.

⁹⁰ Greenl. Ev., § 479, and cases cited; Post v. Supervisors, 105 U. S. 667, 26 L. Ed. 1204; Root v. King, 7 Cow. (N. Y.) 613. See notes to Spangler v. Jacoby, 58 Am. Dec. 574, and Jones v. Jones, 51 Am. Dec. 616.

⁹¹ Whiton v. Albany City Ins. Co., 109 Mass. 24.

⁹² Del Hoyo v. Brundred, 20 N. J. L. 328; Rex v. Holt, 5 Term Rep 436, 101 Eng. Reprint, 245; Phillips, Ev., 407; Greenl. Ev., § 540.

case,⁹³ Kent, C. J., in dealing with the admissibility of evidence of a blockade, said: "The letter of Mr. Canning to Mr. Pinkney, of the 8th of January, 1808, would have still further corroborated the proof of the blockade, as it was decisive evidence of the intention of the English government to include St. Lucar in the blockade of Cadiz, and to carry the blockade, at the entrances of these ports, into the most rigorous effect. This letter, I think, ought to have been admitted in evidence. It appears to have been printed at the city of Washington, by persons whom the defendants offered to show were printers to Congress, and to have composed part of a set of public documents transmitted to Congress, by the President of the United States. A greater strictness of proof, in respect to such public matters of state, and when they are introduced collaterally, and not as matter of fact in issue, would be inconvenient and is not now, in practice, required." In Maine certain addenda to the state adjutant general's reports, being printed by the official printer, under official supervision, were admitted as *prima facie* copies, "and we think are within the principle admitting printed public documents in evidence as copies of the original documents."⁹⁴ A certified copy of a letter written by the United States Secretary of State with reference to Costa Rica's jurisdiction over the territory which the United States claimed belonged to Panama was admitted in evidence on the ground that it was an official document containing, and calling for judicial cognizance of, a statement of the position of the United States on a political, nonjudicial question.⁹⁵ Original official communications between high civil and military officers of the Confederate states, or certified copies thereof, are competent evidence to show that the Confederate authorities obtained possession of a vessel by purchase, and not by capture or by other forcible and com-

⁹³ Radcliff v. United Ins. Co., 7 Johns. (N. Y.) 38.

⁹⁵ American Banana Co. v. United Fruit Co., 160 Fed. 184.

⁹⁴ Milford v. Greenbush, 77 Me. 330.

pulsory appropriation.⁹⁶ The compendium of the tenth census, printed by the authority of Congress at the government printing office in Washington, was held evidence to show the population of a town in 1880.⁹⁷ The "State Register," being made by law the public paper in which the official acts of the governor required to be made public are published, is admissible in evidence to prove the existence of facts stated in the governor's proclamation.⁹⁸ The printed journals of either house of a legislature, published in obedience to law, and the copies of such journals certified by the Secretary of State, are competent evidence of the proceedings in the legislature.⁹⁹ The federal statute provides that "extracts from the *journals* of the senate or of the house of representatives, and of the executive journal of the senate, when the injunction of secrecy is removed, certified by the secretary of the senate or by the clerk of the house of representatives, shall be admitted as evidence in the courts of the United States, and shall have the same force and effect as the originals would have, if produced and authenticated in court."¹⁰⁰ So when public statutes or legislative relations contain *recitals of public events*, as that a state of war exists or of other events peculiarly within the knowledge of the government, they are deemed competent evidence of the facts so

⁹⁶ *Oakes v. United States*, 174 U. S. 778, 43 L. Ed. 1169, 19 Sup. Ct. Rep. 864.

⁹⁷ *Fulham v. Howe*, 60 Vt. 351, 14 Atl. 652. In *Watkins v. Holman*, 16 Pet. (U. S.) 25, 10 L. Ed. 873, it was held that a volume of state papers showing the report of certain commissioners, under an act of Congress confirming the title in question, was admissible in evidence. It was put on the same ground as journals of Congress and of state legislatures and reports sanctioned and published by authority. As to the volume there in question, the court

said: "Now, this original report, duly authenticated by the treasury department, to which it was made, would be evidence, and it is evidence in the published volume. The very highest authenticity attaches to these state papers, published under the sanction of Congress." To same effect is *Bryan v. Forsyth*, 19 How. (U. S.) 334, 15 L. Ed. 731.

⁹⁸ *Lurton v. Gilliam*, 1 Scam. (Ill.) 577, 33 Am. Dec. 430.

⁹⁹ *Post v. Supervisors*, *supra*.

¹⁰⁰ *United States Rev. Stats.*, § 995 (U. S. Comp. Stats. 1901, p. 673, 3 Fed. Stats. Ann. 34).

recited.¹ The rule is well stated in the useful American edition of Stephen's Digest of Evidence that when any act of state or any fact of a public nature is in issue, or is or is deemed to be relevant to the issue, any statement of it made in a recital contained in any public statute, or in any public proclamation or any message of the executive to the legislature, or in any legislative resolutions, is deemed to be a relevant fact, and the recital of the acts of any foreign governments and functionaries in state papers published by authority of Congress, and in diplomatic correspondence communicated by the President to Congress, is deemed to be a relevant fact to prove such acts.²

§ 508 (520). Official registers—Books of public officers. When persons in public office are required by statute or by the nature of their office to write down particular transactions occurring in the course of their public duties and under their personal observation, such records are generally admissible in evidence.³ When such entries are made

¹ *Rex v. Deberenger*, 3 Maule & S. 67, 105 Eng. Reprint, 536; *Thelusion v. Cosling*, 4 Esp. 266.

² *Reynolds' Steph. Ev.*, art. 33. See, also, the following references given by Reynolds: *Greenl. Ev.*, § 491; *Armstrong v. United States*, 13 Wall. (U. S.) 154, 20 L. Ed. 614; *Radcliff v. United Ins. Co.*, 7 Johns. (N. Y.) 38; *Talbot v. Seeman*, 1 Cranch (U. S.), 1, 37, 38, 2 L. Ed. 15; *Bryan v. Forsyth*, 19 How. (U. S.) 334, 338, 15 L. Ed. 674; *Watkins v. Holman*, 16 Pet. (U. S.) 25, 55, 56, 10 L. Ed. 873; *Gregg v. Forsyth*, 24 How. (U. S.) 179, 16 L. Ed. 731.

³ *Whalen v. Gleeson*, 81 Conn. 638, 71 Atl. 908; *Trentham v. Waldrop*, 119 Ga. 152, 45 S. E. 988; *Black Canyon Irr. Dist. v. Marple*, 19 Idaho, 176, 112 Pac. 766; *Bader v.*

State, 176 Ind. 268, 94 N. E. 1009; *Edwards v. City of Cedar Rapids*, 138 Iowa, 421, 116 N. W. 323; *Black Diamond Coal etc. Co. v. Price*, 33 Ky. Law Rep. 334, 108 S. W. 345; *Short's Succession*, 45 La. Ann. 1485, 14 South. 184; *Brackett v. Persons Unknown*, 53 Me. 228; *Delaney v. Framingham Gas etc. Co.*, 202 Mass. 359, 88 N. E. 773; *People v. Kemp*, 76 Mich. 410, 43 N. W. 439; *Hayward v. Bath*, 38 N. H. 179; *Miller v. Northern Pac. R. Co.*, 18 N. D. 19, 118 N. W. 344; *Davenport v. McKee*, 98 N. C. 500, 4 S. E. 545; *Allegheny v. Nelson*, 25 Pa. 332; *Freeman v. Bailey*, 50 S. C. 241, 27 S. E. 686; *Veatch v. Gray*, 41 Tex. Civ. App. 145, 91 S. W. 324; *State v. Neal*, 25 Wash. 264, 65 Pac. 188, 68 Pac. 1135; *Dickinson v. Smith*, 134 Wis. 6, 114 N. W. 133; *Evanston*

by authorized public agents in the course of public duty, and relate to matters in which the whole public may be interested, these are deemed sufficient sanctions to dispense with the necessity of an oath and cross-examination.⁴ The rule is thus stated by Stephen: "An entry in any record, official book or register kept in any state, or at sea, or in any foreign country, stating, for the purpose of being referred to by the public, a fact in issue or relevant, or deemed to be relevant thereto, and made in proper time by any person in the discharge of any duty imposed upon him by the law of the place in which such record, book or register is kept, is itself deemed to be a relevant fact."⁵ And the law here is practically the same. The cases are numerous that the entries are competent evidence where the nature of the office seems to require them and whether the duty to make them is enjoined by statute or by a superior officer in the performance of official duty. So long as the one making them was in discharge of a public and official duty in so keeping the book of entry, it is sufficient.⁶ Such entries are generally made by those who can have *no motive* to suppress the truth, or *to fabricate* testimony. Moreover, in many cases they are made in the *discharge of duty*, pursuant to an oath of office.⁷ In his work on Evidence, Tay-

v. Gunn, 99 U. S. 660, 25 L. Ed. 306; Hogarth Shipping Co. v. Federal Sugar Refining Co., 174 Fed. 278.

⁴ Greenl. Ev., § 483. See the late cases: Tenement House Dept. v. Weil, 76 Misc. Rep. 273, 134 N. Y. Supp. 1062; Hammerstein v. Hammerstein, 74 Misc. Rep. 567, 134 N. Y. Supp. 473; Lawless v. Raddis (Okl.), 129 Pac. 711; In re Yankton-Clay County Drainage Ditch (S. D.), 137 N. W. 608; Quannah etc. R. Co. v. Drummond (Tex. Civ. App.), 147 S. W. 728; Guan Lee v. United States, 198 Fed. 596, 117 C. C. A. 304; Toy Dip v. United States, 198 Fed. 603, 117 C. C. A. 311.

⁵ Steph. Ev., art. 34.

⁶ White v. United States, 164 U. S. 100, 41 L. Ed. 365, 17 Sup. Ct. Rep. 38. See, also, United States v. Cross, 20 D. C. 365; Black Canyon Irr. Dist. v. Marple, 19 Idaho, 176, 112 Pac. 766; La Salle County v. Simmons, 10 Ill. 513; Groesbeck v. Seeley, 13 Mich. 329; State v. Van Winkle, 25 N. J. L. 73; Coleman v. Commonwealth, 25 Gratt. (Va.) 865, 18 Am. Rep. 711; White v. United States, 164 U. S. 100, 41 L. Ed. 365, 17 Sup. Ct. Rep. 38; Hogarth Shipping Co. v. Federal Sugar Refining Co., 174 Fed. 278.

⁷ Greenl. Ev., §§ 483, 484. If they are not in the discharge of duty they are not admissible. If

lor mentions a large number of books of this character which the law recognizes as official registers: for example, among others, parish registers, registers of births, marriages and deaths, made pursuant to the registration acts, land tax assessments, bishops' registers, books kept at public prisons, official log-books, books kept by the coast guard showing the state of wind and weather, registers of parliamentary votes, custom-house revenue books and books of other public offices.⁸ Many others are mentioned but these sufficiently illustrate the class of books usually referred to. In this country the same rule has been recognized in many instances.⁹ It would seem to be settled upon authority that

the authorized person was bound to record the fact, his entry is competent, but as to matters which he was not bound to record, his entry being extraofficial is merely the statement of a private person and inadmissible as hearsay: *Fox v. Peninsular etc. Works*, 92 Mich. 243, 52 N. W. 623; *Hegler v. Faulkner*, 153 U. S. 109, 38 L. Ed. 653, 14 Sup. Ct. Rep. 779; *Big Thompson etc. Co. v. Mayne*, 36 Colo. 355, 91 Pac. 44.

⁸ *Tayl. Ev.*, 10th ed., § 1595; *Doe v. Barnes*, 1 Moody & R. 386 (marriage register); *Doe v. Seaton*, 2 Ad. & E. 178, 111 Eng. Reprint, 66 (land tax assessments); *Arnold v. Bishops*, 5 Bing. 316, 130 Eng. Reprint, 1083 (bishop's register); *Salte v. Thomas*, 3 Bos. & P. 188, 127 Eng. Reprint, 104 (prison books); *D'Israeli v. Jowett*, 1 Esp. 427 (log-books); *Catherina Maria, L. R.* 1 Adm. & Ecc. 53 (coast guard books); *Reed v. Lamb*, 29 L. J. Ex. 452, 6 Hurl. & N. 75, 6 Jur., N. S., 828 (parliamentary register); *Johnson v. Ward*, 6 Esp. 48 (custom books). See Stats. 6 & 7 Wm. IV, c. 86. On "Weight of Weather Records as Evidence," see note to

Hufnagle v. Delaware & Hudson Co., 19 Ann. Cas. 852.

⁹ In the admission of *registries of deeds* and mortgages: *Conway v. Case*, 22 Ill. 127; *Dixon v. Doe*, 5 Blackf. (Ind.) 106; *Booge v. Parsons*, 2 Vt. 456, 21 Am. Dec. 557; books of accounts and of grants in the office of an alcalde: *Downer v. Smith*, 24 Cal. 114; the records of miners' claims: *Pralus v. Pacific Gold etc. Min. Co.*, 35 Cal. 30, 12 Morr. Min. Rep. 478; *Attwood v. Fricot*, 17 Cal. 37, 76 Am. Dec. 567, 2 Morr. Minn. Rep. 305; records of *registered letters* received at a postoffice: *Gurney v. Howe*, 9 Gray (Mass.), 404, 69 Am. Dec. 299; the registration of vessels in the custom-house: *United States v. Johns*, 4 Dall. (Pa.) 412, Fed. Cas. No. 15,481, 1 L. Ed. 888, 1 Wash. C. C. 363; *Catlett v. Pacific Ins. Co.*, 1 Wend. (N. Y.) 561; the records of *city ordinances*: *Commonwealth v. Chase*, 6 Cush. (Mass.) 248; of the attendance of pupils at school: *Thurstin v. Luce*, 61 Mich. 292, 28 N. W. 103; the registry of *births, deaths and marriages* kept by a religious society: *Stoevev v. Whitman*, 6 Binn. (Pa.) 416; *Jacobi v. Order of Germania*, 26 N. Y. Supp. 318; *Hyam v. Edwards*, 1 Dall. (Pa.)

a ship's manifest containing a list of its alien immigrant passengers made by a designated officer under the positive requirements of a statute regulating the manner in which such officer shall discharge a *quasi* public duty, delivered to a proper officer of the government which confers the authority and imposes the duty, and produced by a proper

2, 1 L. Ed. 11; or by a town clerk: *Sumner v. Sebec*, 3 Me. 223; *Jacocks v. Gilliam*, 3 Murph. (7 N. C.) 47; the records of *baptisms*: *Durfee v. Abbott*, 61 Mich. 471, 28 N. W. 521; the records of a city or village: *Barker v. Fogg*, 34 Me. 392; of a *school district*: *Sanborn v. School Dist.*, 12 Minn. 17; *Thurstin v. Luce*, 61 Mich. 292, 28 N. W. 103; of *town officers* showing accounts and expenses: *Thornton v. Campton*, 18 N. H. 20; of town meetings: *Isbell v. New York Ry. Co.*, 25 Conn. 556; *Bishop v. Cone*, 3 N. H. 513; *Grafton v. Reed*, 34 W. Va. 172, 12 S. E. 767; of acts of boards of supervisors: *People v. Bircham*, 12 Cal. 50; *Blackman v. Dunkirk*, 19 Wis. 183; of county commissioners: *Cuttle v. Brockway*, 24 Pa. 145; *Johnson v. Wakulla Co.*, 28 Fla. 720, 9 South. 690; of town officers: *Jay v. Carthage*, 48 Me. 353; *Chatham v. Young*, 113 N. C. 161, 37 Am. St. Rep. 617, 18 S. E. 92; maps, plat-books and field-books of *surveyors*, prepared and deposited according to statute in a public office: *People v. Denison*, 17 Wend. (N. Y.) 312; *Miller v. Indianapolis*, 123 Ind. 196, 24 N. E. 228; *Commonwealth v. King*, 150 Mass. 221, 5 L. R. A. 536, 22 N. E. 905; *Polhill v. Brown*, 84 Ga. 338, 10 S. E. 921; dockets of the *clerk of a court* showing issuing and return of writs, after proof has been made of the loss of the writ in question: *Browning v. Flanagan*, 22 N. J. L. 567; the record of *weather* kept by a person employed in the signal service of the

United States: *Evanston v. Gunn*, 99 U. S. 660, 25 L. Ed. 306; *Chicago etc. Ry. Co. v. Traves*, 17 Ill. App. 136; *Knot v. Raleigh Ry. Co.*, 98 N. C. 73, 2 Am. St. Rep. 321, 3 S. E. 735; *Moore v. Gaus & Son Mfg. Co.*, 113 Mo. 98, 20 S. W. 975; *DeArmond v. Neasmith*, 32 Mich. 231 (see, also, *Hart v. Walker*, 100 Mich. 406, 59 N. W. 174, where private weather records were admitted); and records of the state house of correction: *People v. Kemp*, 76 Mich. 410, 43 N. W. 439. The following are some of the later cases with references abridged from 15 Current Law, 1779, 1780: *Town records*: *Leavitt v. Town of Somerville*, 105 Me. 517, 75 Atl. 54. *Records of city council and reports of officials*: *Noris v. McFadden*, 159 Mich. 424, 16 Det. Leg. N. 944, 124 N. W. 54. *Official weather bureau records*: *Hufnagle v. Delaware & H. Co.*, 227 Pa. 476, 19 Ann. Cas. 850, 76 Atl. 205. *Records of fiscal court of county*: *Kozee v. Commonwealth*, 139 Ky. 66, 129 S. W. 327. *Report of mine superintendent to state mine inspector*: *Atitus v. Spring Val. Coal Co.*, 246 Ill. 32, 138 Am. St. Rep. 221, 92 N. E. 579. *A coroner's verdict*: *Stollery v. Cicero & P. St. R. Co.*, 143 Ill. App. 499. *Archives of general land office*: *Myers v. Moody* (Tex. Civ. App.), 122 S. W. 920. *Map of survey*: *Finberg v. Gilbert* (Tex. Civ. App.), 124 S. W. 979. *Report of survey*: *Dent v. Simpson*, 81 Kan. 217, 105 Pac. 542. *Field-notes and map of survey*:

custodian from the proper government office, so far partakes of the character of a public document as to become evidence of the facts which it contains and which it is by law required to set out. The admissibility of a paper of a public character would not depend upon its strict regularity. If made by authority and under positive law, and in accordance with its substantial requirements, it would be sufficient.¹⁰ Nor need it be kept by the public officer

Board of Commrs. of Sheridan County v. Patrick, 18 Wyo. 130, 104 Pac. 531, 107 Pac. 748. *Transcript of death certificate*: Hoffman v. Metropolitan Life Ins. Co., 135 App. Div. 739, 119 N. Y. Supp. 978. *Copy of death registration*: State v. McDonald, 55 Or. 419, 103 Pac. 512, 104 Pac. 967, 106 Pac. 444. *Copy of tax digest of county*: McMillan v. Savannah Guano Co., 133 Ga. 760, 66 S. E. 943. *Of sheriff's return of sales*: Wellman v. Hoge, 66 W. Va. 234, 66 S. E. 357. *Petition to legislature*: Bailie v. Western Livestock & Land Co., 55 Tex. Civ. App. 473, 119 S. W. 325. *Reports of mine inspections*: Henderson Min. & Mfg. Co. v. Nicholson (Ky.), 126 S. W. 139. *Transcript from state penitentiary books*: Folks v. Lee, 135 Ga. 179, 69 S. E. 24. *Resolution of county board*: People v. Cairo V. & C. R. Co., 243 Ill. 217, 90 N. E. 730. *Copy of plat*: Perry v. Sheldon, 30 R. I. 426, 75 Atl. 690. *Copy of memoranda on cover of papers in land office*: Allen v. Clearman (Tex. Civ. App.), 128 S. W. 1140. *Copy of report of surveyor*: Finberg v. Gilbert (Tex. Civ. App.), 124 S. W. 979. *Sketch from map of survey*: Finberg v. Gilbert (Tex. Civ. App.), 124 S. W. 979. *Indorsement on land grant*: Davidson v. Ryle, 103 Tex. 209, 124 S. W. 616, 125 S. W. 881. *Record of state land office incompetent because not properly authenticated*:

Winn v. Whitehouse, 96 Ark. 42, 131 S. W. 70. *Public school register*: Levels v. St. Louis etc. R. Co., 196 Mo. 606, 94 S. W. 275. *Minutes of board of health*: Kwong L. Y. Co. v. Alliance Co., 16 Haw. 674.

¹⁰ *McInerney v. United States*, 143 Fed. 729, 74 C. C. A. 655. There seems to be no substantial difference between the requirements of the statute here and those of the English statute, under which, upon very forcible reasoning, it was held in *Richardson v. Mellish*, 2 Bing. 229, 130 Eng. Reprint, 294, that the list of passengers returned by the captain under the authority of the English act was admissible evidence as against third parties. The principle of the English case was apparently adopted with approval by the supreme court of the United States in *Buckley v. United States*, 4 How. (U. S.) 251, 258, 11 L. Ed. 961. In the case of *Evanston v. Gunn*, 99 U. S. 660, 666, 25 L. Ed. 306, the record was kept by a person employed in the signal service of the United States, but the supreme court did not base its admissibility so much upon official capacity as upon the idea that the record was made by a person whose public duty it was to record truly the facts stated, and upon the idea that it was of a public character, and kept for public purposes. Neither the English case

himself, if the entries are made under his direction by a person authorized by him.¹¹ This class of evidence is not strictly confined to facts within the personal knowledge of the officer making the record. For example, where a book was kept in the office of the marshal in which all the measurements of convicted persons were kept and their description written and furnished to the Department of Justice, and the practice was for one to take the measurement and call it out to the clerk who reduced it to writing, the evidence of the writing clerk would be admissible though he had not verified the facts contained in the entry.¹² But the entries are not evidence if made by an irresponsible person, such as one who has vacated the office, or if they do not appear to have been made by proper authority.¹³

§ 509 (521). Proof of facts contained in official registers. The contents of books of the character described in the last section are proven by the production of the books or documents themselves, and by proof that they come from

nor the American cases make the admissibility of the document depend so much upon the strict official capacity of the person making a report, as upon the nature of the act and upon the idea that it was an act done in discharge of a duty of a public character under the authority and requirements of the law.

¹¹ *Galt v. Galloway*, 4 Pet. (U. S.) 332, 7 L. Ed. 876. See, also, *Nolin v. Palmer*, 21 Ala. 66; *Shepherd v. Turner*, 129 Cal. 530, 62 Pac. 106; *Wooster v. Butler*, 13 Conn. 309; *Birmingham v. Pettit*, 21 D. C. 209; *Maples v. Hoggard*, 58 Ga. 315; *Matlock v. Hawkins*, 92 Ind. 225; *In re Jones*, 130 Iowa, 177, 106 N. W. 610; *State v. Krause*, 58 Kan. 651, 50 Pac. 882; *Illinois Cent. R. Co. v. Barrett*, 23 Ky. Law Rep. 1755, 66 S. W. 9; *Gray v. Waterman*, 40 Ill. 522; *Milford v. Greenbush*, 77 Me. 330; *Allen v. Kidd*, 197 Mass. 256, 84 N. E. 122;

Taylor v. City of Jackson, 151 Mich. 639, 115 N. W. 977; *Coopwood v. Prewett*, 30 Miss. 206; *Stumpe v. Kopp*, 201 Mo. 412, 99 S. W. 1073; *Angier v. Ash*, 26 N. H. 99; *Wardwell v. Patrick*, 1 Bosw. (N. Y.) 406; *Grugan v. Philadelphia*, 158 Pa. 337, 27 Atl. 1000; *Putnam v. Custer County*, 25 S. D. 542, 127 N. W. 641; *Buchanan v. Western Union Tel. Co.* (Tex. Civ. App.). 100 S. W. 974; *Wheeler v. Barre School Dist.* No. 13, 64 Vt. 184, 26 Atl. 1094; *Chaffee v. United States* 18 Wall. 516, 21 L. Ed. 908.

¹² *United States v. Cross*, 20 D. C. 365. See, also, *City of Worcester v. Northborough*, 140 Mass. 397, 5 N. E. 270.

¹³ *Gray v. Waterman*, 40 Ill. 522; *Allen v. Vincennes*, 25 Ind. 531; *Harris v. Commonwealth*, 20 Gratt. (Va.) 833.

the proper custody;¹⁴ and in some cases, sworn¹⁵ or certified¹⁶ copies of such books have been received, where the books themselves could not readily be obtained. Although such records are admissible, they do not in general import absolute verity, but are treated as *prima facie* evidence of the facts entered and of the documents recorded.¹⁷ But they afford no evidence of facts which *they do not properly contain*, or of any fact which can only be inferred from the record by argument. Thus, army registers published by the Secretary of War afford no evidence from which the pay of army officers can be inferred, although, if properly authenticated, they may afford evidence as to the names, dates of commissions and similar facts.¹⁸ A certificate of a poorhouse superintendent admitting a laborer as a city charge, or the indorsement upon it that the laborer was suffering from arsenical poisoning, was inadmissible in an action by the laborer against the employer who set him to work at vats whence he inhaled the noxious vapors. It was irrelevant in that the indorsement was not required by any statute. While the registration of the patient was necessary, evidence of facts not required to be recorded was inadmissible.¹⁹ Regarding certificates given by persons in official station, the rule is that, if the person was bound to record the fact, the proper evidence is the production of the record itself, or, failing that, a copy of the record; but as to matters which he was not bound to record, his certificate, being extraofficial, is merely the statement of

¹⁴ *Atkins v. Hatton*, 2 Anstr. 387; *Armstrong v. Hewett*, 4 Price, 216, 18 R. R. 707; *Pulley v. Hilton*, 12 Price, 625; *Swinnerton v. Stafford*, 3 Taunt. 91, 128 Eng. Reprint, 37.

¹⁵ *Jackson v. King*, 5 Cow. (N. Y.) 237, 15 Am. Dec. 468; *Jackson v. Boneham*, 15 Johns. (N. Y.) 226.

¹⁶ *Lewis v. Marshall*, 5 Pet. (U. S.) 470, 8 L. Ed. 195; *Jay v. Carthage*, 48 Me. 353; *Miller v. City*

of Indianapolis, 123 Ind. 196, 24 N. E. 228.

¹⁷ *Westerhaven v. Clive*, 5 Ohio, 136; *Chapman v. Herrold*, 58 Pa. 106; *Gurney v. Howe*, 9 Gray (Mass.), 404, 69 Am. Dec. 299. See cases cited in note 3, § 508, *ante*.

¹⁸ *Wetmore v. United States*, 10 Pet. (U. S.) 647, 9 L. Ed. 567.

¹⁹ *Fox v. Peninsular etc. Works*, 92 Mich. 243, 52 N. W. 623.

a private person.²⁰ The mere recital, in a sheriff's certificate, of an execution, is not evidence of its existence, because such recital is not a necessary part of the certificate, which is made evidence of those facts only which the statute requires should be stated in it.²¹ While a statement of the official acts of a county treasurer in their appropriate places and correct order are evidence, an unofficial marginal note or indorsement is not entitled to be weighed against a distinct, explicit and authentic record.²² And an entry in a registry of baptism is not evidence of the date of birth,²³ though it may be received on this issue in connection with other facts.²⁴ But a baptismal registry describing the person as illegitimate was received as giving some evidence of this fact.²⁵ "It is deemed essential to the official character of these books that the entries in them be made *promptly*, or at least without such long delay as to impair their credibility, and that they be made by the person whose duty it was to make them, and in the mode required by law, if any has been prescribed."²⁶ Where thus made, they may be introduced in favor of the officer making them, as presumptive evidence of the performance of the acts registered.²⁷ Although most of the records

²⁰ 1 Greenl. Ev., § 498; Oakes v. Hill, 14 Pick. (Mass.) 442.

²¹ Anderson v. James, 4 Rob. (N. Y.) 35.

²² Coxe v. Deringer, 78 Pa. 271. See, also, Ellicott v. Pearl, Fed. Cas. No. 4386, 1 McLean, 206, as to marginal notes by surveyor on plat.

²³ Wihen v. Law, 3 Stark. 63, 23 R. R. 757; Duins v. Donovan, 3 Hagg. Ecc. 301; Burghart v. Angerstein, 6 Car. & P. 690; R. v. North Petherton, 5 Barn. & C. 508, 108 Eng. Reprint, 189; R. v. Clapham, 4 Car. & P. 29; Lavin v. Mutual Aid Soc., 74 Wis. 349, 43 N. W. 143; Durfee v. Abbott, 61 Mich. 471, 28 N. W. 521; Mutual Benefit etc. Ins. Co. v. Tisdale, 91 U. S. 238, 23 L.

Ed. 314; McGuirk v. Mutual Benefit Life Co., 20 N. Y. Supp. 908, 66 Hun, 628; Houlton v. Manteuffel, 51 Minn. 185, 53 N. W. 541. The same rule was adopted in Hegler v. Faulkner, 153 U. S. 109, 38 L. Ed. 653, 14 Sup. Ct. Rep. 779.

²⁴ Whitcher v. McLaughlin, 115 Mass. 167.

²⁵ Cope v. Cope, 1 Moody & R. 269, 5 Car. & P. 604.

²⁶ Greenl. Ev., § 485; Doe v. Bray, 8 Barn. & C. 813, 108 Eng. Reprint, 1245; Walker v. Wingfield, 18 Ves. 443, 34 Eng. Reprint, 384; Birmingham v. Pettit, 21 D. C. 209.

²⁷ Bissell v. Hamblin, 6 Duer (N. Y.), 512.

known as official registers, within the meaning of the rule under discussion, are *required to be kept by statute*, yet this is *not in all cases a prerequisite* to the admission of the record as evidence.²⁸ It is necessary that they should be in writing. It is of no moment that the entries are in favor of the one recording them, although the effect may make his own acts evidence for him and enable him, by his own certificate, to make proof for himself. But this is a necessary, and by no means an unusual, consequence, and generally takes place in cases where the recording officer derives his authority from the constituency whose doings he records.²⁹ But if they are against the interest of the one recording them, their claim to admissibility is, if anything, enhanced.³⁰ So in the case of the death of the person recording them, and in such cases the rule has been stretched to cover entries that might not be strictly official.³¹

§ 510 (522). Registers of marriage, birth and death.— In most countries where the civil law prevails, registers of marriages, births and deaths, kept by the clergy, are received as primary evidence of such facts.³² But in England and at common law such registries were not admissible. It was insisted that before such registries were admissible,

²⁸ *Evanston v. Gunn*, 99 U. S. 660, 25 L. Ed. 306; *Bell v. Kendrick*, 25 Fla. 778, 6 South. 868; *Miller v. City of Indianapolis*, 123 Ind. 196, 24 N. E. 228; *Hesser v. Rowley*, 139 Cal. 410, 73 Pac. 156; *State v. Hall*, 16 S. D. 6, 65 L. R. A. 151, 91 N. W. 325; *White v. United States*, 164 U. S. 100, 41 L. Ed. 365, 17 Sup. Ct. Rep. 38. See, also, preceding section.

²⁹ *Shattuck v. Gilson*, 19 N. H. 296.

³⁰ *Livingston v. Arnoux*, 56 N. Y. 507.

³¹ *Spann v. Baltzell*, 1 Fla. 301, 46 Am. Dec. 346; *Field v. Boynton*,

33 Ga. 239; *Livingston v. Arnoux*, *supra*. Since memoranda made by one in the ordinary course of business, of acts or matters which his duty in such business requires him to do for others, are, in case of his death, admissible evidence of the acts and matters so done, *a fortiori*, the acts of a public officer, like a notary public, are admissible, though not strictly official, if they are according to the customary business of his office, because he acts as a sworn officer and is clothed with public authority and confidence: *Nicholls v. Webb*, 8 Wheat. (U. S.) 326, 5 L. Ed. 628.

³² Whart. Ev., § 649.

it must be shown that they were required by law as kept for the public benefit. "So the records of baptisms and marriages formerly performed at the Fleet and Kings Bench Prisons, at May Fair, at the Mint in Southwark and in certain other places are inadmissible on the ground that they were not compiled under public authority. So a marriage register kept by a clergyman in Ireland, prior to the 31st day of March, 1845, when the Irish Marriage Act came into operation, has, for a similar reason, been rejected. So a Jewish register of circumcision, kept at the great synagogue in London, has been rejected, though it was proved that the entries in it were in the handwriting of the deceased Chief Rabbi, whose duty it was to perform the rites of circumcision, and to make corresponding entries in the book. So the birth, marriage or burial register of a Wesleyan or other dissenting chapel will be rejected, unless it has been deposited in the office of the Registrar-General, and entered in his list pursuant to the provisions of the act of 3 and 4 Vict., c. 92."³³ The admission of such evidence has been regulated by statute since the reign of William IV; and certified copies of the registers established by law are competent evidence.

§ 511 (523). *Same, continued.*—In the United States, somewhat *greater latitude* seems to have been allowed; and it has frequently been held that such entries are admissible, if made in the course of official duty, although not required to be made by law.³⁴ Thus, it was held that, independently of any statute, a *baptismal register*³⁵ of a church in which the entries are made in the ordinary course of a clergyman's

³³ Tayl. Ev., 10th ed., § 1592.

³⁴ *Evanston v. Gunn* (U. S.), 99 U. S. 660, 25 L. Ed. 306; *Blackburn v. Crawfords*, 3 Wall. (U. S.) 175, 18 L. Ed. 186; *Lewis v. Marshall*, 5 Pet. (U. S.) 470, 8 L. Ed. 195; *Jackson v. King*, 5 Cow. (N. Y.) 237, 15 Am. Dec. 468; *Kyburg v. Perkins*, 6 Cal. 674; *Durfee v. Abbott*, 61

Mich. 471, 28 N. W. 521; *Hunt v. Order of Chosen Friends*, 64 Mich. 671, 8 Am. Rep. 855, 31 N. W. 576.

³⁵ *Blackburn v. Crawfords*, 3 Wall. (U. S.) 175, 18 L. Ed. 186; *Supreme Assembly, Royal Society v. McDonald*, 59 N. J. L. 248, 35 Atl. 1061.

business is admissible to prove the fact and date of baptism, but not the legitimacy of the child, nor the date of birth.³⁶ But in other cases it has been held that such entries, where they are not by law required to be made, are not admissible, unless the person who made them is deceased; in which case they are admissible upon the ground that they are entries of deceased persons made in the exercise of their calling contemporaneously with the event.³⁷ But there exists not only a want of uniformity in such legislation as there is on the subject, but an uncertainty as to the effect of certain municipal laws for the registration of these events. Thus in some jurisdictions the records when kept in the performance of a legal duty are admissible.³⁸ In other jurisdictions, it has been held that municipal laws requiring recordation of births, deaths and marriages are only police regulations, and therefore not public records. In Nebraska it has been held that a record kept under the ordinances of a city for the evident purpose of assisting the board of health in the conduct of the affairs of that office is not such a public record as to be entitled to admission in evidence to show the truth of the matters therein recited.³⁹ In New York it has been held that the records of a board of health of a city required by police regulations to be kept for local and specific purposes are not public records in such sense as makes them evidence in a controversy between private parties of the facts recorded.⁴⁰ A study of

³⁶ *Houlton v. Manteuffel*, 51 Minn. 185, 53 N. W. 541; *Berry v. Hull*, 6 Gild. (N. M.) 643, 30 Pac. 936.

³⁷ *Kennedy v. Doyle*, 10 Allen (Mass.), 161; *Chambers v. Chambers*, 32 N. Y. Supp. 875; *Whitcher v. McLaughlin*, 115 Mass. 167.

³⁸ *Commonwealth v. Hayden*, 163 Mass. 453, 47 Am. St. Rep. 468, 28 L. R. A. 318, 40 N. E. 846; *Finer v. Nichols*, 122 Mo. App. 497, 99 S. W. 808; *Jacocks v. Gilliam*, 7 N. C. 47; *Derby v. Salem*, 30 Vt. 722.

³⁹ *Sovereign Camp etc. v. Grandon*, 64 Neb. 39, 89 N. W. 448.

⁴⁰ *Buffalo Loan etc. Co. v. Knights Templar etc. Aid Assn.*, 126 N. Y. 450, 22 Am. St. Rep. 839, 27 N. E. 942; but in *Markowitz v. Dry Dock etc. R. Co.*, 12 Misc. Rep. 412, 33 N. Y. Supp. 702, this case was distinguished. In the last-named case the certificate was made by a judicial officer, and in addition the certificate was made evidence by the statute under which the judicial officer acted.

the cases will disclose that there is no real conflict on the subject. When the certificate of the event is not filed in pursuance of a law enacted for the purpose of registering the birth, death or marriage, as the case may be, the courts uniformly decline to read that intention into the law; on the other hand, when the statute is passed for the express purpose, there seems no decision attempting to override it. In all cases the first measure of inquiry should be the language and next the object of the statute in question. Statutes will be found in most of the states which require public officers to keep records of *marriages, births and deaths*. In such cases, on principles already stated, the records should be received as evidence. Indeed, in some instances the statutes require the records to be received as presumptive evidence of the marriage, birth or death so recorded.⁴¹ In some cases, too, the statutes expressly limit the range of the register to the particular fact of the birth, marriage or death, excluding other facts which may appear therein. That is so in Vermont, where the statute provides that no public record of births, marriages, or deaths required by law to be kept, nor any certified copy thereof, shall be competent evidence in the trial of any suit to prove any fact stated therein, except the fact of birth, marriage or death. Hence a certificate which stated the cause of death to have been pneumonia was rejected when offered in proof of that fact.⁴² Under statutes, copies of records from *other states* properly authenticated have been frequently admitted.⁴³ But even where the statute makes the record presumptive evidence, it is no more than presumptive evidence, and does not supersede the testimony of those having knowledge of the facts. In a Wisconsin case in which it was necessary to prove the age of the witness, her

⁴¹ See the statutes of the jurisdiction.

⁴² *McKinstry v. Collins*, 76 Vt. 221, 56 Atl. 985.

⁴³ *Hawes v. State*, 88 Ala. 37, 7 South. 302; *Erwin v. English*, 61 Conn. 502, 23 Atl. 753; *Hunt v.*

Chosen Friends, 64 Mich. 671, 8 Am. St. Rep. 855, 31 N. W. 576; *Tessmann v. United Friends*, 103 Mich. 185, 61 N. W. 261. See note to *Wileox v. Bergman*, 5 L. R. A., N. S., 938-984.

mother was asked the question as to how old she was. This was objected to, and the mother stated that she had or kept a baptismal certificate. It was contended that such family record was the best evidence of her age. Said the court: "We have no statute that makes such record evidence, and section 4160 of the Revised Statutes makes the registration of births in the register's office only presumptive evidence thereof. In both cases, the evidence would be merely hearsay or secondary, at best. It certainly could not supersede the testimony of the mother of the exact age of her child. No evidence could possibly be better or more reliable."⁴⁴

§ 512 (524). **Ship registers.**—Statutes have been enacted by Congress regulating the registry of vessels, for the purpose of showing the character of the vessel, and to entitle her to the advantages secured by law to the vessels of our country.⁴⁵ The registries are made and kept by sworn public officers in the usual course of business, and hence are entitled to confidence as official registers. They may be used as evidence of ownership of the vessel against the persons who have procured the registry to be made,⁴⁶ and as tending to prove the warranty of American property in the policy;⁴⁷ in such cases, it is *prima facie* evidence, but not conclusive.⁴⁸ For instance, it has been held that a certificate of registry which showed the name of one person as owner was not conclusive against that one person, and that he was not estopped from giving evidence of the real

⁴⁴ Hermann v. State, 73 Wis. 248, 9 Am. St. Rep. 789, 41 N. W. 171.

⁴⁵ U. S. Rev. Stats., § 4131 et seq. (U. S. Comp. Stats. 1901, p. 2803 et seq.; 5 Fed. Stats. Ann. 395; 7 Fed. Stats. Ann. 10). See, also, Sharp v. United Ins. Co., 14 Johns. (N. Y.) 201.

⁴⁶ Moore v. Anderson, 8 Ind. 18; Begley v. Morgan, 15 La. 162, 35 Am. Dec. 188; Ligon v. Orleans Nav.

Co., 7 Mart. (La.), N. S., 682; Bradbury v. Johnson, 41 Me. 582, 66 Am. Dec. 264; Leonard v. Huntington, 15 Johns. (N. Y.) 298; Bas v. Steele, Fed. Cas. No. 1088, 3 Wash. C. C. 381; Tinkler v. Walpole, 14 East, 226, 104 Eng. Reprint, 587.

⁴⁷ Catlett v. Pacific Ins. Co., 1 Wend. (N. Y.) 561.

⁴⁸ Colson v. Bonzey, 6 Me. 474.

ownership.⁴⁹ The ownership of the vessel depends upon other proof, and is not conclusively settled by the registry, since our laws recognize the possibility that the register exists in the name of one while the property is really in another person.⁵⁰ Thus, in an indictment for piracy, the national character of a merchant vessel of the United States may be proved without the certificate of registry or other documentary evidence.⁵¹ In an action to recover a premium of insurance on the ground that the plaintiff had no interest in the vessel at the time of insurance, the register, which was in the name of other persons, was held not even

49 *Card v. Hines*, 35 Fed. 598. In that case the court pointed out that estoppel, as the term is known at the common law, has no place in admiralty, and that the certificate in question warned everyone by a notice upon it that it was not a document of title, and that it did not necessarily contain notice of all changes of ownership. In *Bradbury v. Johnson*, *supra*, the question was well considered by Rice, J., and the opinion is authority that the registry acts are considered as institutions purely local and municipal, for purposes of public policy. The register, therefore, is not, of itself, evidence of property, except so far as it is confirmed by some auxiliary circumstance, showing that it was made by the authority or assent of the person named in it, and who is sought to be charged as owner. Without such connecting proof, the register has been held not to be even *prima facie* evidence to charge a person as owner; and even with such proof, it is not conclusive evidence of ownership; for an equitable title in one person may well consist with the documentary title at the custom-house in another. Where the question of ownership is merely incidental, the register alone has been

deemed sufficient *prima facie* evidence. But in favor of the person claiming as owner, it is no evidence at all, being nothing more than his declaration: 1 *Greenl. Ev.*, § 494; *Tinkler v. Walpole*, 14 *East*, 226, 104 *Eng. Reprint*, 587; *Fraser v. Hopkins*, 2 *Taunt.* 5, 127 *Eng. Reprint*, 875; *McIver v. Humble*, 16 *East*, 169, 104 *Eng. Reprint*, 1053; 1 *Stark. Ev.*, pt. 2, § 53; 1 *Phill. Ev.* 411. But though the production of the register or certificate in which his name is omitted is conclusive to negative the interest of the assured, yet its production with the name inserted is not in itself, without more, even *prima facie* evidence of his title: *Arnould on Ins.* 1327. The register cannot be rendered evidence in favor of the person who procured it to be made, though it may be against him: *Ligon v. Orleans Navigation Company*, 7 *Mart. (La.)*, N. S., 682. The certificate of registry is not even *prima facie* evidence of ownership: *Pirie v. Anderson*, 4 *Taunt.* 652, 128 *Eng. Reprint*, 487; 2 *Saund. Pl. & Ev.* 237.

50 *Sharp v. United Ins. Co.*, 14 *Johns. (N. Y.)* 201; *Leonard v. Huntington*, 15 *Johns. (N. Y.)* 298.

51 *United States v. Furlong*, 5 *Wheat. (U. S.)* 184, 5 *L. Ed.* 64.

prima facie evidence to prove that the plaintiff was not the owner.⁵² So the fact that the register remains in the name of A does not necessarily make him liable for repairs after a sale by him.⁵³ In an action against a person as owner, the register, if the oath of ownership is made by himself, is treated as an admission which may be given in evidence to charge him; if made by another person, and his assent thereto is not proved, it is the declaration of another party, which cannot affect him. But when offered by a party to establish his own title, it is simply a proposition to prove his own declarations for his own benefit, and therefore inadmissible for that purpose.⁵⁴

§ 513 (525). Log-books as evidence.—Under acts of Congress providing that masters of vessels shall have official log-books, and make certain entries therein, such books are frequently received in evidence to establish such facts as are contemplated by the act.⁵⁵ But they are evidence of no other facts.⁵⁶ Such an entry in the log-book is indispensable evidence of the fact of desertion, when a forfeiture of wages is insisted upon.⁵⁷ “The log-book, in general, ought not to be admitted to establish any facts, save such as are contemplated by the act of Congress. It is in no sense *per se* evidence except in certain cases provided for by statute.⁵⁸ It does not import legal verity; and in every other case is mere hearsay, not under oath. It may be used against persons, to whom it should be brought home as having a concern in writing or directing what should be contained therein, to contradict their statements or their de-

⁵² Sharp v. United Ins. Co., 14 Johns. (N. Y.) 201.

⁵³ Leonard v. Huntington, 15 Johns. (N. Y.) 298. See, also, Starr v. Knox, 2 Conn. 215.

⁵⁴ Bradbury v. Johnson, *supra*.

⁵⁵ U. S. Rev. Stats., § 4290 (U. S. Comp. Stats. 1901, p. 2948; 4 Fed. Stats. Ann. 867).

⁵⁶ Jones v. Brig Phoenix, Fed. Cas. No. 7489, 1 Pet. Adm. (U. S.) 201.

⁵⁷ Malone v. Bell, 1 Pet. Adm. (U. S.) 139, Fed. Cas. No. 8994; Phoebe v. Dignum, Fed. Cas. No. 11,110, 1 Wash. C. C. 48; Douglas v. Eyre, Fed. Cas. No. 4032, 1 Gilp. (U. S.) 147.

⁵⁸ United States v. Gilbert, Fed. Cas. No. 15,204, 2 Sum. 19. See, also, Worth v. Mumford, 1 Hilt. (N. Y.) 1; Cameron v. Rich, 5 Rich. (S. C.) 352, 52 Am. Dec. 747.

fense. But it cannot be received as evidence for such persons or others, except by force of a statute rendering it so."⁵⁹ The log-book must be identified before it can be introduced in evidence.⁶⁰ It will then be presumed that the entries were made in due time as provided by the statute. A *protest* is a declaration on oath, by the master, of the circumstances attending the loss of his vessel, intended to show the loss occurred by the perils of the sea, and concluding with a protestation against any liability of the owner to the freighters. Its use and design seem to be merely to authenticate the fact of a loss to the insurer and all concerned, and to repel any inference, unfavorable to the owner, from a neglect to record, at the earliest time, a statement of the fact and causes of the loss. Though some of the crew may join in the declaration, the protest is the act of the master. From the character of the instrument, being an *ex parte* declaration, it is contrary to settled principles that it should be received as evidence of the facts therein stated.⁶¹ It is not so received in the English courts,⁶² nor in the courts of most of the United States.⁶³

⁵⁹ United States v. Gilbert, *supra*.

⁶⁰ United States v. Mitchell, Fed. Cas. No. 15,791, 2 Wash. C. C. 478. In *The Kentucky*, 148 Fed. 500, a question arose in the case concerning the receipt of the Kentucky's log-books in evidence. They were used during the examination, *de bene esse*, of some of her witnesses, and marked for identification. Ordinarily, the entries in such books are not receivable in support of the party who makes them (*Worrall v. Davis Coal & Coke Co.* (D. C.), 113 Fed. 549, 557), but where they are called for and made use of by the other party for the purpose of cross-examining the opposing witnesses, and the testimony so adduced is more intelligible by a reference to the books, they should be received.

⁶¹ *Cudworth v. South Carolina Ins. Co.*, 4 Rich. (S. C.) 416, 55 Am. Dec. 692. Although it has been admitted in our courts, in an action by the owner against the insurer (*Miller v. South Carolina Ins. Co.*, 2 McCord (S. C.), 336, 13 Am. Dec. 734), there is no authority which sanctions the admission in evidence of the protest, when the master is himself sole owner and plaintiff in the action.

⁶² *Senat v. Porter*, 7 Term Rep. 158, 101 Eng. Reprint, 908.

⁶³ In *Hand v. The Elvira*, Fed. Cas. No. 6015, Gilp. 60, the court said: "In a seaman's protest and reports the waves are always mountain high, the winds never less than a hurricane, and the peril of life generally impending. There may be some pride of authorship in these

§ 514 (526). **Records of municipal corporations.**—It has been long and well settled that the records of public or municipal corporations are properly admissible in evidence generally to prove facts stated in them. And among the records so admissible are the books of record of the transactions of towns, city councils, and other municipal bodies.⁶⁴ The same reasons which authorize the admission of entries in official registers apply in favor of the introduction of the records of public and municipal corporations. The acts of such corporations and of their officers concern the rights of the public; and the presumption exists that the records of such acts are authentic. It has often been decided that the books of such corporations, when properly identified, should be received to prove their acts.⁶⁵ The records of public or municipal corporations are properly received in

compositions, and the writer may aim to exhibit his power and skill in describing dangers." In *Merri-man v. The May Queen*, Fed. Cas. No. 9481, Newb. 464, the court adopted from *Abb. Shipp.* 466, "With whatever formalities drawn up, it cannot be received in our courts as evidence for the master or his owners; but it may be evidence against him and them, and he should take care to supply from the log-book, his own recollection and that of the mate, or trustworthy mariners, true and faithful instructions for its preparation." In *Sampson v. Johnson*, Fed. Cas. No. 12,281, 2 Cranch C. C. 107, the court permitted the captain's protest to be given in evidence to corroborate his testimony.

⁶⁴ *Rex v. Mothersell*, 1 Str. 93, 93 Eng. Reprint, 405; *Denning v. Roome*, 6 Wend. (N. Y.) 651; *Weith v. City of Wilmington*, 68 N. C. 24; *Greenfield v. Camden*, 74 Me. 56.

⁶⁵ *Rex v. Mothersell*, 1 Str. 93, 93

Eng. Reprint, 405; *Ronkendorff v. Taylor*, 4 Pet. (U. S.) 349, 7 L. Ed. 882; *Owings v. Speed*, 5 Wheat. (U. S.) 420, 5 L. Ed. 124; *Denning v. Roome*, 6 Wend. (N. Y.) 651; *Whitehouse v. Bickford*, 29 N. H. 471; *People v. Murray*, 57 Mich. 396, 24 N. W. 118; *O'Mally v. McGinn*, 53 Wis. 353, 10 N. W. 515; *City of Greeley v. Hamman*, 17 Colo. 30, 28 Pac. 460. See note to *Sawyer v. Manchester etc. R. Co.*, 13 Am. St. Rep. 550, from which we have extracted useful observations. They are admissible to show *taxes* assessed against individuals: *Ronkendorff v. Taylor*, 4 Pet. (U. S.) 349, 7 L. Ed. 882; *Commonwealth v. Heffron*, 102 Mass. 148; *Whitney v. Port Huron*, 88 Mich. 268, 26 Am. St. Rep. 291, 50 N. W. 316; to prove acts of trustees appointed by the statute: *Owings v. Speed*, 5 Wheat. (U. S.) 420, 5 L. Ed. 124; the *records of cities*: *Rust v. Boston Mill Corp.*, 6 Pick. (Mass.) 158; and also to prove appointment of *town offi-*

evidence, not only when they constitute *admissions* on the part of the corporation as evidence generally of those transactions which the law requires such corporations to record, but they are received on the same grounds on which other records are admissible.⁶⁶ Hence, where the records are of a public character and have been kept by the proper officers, they may be received, not only against the corporation and in litigation between third parties, but *in behalf of the corporation* itself, or its agents.⁶⁷ The original minutes of a municipal corporation are competent evidence of the acts of the corporation without further proof of their verity.⁶⁸ The *minutes* of a regular meeting of a city council, written down by the clerk and approved by the council, are evidence of the proceedings, although not recorded in a book, in the absence of any law requiring it;⁶⁹ and when the minutes of a meeting state that a certain ordinance was passed by the council, it is to be presumed that it passed in the mode required by the charter.⁷⁰ But when the statute prescribes certain *formalities*, it must be proved that these have been complied with in the passage of the ordinance, if such issue is raised.⁷¹ But such entries are not admissible, if of a mere private nature, although contained in public records. It is necessary that they should be corporate acts, otherwise the mere fact of them being in the corporate books does not render them admissible.⁷² It is held that the books of account of a municipal corporation, kept by the proper

cers: Bishop v. Cone, 3 N. H. 513. See, also, the late cases: Ex parte Felker, 3 Ala. App. 231, 58 South. 94 (absence of authentication of presiding officer); State v. Hefferman, 243 Mo. 442, 148 S. W. 90.

⁶⁶ See § 267, *ante*, as to admissions by public corporations.

⁶⁷ Rex v. Mothersell, 1 Str. 93, 93 Eng. Reprint, 405; Thetford's Case, 12 Vin. Abr. 90; South School Dist. v. Blakeslee, 13 Conn. 227; Denning v. Roome, 6 Wend. (N. Y.) 651; Troy v. Atchison etc. Railroad Co., 11 Kan. 519, 13 Kan. 70.

⁶⁸ People v. Zeyst, 23 N. Y. 140; Commonwealth v. Chase, 6 Cush. (Mass.) 248; Denning v. Roome, 6 Wend. (N. Y.) 651.

⁶⁹ O'Mally v. McGinn, 53 Wis. 353, 10 N. W. 515.

⁷⁰ O'Mally v. McGinn, 53 Wis. 353, 10 N. W. 515; State v. King, 37 Iowa, 462.

⁷¹ Larkin v. Burlington etc. Ry. Co., 85 Iowa, 492, 52 N. W. 480.

⁷² In Marriage v. Lawrence, 3 Barn & Ald. 142, 106 Eng. Reprint, 615, the following judicial expressions lucidly illustrate the proposi-

officer, are *prima facie* evidence of the facts therein stated, and are competent to charge the corporation. Entries in such books are not, however, conclusive, but are subject to parol explanation;⁷³ and it has been held that such entries are not competent evidence on behalf of the corporation when they are not records of the acts of the corporation.⁷⁴ "A public or municipal corporation required by law to keep a record of its public, or official proceedings, *may itself use such records as evidence* in suits to which it is a party; but the records must first be properly authenticated."⁷⁵ Indeed, in actions generally, including actions against agents or officers of the corporation, as individuals, the *original minutes or records* of the corporation are competent evidence of the acts and proceedings of the corporation."⁷⁶

§ 515 (527). Same—How authenticated and proved.— Such records should be authenticated by the proper officers,

tion: Abbott, C. J.: "It seems to me that this evidence was rightly rejected. This was no more than a minute made by a party in his own memorandum-book, and it was, in fact, making evidence for himself. It is said these were public books in which this entry was found; but they were not public books for all purposes. If this entry had been of a public nature, it would have been different; but this not being so, the rules of evidence require that it should not be received." Bayley, J.: "This falls within the rule of evidence, which prohibits a party from making evidence for himself. If a corporation enter their own private business in the public court book, that circumstance will not alter the nature of the entry; for if the entry apply to private transactions alone, it will still fall within the rule applicable to private books, which cannot be given in evidence for the

party to whom they belong." Holroyd, J.: "The book in which the entry is made can make no difference, for it will not make the entry of a public nature because it was found in a public book; and if it be of a private nature, it is not receivable in evidence."

⁷³ St. Louis Gas Light Co. v. St. Louis, 11 Mo. App. 55, 84 Mo. 202.

⁷⁴ Fraser v. Charleston, 8 S. C. 318.

⁷⁵ South School District v. Blakeslee, 13 Conn. 227; Denning v. Roome, 6 Wend. (N. Y.) 651; Wood v. Jefferson County Bank, 9 Cow. (N. Y.) 194; State v. Van Winkle, 25 N. J. L. 73; McFarlan v. Triton Ins. Co., 4 Denio (N. Y.), 392; Highland Turnpike Co. v. McKean, 10 Johns. (N. Y.) 154, 6 Am. Dec. 324. See, also, O'Mally v. McGinn, 53 Wis. 353, 10 N. W. 515.

⁷⁶ 2 Dillon, Mun. Corp., 5th ed., § 561.

having their custody; and when so authenticated, the originals are competent evidence.⁷⁷ Like other public records, they may be proved, not only by the use of originals, but by the use of sworn or certified *copies*; such copies are only *prima facie* evidence, which may be controlled by proof of their inaccuracy or forgery.⁷⁸ Statutes very generally exist allowing such proof to be made by the use of certified copies. When an error has been made by the clerk in preparing municipal records, he may *amend the record* to conform to the fact while he remains in office.⁷⁹ Such amendments cannot, however, be allowed after the term of office has expired.⁸⁰ It is competent for a public corporation, as it is for every court of record, to amend its records *nunc pro tunc*, if there be matter of record authorizing the amendment;⁸¹ as where the city clerk has failed to keep the record of the yeas and nays upon the adoption of a resolution by the common council, a *nunc pro tunc* entry of the omitted proceedings may be caused to be made by the common council.⁸² It is deemed of so great importance to uphold the proceedings of public corporations that the courts are disposed to be as indulgent in allowing entries of their proceedings to be amended as is consistent with the safety of those whose interests would be affected by them; and the power of clerks of towns and other municipal corporations to amend their records while they con-

⁷⁷ O'Mally v. McGinn, 53 Wis. 353, 10 N. W. 515; Commonwealth v. Hayden, 163 Mass. 453, 47 Am. St. Rep. 468, 28 L. R. A. 318, 40 N. E. 846 (authentication by a deputy); Lindsay v. Chicago, 115 Ill. 120, 3 N. E. 443; Cleveland etc. Ry. Co. v. Tartt, 64 Fed. 823, 12 C. C. A. 618. See, also, Denning v. Roome, 6 Wend. (N. Y.) 651. As to identification of record by stranger, see note to Junior v. State, 6 Ann. Cas. 500.

⁷⁸ Commonwealth v. Chase, 6 Cush. (Mass.) 248; New York, N

H. & H. R. Co. v. Horgan, 26 R. I. 448, 59 Atl. 310. See § 522, *post*.

⁷⁹ Welles v. Battelle, 11 Mass. 477; St. Charles' President v. O'Mailey, 18 Ill. 407; Mott v. Reynolds, 27 Vt. 206; Boston Turnpike Co. v. Pomfret, 20 Conn. 590.

⁸⁰ Hartwell v. Littleton, 13 Pick. (Mass.) 229; Third School Dist. v. Atherton, 12 Met. (Mass.) 105.

⁸¹ Commissioners' Court v. Hearne, 59 Ala. 371.

⁸² Logansport City v. Crockett, 64 Ind. 319.

tinue in office is well established by authority. But the law further provides an effectual remedy for any errors in their records, whether arising from design, mistake, or accident, by the writ of *mandamus*, by means of which these errors may be corrected, on the application of any person interested.⁸³ The doctrine that where there is a record it cannot be added to or varied by parol, but the record will be deemed to be evidence of all that was done, and that nothing more was done, is well sustained by authority.⁸⁴ The rule is, if the law requires the evidence of a transaction to be in writing, oral evidence cannot be substituted for that, so long as the writing exists and can be produced, and this rule applies as well to the transaction of municipal bodies as to those of individuals.⁸⁵ But while the proceedings of municipal bodies, which are required to be recorded, must, as a general rule, be proved by the record, yet a distinction is sometimes made between evidence to contradict facts stated in the record, and evidence to show

⁸³ See *Samis v. King*, 40 Conn. 298; *Farrell v. King*, 41 Conn. 448; *People v. Brinkerhoff*, 68 N. Y. 259. By amending the record himself, however, the officer only does what the court would direct him to do, on the ground that his duty required it; and an application for a *mandamus* in such cases is, therefore, generally unnecessary: See *Boston Turnpike Co. v. Pomfret*, 20 Conn. 590. But the general rule is, that amendments of records are to be made with the saving of the rights of third persons, acquired since the existence of the defect: *Cass v. Bellows*, 31 N. H. 501, 64 Am. Dec. 347.

⁸⁴ *Hutchinson v. Pratt*, 11 Vt. 402; *Moor v. Newfield*, 4 Me. 44; *Gilbert v. New Haven*, 40 Conn. 102.

⁸⁵ *Birmingham v. Chestnutt*, 161 Ala. 253, 49 South. 813; *Yavapai County v. O'Neill*, 3 Ariz. 363, 29 Pac. 430; *Gilbert v. New Haven*, 40 Conn. 102; *Cincinnati etc. R. Co. v.*

People, 205 Ill. 538, 69 N. E. 40; *Lathrop v. Central Iowa R. Co.*, 69 Iowa, 105, 28 N. W. 465; *Brack v. Ochs*, 80 Kan. 433, 102 Pac. 479; *Gaither v. Green*, 40 La. Ann. 362, 4 South. 210; *Hobart v. County of Plymouth*, 100 Mass. 159; *Greeley v. Quimby*, 22 N. H. 335; *Duffy v. Beirne*, 30 App. Div. 384, 51 N. Y. Supp. 626; *People v. Zeyst*, 23 N. Y. 140; *Pierce v. Wright*, 45 How. Pr. (N. Y.) 1; *People v. Mitchell*, 45 Barb. (N. Y.) 208; *Cooke v. Board of Commrs. of Custer County*, 13 Okl. 11, 73 Pac. 270; *City of Cleburne v. Gutta Pereha etc. Mfg. Co. (Tex. Civ. App.)*, 127 S. W. 1072; *Devanney v. Hanson*, 60 W. Va. 3, 53 S. E. 603; *Mendel v. School Dist.*, 121 Wis. 80, 98 N. W. 932; *Owings v. Speed*, 5 Wheat. (U. S.) 420, 5 L. Ed. 124; on "Parol Evidence to Aid, Vary or Contradict Municipal Record," see note to *Denver v. Spencer*, 7 Ann. Cas. 1045.

facts omitted from the record. And in the latter class of cases parol evidence has been held admissible, unless the statute expressly and imperatively requires the same to appear of record, and makes the record the only evidence thereof.⁸⁶ So where the records of a municipal corporation were kept in an imperfect manner, and there was no written evidence in existence to show the adoption by the city council of a resolution authorizing certain work to be done, it was held that parol evidence was admissible to prove the passage of such resolution.⁸⁷

§ 516 (528). Records of private corporations—For what purposes admitted.—Much of the difficulty experienced in settling questions of the admissibility of the records of private corporations is caused by not, at once, in their consideration, completely segregating them from the principles applicable only to public records. The records of private corporations cannot be deemed public records; and therefore quite different rules govern their reception as evidence. By the common-law rules, a private corporation has no more right than an individual to make book entries evidence in its own behalf. In England numerous statutes

⁸⁶ See *United States Bank v. Danbridge*, 12 Wheat. (U. S.) 69, 74, 6 L. Ed. 552; *United States v. Fillebrown*, 7 Pet. (U. S.) 28, 8 L. Ed. 596; *Langsdale v. Bonton*, 12 Ind. 467. In one case the court sustained the admission of parol testimony as a means of establishing in part the passage of an ordinance. It was decided that where a city fails to provide any book for the record of its ordinances, but its ordinances, after their passage and approval, are placed and kept on file in the office of the city clerk, and a third party obtains a duly certified copy of an ordinance so placed and kept on file, and acts in good faith upon such ordinance, and is induced partly there-

by to make large expenditure of money, in a subsequent controversy between the city and such third parties or their assigns, the rule of equitable estoppel will apply to the city, and the due passage and existence of such ordinance may be shown by parol testimony: *Troy City v. Atchison etc. R. Co.*, 11 Kan. 519, 13 Kan. 70; and see *Hutchinson v. Pratt*, 11 Vt. 402; *Bigelow v. Perth Amboy*, 25 N. J. L. 297; *Calahan v. Mayor etc. of New York*, 33 App. Div. 17, 54 N. Y. Supp. 279.

⁸⁷ *Ross v. City of Madison*, 1 Ind. 281, 48 Am. Dec. 361; and see *O'Mally v. McGinn*, 53 Wis. 353, 10 N. W. 515; *Darlington v. Commonwealth*, 41 Pa. 68.

have been enacted making the books of such corporations *prima facie* evidence in their own behalf as to certain facts recorded therein;⁸⁸ and in the United States it is held that the books and minutes of a corporation, if there is nothing to show irregularity in the proceedings, are competent evidence to show that the acts necessary to the *legal incorporation* and organization have been performed.⁸⁹ The cases just cited show that for this purpose the books may be received in evidence, *even in behalf of the corporation*. Accordingly, it has been held that, in actions by the corporation for subscriptions to the corporate stock, the subscription books and orders for payment are proper evidence to *establish liability*,⁹⁰ and also in actions for calls, to establish the amount of the installment, and the fact of the calls.⁹¹ So the minutes have been used as *prima facie* evidence that a quorum was present at a given meeting.⁹² The ordinary *presumption as to regularity* of proceedings applies to the transactions at corporate meetings; and when the records

⁸⁸ 25 & 26 Vict., c. 89, § 67; 33 & 34 Vict., c. 75, § 30; 8 & 9 Vict., c. 16, § 28; Tayl. Ev., 10th ed., § 1781. See note to Sawyer v. Manchester etc. R. Co., 13 Am. St. Rep. 550.

⁸⁹ Semple v. Glenn, 91 Ala. 245, 24 Am. St. Rep. 894, 6 South. 46, 9 South. 265; Duke v. Cahawba Nav. Co., 10 Ala. 82, 44 Am. Dec. 472; Fitch v. Pinecard, 5 Ill. 69; Ryder v. Alton etc. R. Co., 13 Ill. 516; Peake v. Wabash R. Co., 18 Ill. 88; Vawter v. Franklin College, 53 Ind. 88; Hall v. Carey, 5 Ga. 239; Penobscot etc. R. Co. v. Dunn, 39 Me. 587; First Baptist Church v. Harper, 191 Mass. 196, 77 N. E. 778; Wood v. Jefferson County Bank, 9 Cow. (N. Y.) 194; Highland Turnpike Co. v. McKeen, 10 Johns. (N. Y.) 154, 6 Am. Dec. 324; Buncombe Turnpike Co. v. McCarrson, 18 N. C. 306; Grant v. Henry Clay Coal Co., 80 Pa. 208; Grays v. Lynchburg etc.

Turnpike Co., 4 Rand. (Va.) 578; State v. Superior Court, 44 Wash. 108, 87 Pac. 40; Turnbull v. Payson, 95 U. S. 418, 24 L. Ed. 437; Morawetz Priv. Corp., § 75.

⁹⁰ Peake v. Wabash R. Co., 18 Ill. 88; Turnbull v. Payson, 95 U. S. 418, 24 L. Ed. 437; Rockville etc. Road v. Van Ness, Fed. Cas. No. 449, 2 Cranch C. C. 449; Mudgett v. Horrell, 33 Cal. 25; Coffin v. Collins, 17 Me. 440; Hammond v. Straus, 53 Md. 1; Pittsburgh etc. Ry. Co. v. Applegate, 21 W. Va. 172; Lewis' Admr. v. Glenn, 84 Va. 947, 6 S. E. 866; South Branch Ry. Co. v. Long's Admr., 43 W. Va. 131, 27 S. E. 297. See § 517, *post*.

⁹¹ Bavington v. Pittsburgh etc. R. Co., 34 Pa. 358; White Mts. R. Co. v. Eastman, 34 N. H. 124.

⁹² Commonwealth v. Woelper, 3 Serg. & R. (Pa.) 29, 8 Am. Dec. 628.

show the transaction of business at such meetings, it will be presumed that it was performed in the manner required by law, in the absence of evidence to the contrary.⁹³ It will be noted that in admitting this evidence the courts do not trench upon any of the established rules of evidence, but as the corporation speaks by its records, such testimony is necessary to establish its existence, and for the foundation for such claims as it is by law entitled to make outside of these, the private corporation stands on the footing of an individual. As we proceed we shall deal with the exclusion of the corporate books for other purposes. The principle at the foundation of this conclusion is that the business transactions of a corporation with its members are on the same plane as its transactions with strangers, and that the business entries in the books of a corporation are no more evidence against the members than they are against strangers. Every inquiry becomes easier of response if it be kept steadily in view that corporate books are competent evidence of corporate acts—not the acts of others, but of the corporation itself;⁹⁴ and any endeavor to use them for other purposes must rest on some one or other of the exceptional bases which we purpose now to consider.

§ 516a. Same—Opinions of text-writers on corporations. Thompson, in his monumental work on Corporations, clearly announces his conclusions. He says: “The gen-

⁹³ See § 55, *ante*. Thomp. Corp., c. 30.

⁹⁴ *Wesp v. Muckle*, 136 App. Div. 241, 120 N. Y. Supp. 976; *Rudd v. Robinson*, 126 N. Y. 113, 22 Am. St. Rep. 816, 12 L. R. A. 473, 26 N. E. 1046. See, also, *Hughes Mfg. etc. Co. v. Wilcox*, 13 Cal. App. 22, 108 Pac. 871; *Morris v. Morton*, 20 S. W. 287, 14 Ky. Law Rep. 360; *Kitman v. Chicago R. Co.*, 113 Minn. 350, 129 N. W. 844; *Morrison v. State*, 88 Neb. 682, 130 N. W. 293;

North River Meadow Co. v. Christ Church, 22 N. J. L. 424, 53 Am. Rep. 258; *First Baptist Church v. Harper*, 191 Mass. 196, 77 N. E. 778; *Wheeler v. Walker*, 45 N. H. 355; *Shelby v. New York Steam Co.*, 121 N. Y. Supp. 619; *Poppenhusen v. Poppenhusen*, 68 Misc. Rep. 548, 125 N. Y. Supp. 269; *Star Loan Assn. v. Moore*, 4 Penn. (Del.) 308, 55 Atl. 946; *Gilboa v. Kimball* (R. I.), 69 Atl. 765.

eral rule is believed to be that, except for the purpose of proving *what the corporation did*, or what action its corporators took in *effecting its organization*, its books and records are not evidence as against a stranger, or as against a stockholder holding adversely to it. . . . But where it is sought to use the **records of a private corporation**, as evidence of the facts **which they recite**, for the purpose of *concluding*, or even *influencing* the rights of third parties who are strangers to the record, then such records are not admissible, on the same principle which operates to exclude the records of legal judgments when offered for a similar purpose, on the principle that they are *res inter alios acta*,—or in plainer language, upon the principle that the rights of A cannot be concluded or displaced by the facts that C, D, E and F met together in conclave, in the room of a board of directors of a private corporation, and there adopted a certain resolution, or passed a certain vote, or enacted a certain by-law intended to have that effect. The sound rule, then, is that the records of a private corporation cannot be used in evidence for the purpose of sustaining a claim of the corporation against persons who are not members of it, or to defeat a claim of such a person against the corporation, or to affect strangers anyway. . . . As between members of the corporation, they are evidence of corporate acts therein recorded; but they cannot be used in an action against a stranger to connect him with the corporation, unless made so by an act of the legislature. Nor can they be used in evidence in suits by the corporation against its members, for the purpose of proving, on behalf of the corporation, entries which are in its interest. If the contrary were the rule, a corporation might manufacture evidence in its own favor, and those who were its guilty agents in so doing would not be subject to the penalties of perjury. Nor are such books evidence to prove private agreements of the stockholders. Upon the same basis of reasoning, the records of a corporation are not evidence of the truth of the facts therein

recited, *as between a member of the corporation, and a stranger, or between two strangers.*"⁹⁵ Wharton says that even in suits by a corporation against its members its books cannot be used as evidence in proving in behalf of the corporation self-serving entries.⁹⁶ "Entries in the books of a corporation of private pecuniary transactions with a stockholder are not admissible against him, especially when it does not appear by whom the entries were made."⁹⁷

§ 517 (529). Same—In actions on stock subscriptions and other actions.—As has been already pointed out, there is no rule of law which charges a director or stockholder of a corporation with actual knowledge of its business transactions merely because he is such director or stockholder. The books of corporations for many purposes are evidence, not only as between the corporation and its members, and between members, but also as between the corporation or its members and strangers. They are received in evidence generally to prove corporate acts of a corporation, such as its incorporation, its list of stockholders, its by-laws, the formal proceedings of its board of directors, and its financial condition when its solvency comes in question. A corporation seeking to enforce a claim against one of its directors or stockholders must establish it by the application of the same rules of evidence which are applied in an action brought by an individual to enforce a claim against any defendant.⁹⁸ This is a challenged decision to which it is necessary to draw attention. In an action where the books of a corporation were used to prove that the defendant was a stockholder, the supreme court of the United States held that where the name of an individual

⁹⁵ 6 Thompson Comm. on Corp., § 7740, in which will be found the authorities supporting the main propositions.

⁹⁶ Whart. Ev., 3d ed., § 662.

⁹⁷ Angell & Ames, Corp., 11th ed., § 679. See, also, 2 Waterman, Corp., 646.

⁹⁸ Rudd v. Robinson, 126 N. Y. 113, 22 Am. St. Rep. 816, 12 L. R. A. 473, 26 N. E. 1046.

appears on the stock-book of a corporation, as a stockholder, the *prima facie* presumption is that he is the owner of the stock, in a case where there is nothing to rebut that presumption; and in an action against him as a stockholder, the burden of proving that he is not a stockholder or of rebutting that presumption is cast upon the defendant.⁹⁹ Referring to the rule that, in cases of this character, books of the company are admissible in its own behalf, Morawetz says: "While the rule stated in the preceding section appears to be well established by authority, it is difficult to support it by any principle of the common law. The stock-books of a corporation are undoubtedly evidence against it, as admissions; but they cannot be admitted on this ground for the company, against a person who denies that he is a shareholder."¹⁰⁰ That part of the decision in question has been severely criticised and is undoubtedly unsound. In a valuable opinion dealing with that case,¹ the court said that, read in connection with the facts of the case, it is by no means clear that Mr. Justice Clifford meant to imply that the *prima facie* presumption would arise merely from the appearance of the name of the alleged stockholder on the books of the corporation. The case was one where the name properly appeared upon the books, and it is to be presumed that the observation was addressed to the state of facts under consideration. In any other view, it was *obiter*. "Under the circumstances, we do not feel constrained to consider the proposition as authoritatively decided by *Turnbull v. Payson*, and we think it such a departure from principle that it ought to be rejected. In many cases its application might be most dangerous and unjust. When the alleged stockholder has died, and the

⁹⁹ *Turnbull v. Payson*, 95 U. S. 418, 24 L. Ed. 437. See cases cited in § 516, *ante*.

¹⁰⁰ Morawetz, *Priv. Corp.*, § 76; *Wheeler v. Walker*, 45 N. H. 355; *Chase v. Sycamore etc. R. Co.*, 38 Ill. 215; *Fish v. Smith*, 73 Conn. 377,

84 Am. St. Rep. 161, 47 Atl. 711; *Carey v. Williams*, 79 Fed. 906, 25 C. C. A. 227. For full discussion see *Thomp. Corp.*, c. 30, art. 3.

¹ *Carey v. Williams*, 79 Fed. 906, 25 C. C. A. 227.

suit is against his legal representatives, such a rule of evidence might be fatal to their rights." Corporations are not exempt from the ordinary rules of evidence, and there is no stronger presumption of honesty, or regularity or accuracy as to their books or records, than there is in the case of natural persons. In the case referred to the court said: "We are thus brought to the important question in the case, which is whether the entries contained in the corporate books of the company afforded *prima facie* evidence that the defendant was a stockholder. The relation of corporation and stockholder is a contractual one, and can only be created with the consent, express or implied, of both parties. The assent is evidenced when the name of the stockholder appears as such upon the books of the company; as to the corporation, by its act in placing his name there; and, as to the stockholder, by his knowledge and acquiescence in the act. It is not enough that he appears to be a stockholder upon the books, and when this occurs without his sanction he incurs no liability as such. It is an elementary rule of the law of evidence that a party cannot make evidence in his own favor, of a contract, by his own statements or declarations of its existence or its terms. They are evidence against him, but not for him. Accordingly it has uniformly been held that entries in the books of a copartnership, in the nature of declarations showing who are the persons that compose the firm, are not evidence in behalf of the partners, as against a third person, for the purpose of showing that the latter was a member. There is no reason why a different rule should be applied to the entries in the books or records of a corporation which tend to charge a party with the responsibilities of a stockholder." The books and records of corporations, when properly kept, are evidence of the acts and proceedings of the corporate body, but cannot be used to establish claims or rights of the corporation against third persons, unless pursuant to the sanction of some statute.² And they are not evidence against a stockholder in respect to a contract

² And. & A. Corp., § 679.

entered into by him with the corporation, notwithstanding he has access to them, because, as to such a contract, he is regarded, not as a stockholder, but as a stranger.³ The most recent case on this subject is one which depended on the establishment of an alleged deed, a copy of which purported to be entered on the minutes of a corporation's proceedings. The court said: "The appellant relies upon the alleged copy of the instrument of date March 28, 1870, and contends that at the date thereof the property in controversy belonged to Ben Holladay & Co., and that, although it is not described in the copy of that instrument, it was intended to be included therein and conveyed thereby. There is no legal proof, however, that the alleged instrument was ever executed, or that it was ever seen or was in existence or was lost. The evidence offered to prove that there was such an instrument is the minutes of a meeting of the board of directors of the Oregon Central Railroad Company of March 28, 1870, which contain a record of the agreement of cancellation of the construction contract of Ben Holladay & Co., and what purports to be a copy of the instrument which is relied upon, together with certain admissions which are alleged to have been made by Ben Holladay in the answer in the suit of Nightengale & Elliott v. Oregon Central Railroad Company and the Oregon & California Railroad Company, and in an affidavit made by Ben Holladay and filed in that suit, which is referred to in the record as exhibit 52. We agree with the court below that this evidence is not sufficient to overcome the legal title of record. There is no evidence as to the original of the alleged copy of the instrument which is found in the minutes. It is shown in whose handwriting the copy is made, but it is not shown that the copyist was at any time an officer or employee of the corporation."^{3a} "The general rule is believed to be that, excepting for the purpose of

³ Hill v. Manchester etc. Water-works Co., 2 Nev. & M. 573, 5 Barn. & Ad. 866, 110 Eng. Reprint, 1011; Haynes v. Brown, 36 N. H.

545; Hager v. Cleveland, 36 Md. 476.

^{3a} Oregon & C. R. Co. v. Grubisich, 206 Fed. — (not yet reported but decided July 17, 1913).

proving what the corporation did, or what action its corporators took in effecting its organization, its books and records are not evidence as against a stranger, or as against a stockholder holding adversely to it."^{3b} With reference to the alleged admission in the affidavit, the question of the signature involves a decision of almost equal import, and formed the subject of another phase of the case last referred to. The court said: "Nor does the record show that Ben Holladay ever admitted his knowledge of the alleged conveyance. It does appear that his name was affixed to an answer made by the Oregon & California Railroad Company in the Nightengale suit, to which was annexed as an exhibit what purports to be a copy of the instrument which is copied in the minutes. The execution of the instrument, however, was not made an issue in that case. But Holladay did not make the verification to the answer. His name appended thereto appears only as that of the president of the corporation. It does not appear whether he signed it, or whether the attorney of the corporation signed for him. There is nothing to show that Holladay ever read the answer or the exhibit attached thereto, or knew that his name was signed thereto. No presumption that he did can arise from the fact that his signature is found subscribed to the answer as an officer of one of the corporations defendant. He was not a party to that suit, and it was not his answer, and, in the absence of proof that he knew and assented to the contents of the answer, nothing contained therein can be properly considered as an admission by him against his individual interest." The supreme court of the United States has said: "Undoubtedly a corporation is, in law, a person or entity entirely distinct from its stockholders and officers. It may have interest distinct from theirs. Their interests, it may be conceived, may be adverse to its interest, and hence has arisen against the presumption that their knowledge is its knowledge, the counter presumption that, in transactions with it, when their interest is adverse

^{3b} 1 Thomp. on Corporations, § 7740.

their knowledge will not be attributed to it.”^{3c} Continuing, the opinion of the circuit court of appeals says: “The affidavit of Ben Holladay (complainant’s exhibit 52), which is said to contain an admission of his knowledge of a conveyance of the property, may be searched in vain for any statement or suggestion, directly or indirectly, or even remotely, relating to the question of a conveyance of this real estate or the title thereto. It contains no reference whatever to any sale or conveyance of real or personal property from Ben Holladay & Co. to the Oregon Central Railroad Company. Holladay’s statements as to the proceedings at the stockholders’ meeting of March 28, 1870, and the vote of the stockholders in favor ‘of said sale and transfer,’ refer only to the sale and transfer of the franchises and property of the Oregon Central Railroad Company to the Oregon and California Railroad Company. From the fact that Holladay admitted that it was the common judgment of all the stockholders of the Oregon Central Company, its directors, and himself, that the corporate proceedings of March 28 and 29, 1870, were had for the best interests of all concerned in said company, it is not to be inferred that he ratified or affirmed the alleged instrument of March 28, 1870, as a conveyance of, or as expressing an intention to convey, real estate to the Oregon Central Company.” It is to be regretted that we are not afforded an opportunity to discuss this important decision which was announced while these commentaries were already in the press. Although the books of a corporation may be received to prove the acceptance of its charter, its organization, the election of officers, the holding of meetings, the adoption of resolutions and other similar corporate acts, yet it is the general rule that they are not admissible in evidence in matters of a private nature in support of the claims of the corporation *against strangers*;⁴ nor even

^{3c} McCaskill Co. v. United States, 216 U. S. 504, 54 L. Ed. 590, 30 Sup. Ct. Rep. 386.

⁴ Attorney General v. Warwick, 4 Russ. 222, 38 Eng. Reprint, 789; Wheeler v. Walker, 45 N. H. 355;

*against a member who claims adversely, and not under the corporation.*⁵ They are not admissible as evidence of *an*

Chase v. Sycamore etc. R. Co., 38 Ill. 215; Union Bank v. Call, 5 Fla. 409; Hare v. Waring, 3 Mees. & W. 362, 1 H. & H. 90, 7 L. J. Ex. 118; Cook, Corp., 5th ed., § 714; Thomp. Corp., c. 30, art. 3. In Hager v. Cleveland, 36 Md. 476, in an action by a creditor of a manufacturing corporation against a stockholder to enforce his individual liability for a debt contracted by the company, it was held that the books of the corporation relating to its private transactions were not admissible in evidence. In Hill v. Manchester etc. Waterworks Co., 5 Barn. & Ad. 866, 110 Eng. Reprint, 1011, Denman, C. J., writing the opinion, and speaking of certain facts to be proved, said: "These points of fact, however, could only be established by the books kept by the clerk of the company; and the question now to be decided is, whether they are evidence against the plaintiff. It is argued that they were, because he was a proprietor, and the books of a partnership are evidence against any one of the partners, and more particularly as the act requires such books of the proceedings to be kept and that all the proprietors shall have free access to them at all reasonable times. We are, however, of opinion that the principle on which partnership books are evidence against the partners is, that they are the acts and declarations of such partners, being kept by themselves, or by their authority by their servants, and under their direction and superintendence. But the clerk of the company, once appointed, is subject to the control of no individual member, and the free access provided for is only for the purpose of inspec-

tion. A proprietor entering into a contract with the company must be deemed a stranger, and can be affected by no entry made under orders from the entire body": See Colfax Hotel Co. v. Lyon, 69 Iowa, 683, 29 N. W. 780 (acceptance of subscription).

⁵ Wheeler v. Walker, 45 N. H. 355; Trainor v. German-Am. Sav. L. & B. Assn., 204 Ill. 616, 68 N. E. 650. In Haynes v. Brown, 36 N. H. 545, the action was by a creditor of a corporation to recover against a stockholder, and it was held that the books of the corporation were not admissible against a member of the company as evidence of his private transactions or dealings with the company, and that in respect to them he was to be regarded as a stranger. That case has been frequently cited by text-writers and judges, and its authority for the rule thus announced has never been questioned, so far as we can discover. In Chenango Bridge Co. v. Lewis, 63 Barb. (N. Y.) 111, it was held that the books of a bridge company, proved by its treasurer to have been received by him as the company books upon his accession to the office, containing an account of the tolls received for the bridge for several years previous to that time, were not admissible as against a stockholder of the company, to prove the amount of the tolls received during that period, without the necessary and preliminary proof as to such tolls; but that such books proved, by its treasurer, to have been kept by him, and to contain correct entries of tolls, as given to him by the toll-gatherer, coupled with the proof by the toll-gatherer that he made correct returns of the

agreement alleged to have been made *by stockholders*, as individuals, and not intended to bind the corporation.⁶ It has frequently been declared that the books cannot in general be adduced by the corporation in support of its own claims, *against a stranger*, or to affect strangers in any way.⁷ Thus when a minute-book of a railroad corporation contained a purported copy of a certified copy of the record of a county court, it was not evidence against a third party.⁸ The court said: "This entry on the record-book of the railroad company is clearly incompetent evidence against the defendant. It is not the original record evidence of the county court, nor is it a certified copy therefrom; it only purports to be copied on to the book from a certified copy. As such it is a self-serving statement, made up by the railroad company, which, on every rule of law and common justice, is inadmissible against a third party."⁹ But although there are numerous cases in which the books of private corporations have been received in their behalf as against strangers, these cases are for the most part those in which it has been necessary to prove some act of the corporation, a record of which is required to be kept, either by statute or by the rules of the company. Examples of such records are the minutes of the corporate meetings, at which acts have been performed which are relevant to the issue, the stock-books in which subscriptions

tolls received by him, were admissible, because proved by the treasurer who kept them. See, also, *Olney v. Chadsey*, 7 R. I. 224.

⁶ *Black v. Shreve*, 13 N. J. Eq. 455; *Thomp. Corp.*, § 1931.

⁷ *Commonwealth v. Woelper*, 3 Serg. & R. (Pa.) 29, 8 Am. Dec. 628; *Greenl. Ev.*, § 493; *Whart. Ev.*, § 662.

⁸ *Edwards v. Bates County*, 117 Fed. 526. See, also, *Signa Iron Co. v. Greene*, 104 Fed. 854, 44 C. C. A. 221; *Foote v. Anderson*, 123 Fed. 659, 61 C. C. A. 5; *Harrison v. Remington Paper Co.*, 140 Fed. 385, 3 L. R. A., N. S., 954, 72 C. C. A.

405; *Thomas v. United States*, 156 Fed. 897, 84 C. C. A. 477; *Connecticut Mut. L. Ins. Co. v. Schwenk*, 94 U. S. 593, 24 L. Ed. 294; *Coosaw Min. Co. v. Caroline*, 75 Fed. 860; *Trainor v. Ger.-Am. Bldg. Assn.*, 204 Ill. 616, 68 N. E. 650; *Fleming v. Reed*, 77 N. J. L. 563, 72 Atl. 299; *Dolan v. Wilkerson*, 57 Kan. 758, 48 Pac. 23; *Jones v. Florence Wesleyan University, Trustees of*, 46 Ala. 626.

⁹ *Board of Commrs. v. Keene Five Cents Sav. Bank*, 108 Fed. 505, 47 C. C. A. 464; *Coffin v. Board of Commrs.* (C. C.), 114 Fed. 518.

to stock have been received and those records which are necessarily made in the organization of the corporation.¹⁰ "Whenever the action of deliberative body—whether that of a corporation at large, its board or a committee—is competent to be proved, either in favor of or against the corporation, its officers, members or strangers, the contemporaneous corporate record of their action is competent, though not always alone sufficient.¹¹ It is very commonly the case that the act of a private corporation is not competent, unless shown to have been communicated to the other party; and in such case, the books are competent to show the act, provided other evidence of communication is given to connect. The first question, therefore, to be determined is whether the corporate act is competent under the issue, and between the particular parties; if so, the minutes may be resorted to as evidence of it."¹² The true ground upon which the books of a corporation, showing who are the shareholders, are admissible in evidence, is that they are

¹⁰ Wood v. Jefferson County Bank, 9 Cow. (N. Y.) 194; Morawetz, Priv. Corp., § 75, and cases cited.

¹¹ Bank of United States v. Dandridge, 12 Wheat. (U. S.) 64, 6 L. Ed. 552; Grant v. Henry Clay Coal Co., 80 Pa. 208; Schell v. Second Nat. Bank, 14 Minn. 43; Rayburn v. Elrod, 43 Ala. 700; Smith v. Natchez Steamboat Co., 2 Miss. 479. The *act of organizing* may be proved by the books in favor of the corporation or creditors, and against members: Ryder v. Alton etc. R. Co., 13 Ill. 516; Penobscot etc. R. Co. v. Dunn, 39 Me. 587; Highland Turnpike Co. v. McKean, 10 Johns. (N. Y.) 154, 6 Am. Dec. 324; Coffin v. Collins, 17 Me. 440; and strangers: Duke v. Cahawba Nav. Co., 10 Ala. 82, 44 Am. Dec. 472; and in an action between strangers, one claiming a professional degree may prove it by the books of the college that granted

it: Moises v. Thornton, 8 Term. Rep. 303, 101 Eng. Reprint, 1402; and one claiming as assignee of a corporation may prove the *assignment* by the corporate books: Edgerly v. Emerson, 23 N. H. 555, 55 Am. Dec. 207; on the question of *negligence* the books of a corporation are competent to prove its own precautions taken by the appointment of a committee, etc.: Weightman v. Washington, 1 Black (U. S.), 39, 17 L. Ed. 52.

¹² Abbott, Trial Ev., p. 46. See full note as to parol evidence of unrecorded acts of corporation, to Higgins v. Reed, 74 Am. Dec. 310-312. In Poppenhusen v. Poppenhusen, 68 Misc. Rep. 548, 125 N. Y. Supp. 269, it was held that while the entry would not bind outsiders, it was admissible to show a corporate act and the assent thereto of one of its officers.

the best evidence of the assent of the corporation to the contract of membership. Until that assent is proved, the contract is not complete, and no person who has bought shares of stock can be subjected to the liability of a stockholder. When it appears that a person has subscribed for or purchased shares, has voted upon them, has received dividends upon them, or in any other way has consented to occupy the relation of a stockholder, the contract of membership on his part is shown; and the stock-books become competent evidence, because they show that the corporation has likewise consented.¹³ The question that frequently arises is whether, when the identity of corporation books is established, the books "prove themselves." The text-writers say that, as regards the members of the corporation, its books are public books; that they are evidence by way of admissions between members of the corporation. There is an important qualification to this rule, however, which will be found expressed in an opinion of the federal court in the case last cited. We reproduce it: "The books and records of corporations, when properly kept, are evidence of the acts and proceedings of the corporate body, but cannot be used to establish claims or rights of the corporation against third persons, unless pursuant to the sanction of some statute, and they are not evidence against a stockholder in respect to a contract entered into by him with the corporation, notwithstanding he has access to them, because as to such contract he is regarded not as a stockholder, but as a stranger." In that case it was sought to show by the entries in the books of an express company that the party was a stockholder, and therefore liable for an unpaid balance due on the stock. In *Rudd v. Robinson*,^{13a} the court said: "The books of corporations, for many purposes, are evidence, not only as between the corporation and its members, and between members, but also as between the cor-

¹³ *Carey v. Williams*, 79 Fed. 906,
25 C. C. A. 227.

^{13a} *Rudd v. Robinson*, 126 N. Y.
113, 22 Am. St. Rep. 816, 12 L. R. A.
473, 26 N. E. 1046.

poration or its members and strangers. They are received in evidence generally to prove corporate acts of a corporation, such as its incorporation, its list of stockholders, its by-laws, the formal proceedings of its board of directors, and its financial condition when its solvency comes in question. But we have not been able, after a careful examination of the authorities, . . . to find any case in which it has been decided that the books of account of a corporation are competent evidence, of themselves, to establish an account or claim against a trustee or stockholder in an action brought in behalf of the corporation; and it has been repeatedly held by judges and text-writers that they are not competent for that purpose." There is no real discrepancy between the authorities as to the credit to be given to the books of a corporation. The rules governing their admission have been tersely and correctly stated, substantially as follows: (1) As against a stranger, they are not competent evidence of any facts stated in them; although the entries in them may, like all other entries, be proved to be correct by human testimony. (2) As between a corporation and its members, and as between the members of a corporation, the books are evidence of what is in them, except the dealings of the corporation with that particular member. (3) As to his own dealings with a corporation, a member of the corporation is considered a stranger, and, as to those dealings, the entries in the books are not evidence against him.¹⁴ Nor is the shareholder chargeable with constructive notice of the proceedings of the board of directors, its resolutions or its by-laws.¹⁵ In a well-known

¹⁴ *Hayden v. Williams*, 96 Fed. 279, 37 C. C. A. 479, citing and approving *Carey v. Williams*, *supra*, and *Rudd v. Robinson*, *supra*.

¹⁵ In order to bind a stockholder, and make valid a contract which would otherwise be void, it must be shown that he had knowledge of such contract: *Wilbur v. Stopel*, 82 Mich. 344, 21 Am. St. Rep. 568, 46

N. W. 724. In *First Nat. Bank v. Drake*, 29 Kan. 311, 44 Am. Rep. 646, the court said: "We do not think it can be said, as a matter of law, that the directors are conclusively presumed to know the general business of the corporation." Knowledge of some of the directors does not imply knowledge of all: *Leggett v. New Jersey Mfg. Co.*, 1 N. J. Eq.

New York case^{15a} the plaintiff was a stockholder of the defendant, and brought the action to recover damages against the defendant for not properly transmitting a message, and it was offered to be proved, in defense of the action, that the board of directors had adopted a resolution that it would not be liable for mistakes or delays in the transmission or delivery of unrepeatd messages, and would not be liable for damages arising from delays in the transmission or delivery of a repeated message beyond an amount specified; and it was insisted that a shareholder was chargeable with notice of this resolution. The resolution was excluded, and the defendant excepted, and it was held that in this there was no error; that a shareholder in a corporation is not chargeable with constructive notice of resolutions adopted by the board of directors, or by provisions in the by-laws regulating the mode in which its business shall be transacted with its customers, and that the plaintiff's rights arising out of defendant's contract to transmit the message were in no wise limited by its regulations or by-laws not brought to his knowledge. The principle at the foundation of that decision is, that the business transactions of a corporation with its members are on the same footing as its transactions with strangers, and that the business entries in the books of a corporation are no more evidence against the members than they are against strangers.

§ 518 (530). Same—As admissions—As account-books. It is very clear that corporate books and records may be introduced against the corporation as *admissions*.¹⁶ Thus

541, 23 Am. Dec. 728. See, also, *Thayer v. Schley*, 137 App. Div. 166, 121 N. Y. Supp. 1064, where the corporation was not a party to the action.

^{15a} *Pearsall v. Western Union Tel. Co.*, 124 N. Y. 256, 21 Am. St. Rep. 662, 26 N. E. 534.

¹⁶ *Smith v. Woodville etc. Min.*

Co., 66 Cal. 398, 5 Pac. 688; *Clarke v. Warwick Cycle Co.*, 174 Mass. 434, 54 N. E. 887; *Kalamazoo Novelty Mfg. Works v. Macalister*, 40 Mich. 84; *North American Bldg. Assn. v. Sutton*, 35 Pa. 463, 78 Am. Dec. 349. In *Wesp v. Muckle*, 136 App. Div. 241, 120 N. Y. Supp. 976, the syllabus discloses that: "In an ac-

in the case cited in the note hereto,^{16a} where the trustee of a bankrupt corporation sued directors for dividends illegally paid, the court said: "In the present case the action of the director in his official capacity is involved. The declaration of dividends was very carefully guarded by section 28 of the stock corporation law (Consol. Laws, c. 59), and no such distribution of corporate assets can be legally made unless the net earnings clearly justify such a division. Any director violating this salutary provision is liable to the corporation, 'and to the creditors thereof to the full amount of any loss sustained by such corporation or its creditors respectively by reason of such withdrawal, division or reduction.' (Section 28, Stock Corporation Law.) If a director present at a meeting of the board desired to be absolved from the liability imposed by this statute, he could cause his dissent to be entered at large upon the minutes of the directors at the time. Whether the director knows the exact condition of the corporation is unimportant. It is his duty to ascertain whether the earnings authorize the withdrawal of the corporate assets to pay a dividend. If he can be excused because he did not know the condition of the corporation, the effect of the statute would be nullified. It is the financial standing of the company which is always involved when a dividend is declared, and it is upon that standing that the vote of the directors is founded. It is a different situation where a corporation is suing a stranger or one of its members to recover an indebtedness, or charging him with holding its property. It cannot establish its debt or title to its property by an entry in the corporate books, unless the defendant assented to the entry. The crux of the litigation in this case is the financial condition of the corporation, and the books of the

tion by a trustee of a bankrupt stock corporation against the directors to recover for dividends declared by them and paid from the capital stock, instead of from its surplus profits, the ledger of the corporation was

admissible in evidence to show the financial condition of the corporation when the dividends were declared."

^{16a} Wesp v. Muckle, *supra*.

company disclose that condition. It is obliged by statute to keep 'correct books of account of all its business and transactions.' (Section 32, Stock Corporation Law.) It is in those books that the affairs and transactions of the company are supposed to be found. The distinction between a case of this kind and that involved in the Rudd Case is clear, and is recognized in the opinion in that case, . . . which says: 'The books of corporations for many purposes are evidence, not only as between the corporation and its members, and between members, but also as between the corporation or its members and strangers. They are received in evidence generally to prove corporate acts of a corporation, such as its incorporation, its list of stockholders, its by-laws, the formal proceedings of its board of directors, and its financial condition when its solvency comes in question.'^{16b} Whenever a dividend was declared, the secretary gave to each director a statement purporting to be taken from the books of the company and showing its financial standing. Each director took this statement with him, and the appellant Strassenburgh testified that he had one of these statements at the time of the trial. Not one of them was offered in evidence. There is nothing to show that the entries in the books differed from the copies furnished to the directors. Presumably they were identical, and defendants, therefore, knew what the books contained. They had abundant opportunity to examine the statement each time and ascertain whether a dividend was proper. The estimation of values they assented to or did not investigate. They may have relied on the secretary, but it was their affirmative duty to know whether a dividend was justified before authorizing its payment." In like manner they may constitute admissions *on the part of the members* of the corporation, when the circumstances are such that the members can be deemed conversant with their contents. Thus, the books of a bank showing its ac-

^{16b} The same distinction is illustrated in *Leonard v. Faber*, 52 App. Div. 495, 65 N. Y. Supp. 594.

count with the president, who had access to such books, may be admitted in an action against him by a receiver of the bank to show the state of accounts with the bank,¹⁷ or to show, in such action, the proceedings of a directors' meeting.¹⁸ Although in general the books of a corporation are not competent evidence to affect strangers¹⁹ they are *admissible as between the members* on proof of knowledge on their part of such entries.²⁰ But there is *no rule of law which charges a stockholder* or even a director of a corporation *with actual knowledge* of its business transactions merely because he is such stockholder or director. Hence the books of account of a corporation are not sufficient alone to establish an account or claim against such person in an action brought in behalf of a corporation, and *a shareholder is not chargeable with constructive notice* of resolutions adopted by the board of directors or by provisions in the by-laws regulating the mode in which its business shall be transacted with its customers.²¹ It is frequently easier to charge a director with knowledge of the books than it is to charge a stockholder, because he usually has an active part in the management of the corporation; but, as a general rule, many directors in corporations are just as ignorant, and necessarily so, of the particular accounts contained in its books as stockholders are. "It would be quite a dangerous, and we think startling, proposition to hold that a clerk or other officer in a business corporation could enter charges in its books of account against a director or stockholder which could be proved in favor of the corporation by the mere production of the books, thus throwing upon him, or his personal represen-

17 Olney v. Chadsey, 7 R. I. 224.
See §§ 268, 270, *supra*.

18 Olney v. Chadsey, 7 R. I. 224.

19 Calvert v. Alvey, 152 N. C. 610, 136 Am. St. Rep. 847, 68 S. E. 153.

20 Chase v. Sycamore etc. R. Co., 38 Ill. 215; Union Bank v. Call, 5 Fla. 409; Cook, Corp., 5th ed., § 727.

21 Rudd v. Robinson, 126 N. Y. 113, 22 Am. St. Rep. 816, 12 L. R. A. 473, 26 N. E. 1046; Pearsall v. Western Union Tel. Co., 124 N. Y. 256, 21 Am. St. Rep. 662, 26 N. E. 534; Wheeler v. Walker, 45 N. H. 355; Hager v. Cleveland, 36 Md. 476; Thompson Corp., § 1932.

tatives after his death, the burden of explaining the entries or showing them to be untrue, and we believe the doctrine has no support in principle or authority.'"²² Although the books and records of a corporation are *prima facie* evidence against it as admissions, they are *not conclusive*, unless they are the records of its proceedings duly made by the recording officer, or unless some person has had proper access to them or knowledge of them, has become aware of their contents, and has acted upon the faith that they were the records of its proceedings. A corporation is not bound, as to third persons, by *interpolations* fraudulently inserted in its records, where such third persons have not acted on, or seen or known of the existence of the matters so interpolated and appearing to be recorded. It is not estopped or bound by such fraudulent addition, unless it is shown to have been negligent in omitting to make due correction of the records, and that some innocent third person has been misled thereby.²³ The books of corporations may be received in evidence for the purpose of *showing the state of accounts* or a course of dealing, where under similar circumstances the books or individuals would

²² *Rudd v. Robinson, supra.* In this case, which is a valuable compendium, Earl, J., contributed the following useful expressions: "After a careful consideration of all the cases which have come to our attention, we can perceive no principle upon which the account-books of a corporation can be evidence against a member of the corporation of the accounts and entries therein made in a suit brought by the corporation or its representatives against him to enforce his liability upon such account. The officers and bookkeepers of a corporation are in no sense his agents. Individually, he has no control over their acts, and has no responsibility therefor; and in making the entries they do not, in any legal sense, represent or bind him. As to the

competency of such books, directors and stockholders of a corporation stand upon the same footing. It is quite true that a director stands in a more favorable position to know what is going on within the corporation and to be more familiar with its books in some cases than a stockholder. He has the right to inspect the books of the corporation, and so has a stockholder. A stockholder having the ability is just as able to become familiar with the contents of the books of a corporation to which he belongs as a director; and there is no principle of law by which a director can be charged with knowledge of the entries in the books of a corporation, which is not equally applicable to its stockholders."

²³ *Holden v. Hoyt*, 134 Mass. 181.

be admitted.²⁴ Thus, entries in the books of banks showing receipts and payment of money in the regular course of business, as well as the state of a depositor's account, have been held admissible.²⁵ Like other records, the records of a private corporation should be *authenticated* as the corporation books, kept as such;²⁶ and the proof should show that the entries have been made by the proper officer, or some other person in his necessary absence.²⁷ It is not essential that the entries should have been originally made in the books themselves, but in such case the verification

²⁴ St. Louis Gas Light Co. v. St. Louis, 86 Mo. 495; Cormac v. Western Bronze Co., 77 Iowa, 32, 41 N. W. 480; Ganther v. Jenks, 76 Mich. 510, 43 N. W. 600 (to show payment of money in behalf of the corporation). See the late cases: Richolson v. Ferguson, 87 Kan. 411, 124 Pac. 360; Gelder v. Welsh, 169 Mich. 490, 135 N. W. 280; Blom v. Blom Codfish Co., 71 Wash. 41, 127 Pac. 596; Security State Bank v. Fussell (Okla.), 129 Pac. 746; Gold Glen Mining etc. Co. v. Dennis, 21 Colo. App. 284, 121 Pac. 677.

²⁵ Thornton v. Campton, 18 N. H. 20; Wheeler v. Walker, 45 N. H. 355; Union Bank v. Knapp, 3 Pick. (Mass.) 96, 15 Am. Dec. 181; Jordon v. Osgood, 109 Mass. 457, 12 Am. Rep. 731; Culver v. Marks, 122 Ind. 554, 17 Am. St. Rep. 377, 7 L. R. A. 489, 23 N. E. 1086; Goff v. Stoughton Bank, 84 Wis. 369, 54 N. W. 732. In dealings with depositors the pass-books may be introduced in evidence: First Nat. Bank v. Williams, 4 Ind. App. 501, 31 N. E. 370; Kux v. Central Savings Bank, 93 Mich. 511, 53 N. W. 828. But the bank cannot introduce its ledger in its own behalf: First Nat. Bank v. Williams, 4 Ind. App. 501, 31 N. E. 370.

²⁶ Hurwitz v. Gross, 5 Cal. App. 614, 91 Pac. 109; Lowry Nat. Bank v. Fickett, 122 Ga. 489, 50 S. E. 396; Mandel v. Swan Land etc. Co., 154 Ill. 177, 45 Am. St. Rep. 124, 27 L. R. A. 313, 40 N. E. 462; Interstate etc. Bank Co. v. Powell etc. Co., 126 La. 22, 25 South. 179; Smith v. Natchez Steamboat Co., 1 How. (Miss.) 479; United Growers' Co. v. Eiser, 20 Misc. Rep. 531, 47 N. Y. Supp. 906; Highland Turnpike Co. v. McKean, 10 Johns. (N. Y.) 154, 6 Am. Dec. 324; Fleming v. Wallace, 2 Yeates (Pa.), 120; Vanderwerken v. Glenn, 85 Va. 9, 6 S. E. 806; Lewis v. Glenn, 84 Va. 947, 6 S. E. 866; Chesapeake etc. R. Co. v. Deepwater R. Co., 57 W. Va. 641, 50 S. E. 890.

²⁷ Syuchar v. Workingmen's Co-operative Assn., 14 Misc. Rep. (N. Y.) 10, 35 N. Y. Supp. 124; Fraternal Relief Assn. v. Edwards, 9 Ga. App. 43, 70 S. E. 265; Stebbins v. Merritt, 10 Cush. (Mass.) 27; North America Bldg. Assn. v. Sutton, 35 Pa. 463, 78 Am. Dec. 349; Illinois Conference etc. v. Plagge, 177 Ill. 431, 69 Am. St. Rep. 252; 53 N. E. 76; St. Lawrence Mut. Ins. Co. v. Paige, 1 Hilt. (N. Y.) 430; Morgan v. Lehigh Valley Coal Co., 215 Pa. 443, 64 Atl. 633.

should extend to the original notes.²⁸ It has been held that short notes made by the clerk of a court in the minute-book must stand as the record until a more complete and intelligible record is made up; and if, in the meantime, they are lost or destroyed, this constitutes a loss of the records, and secondary proof of their contents may be received.²⁹

§ 519 (531). Recording acts—Conveyances—Documents recorded, when admissible.—At this date it is hardly worth making any investigation into the state of the law prior to the enactment of statutes regulating the registration of deeds and the effect of such registration as evidence. From an early period in the history of this country statutes have existed in the several states providing for the recording of conveyances of land which had been duly proved or acknowledged; and providing also that such records or copies, duly authenticated, should be as effectual evidence as if the original had been produced in court.³⁰ There are now statutes in all the jurisdictions of this country regulating the subject in more or less detail. In some states the statutes are very broad, including not only conveyances, but all other documents executed or acknowledged in such manner as to be entitled to record in the office specified by the statute. The statutes sometimes include documents recorded *in other states* or in foreign countries. In a few states the statute dispenses with proof of execution except in cases where the *grantee* himself or his heirs seeks to make the proof.³¹ In other states, the record of a deed may be shown without inquiry as to the original

²⁸ *Vawter v. Franklin College*, 53 Ind. 88.

²⁹ *Pruden v. Alden*, 23 Pick. (Mass.) 184, 34 Am. Dec. 51, and note thereto. But where minutes purporting to be of corporation meetings consisted of separate sheets of paper pinned to the leaves of a record book and otherwise unidentified, they were held inadmis-

sible: *McConnell v. Combination Min. etc. Co.*, 30 Mont. 239, 104 Am. St. Rep. 703, 76 Pac. 194.

³⁰ *Van Cortland v. Tozer*, 17 Wend. (N. Y.) 338; *Conley v. State*, 85 Ga. 348, 11 S. E. 659. As to deeds recorded in other states, see *William M. Rice Institute v. Freeman* (Tex. Civ. App.), 145 S. W. 688.

³¹ See statutes of jurisdiction.

whenever the evidence as a whole fairly indicates that the original is not in the possession or under the control of the party offering such proof;³² and again in others it is admissible without any limitations.³³ But where there is no such statute, neither the record nor copies thereof are competent evidence; *such records, unlike judicial records and official registers*, are mere copies, and open to the objection that they are not the best evidence. In such cases, the original should be produced, if within the power of the one claiming under it; in other words, the copy cannot be used without laying the usual foundation for the introduction of secondary evidence.³⁴ Obviously, the record or copy is not evidence to prove the original, unless the record is in *compliance with the statute*. Thus, where the statute makes the *acknowledgment* of the instrument,³⁵ or its proof by subscribing witnesses,³⁶ a requisite to be complied with before recording, and these conditions are wholly omitted, or not substantially complied with, the

³² *Staunehfield v. Jeutter*, 4 Neb. (Unof.) 847, 96 N. W. 642.

³³ It is necessary to see the statutes of the various states, but the following cases will be found useful references: *Grant v. Oliver*, 91 Cal. 158, 27 Pac. 596, 861; *Burns v. Harris*, 66 Ind. 536. See *Daniels v. Stone*, 6 Blackf. (Ind.) 450; *Bradley v. Silsbee*, 33 Mich. 328; *Gaston v. Merriam*, 33 Minn. 271, 22 N. W. 614; *Cogan v. Frisby*, 36 Miss. 178; *Patton v. Fox*, 179 Mo. 525, 78 S. W. 804; *Chase v. Caryl*, 57 N. J. L. 545, 31 Atl. 1024; *Clark v. Clark*, 47 N. Y. 664; *Ratliff v. Ratliff*, 131 N. C. 425, 63 L. R. A. 963, 42 S. E. 887; *Serles v. Serles*, 35 Or. 289, 57 Pac. 634; *Swank v. Phillips*, 113 Pa. 482, 6 Atl. 450; *Tate v. Rose*, 35 Utah, 229, 99 Pac. 1003; *Blaha v. Borgman*, 142 Wis. 43, 124 N. W. 1047 (in which the deed was dated six days later than the acknowledgment). This discrepancy, said the

court, however it might be explained, did not overcome the fact that the paper on its face bore such a certificate of acknowledgment as the statute required to entitle it to record, and consequently the record was properly admitted in evidence.

³⁴ *Brooks v. Marbury*, 11 Wheat. (U. S.) 78, 6 L. Ed. 423; *Den v. Gustin*, 12 N. J. L. 42; *Rucker v. McNeely*, 5 Blackf. (Ind.) 123; *Peck v. Clark*, 18 Tex. 239. But see *Reinboth v. Zerbe Run Imp. Co.*, 29 Pa. 139; *Craufurd v. State*, 6 Har. & J. (Md.) 231.

³⁵ *Johnston v. Haines*, 2 Ohio, 55, 15 Am. Dec. 533; *Hall v. Gittings*, 2 Har. & J. (Md.) 380; *Hayden v. Westcott*, 11 Conn. 129; *Jackson v. Gould*, 7 Wend. (N. Y.) 364; *Krueger v. Walker*, 80 Iowa, 733, 45 N. W. 871. See § 537, *post*.

³⁶ *Pidge v. Tyler*, 4 Mass. 541; *Maxwell v. Light*, 1 Call (Va.), 117.

record is not evidence.³⁷ Nothing outside the statutory entries, however, is admissible. Where a record kept by a register of deeds for convenience, showing to whom recorded instruments have been delivered, is not made evidence of the fact under the statute, it is not admissible.³⁸

§ 520 (532). Same—Requisites—Certificates of acknowledgment—Defects in.—We have to repeat here that the statutory requirements differ in minor details in the various states, and that our comments must be read by the light of the local enactments. Under registry laws of the character now under discussion, the acknowledgment should purport on its face to be taken *before an officer having authority* to take the same.³⁹ Such statement in the certificate of acknowledgment is *prima facie* evidence that he is such an officer.⁴⁰ Although the statutes relating

³⁷ The same is true if the *acknowledgment* is taken after the time allowed by law: *Hog v. Perry*, 1 Litt. (Ky.) 171; *Womack v. Hughes*, Litt. Sel. Cas. (Ky.) 292; *Cunningham v. Buckingham*, 1 Ohio, 264; *Shields v. Buchanan*, 2 Yeates (Pa.), 219; or before an officer having no authority: *Heister v. Fortner*, 2 Binn. (Pa.) 40, 4 Am. Dec. 417; *Johnston v. Haines*, 2 Ohio, 55, 15 Am. Dec. 533; *Connelly v. Bowie*, 6 Har. & J. (Md.) 141; or if no official seal is affixed, when this is required by the statute: *Miller v. Henshaw*, 4 Dana (Ky.), 325; or if the record is *not recorded* in the county or the office required by law: *Jackson v. Rice*, 3 Wend. (N. Y.) 180, 20 Am. Dec. 683; or if the instrument is *not of the class* included in the registry laws: *Miller v. Holt*, 1 Tenn. 111; *Cheney v. Watkins*, 1 Har. & J. (Md.) 527, 2 Am. Dec. 530; *Dick v. Balch*, 8 Pet. (U. S.) 30, 8 L. Ed. 856 (where the acknowledgment is not according to law, the record is inadmissible, nor can it be remedied by proof of a

custom of the recorder's office to record deeds without recording the certificate); *Velott v. Lewis*, 102 Pa. 326.

³⁸ *Lloyd v. Simons*, 90 Minn. 237, 95 N. W. 903; *Davis v. Davis*, 24 S. D. 474, 124 N. W. 715.

³⁹ *Hayes v. Banks*, 132 Ala. 354, 31 South. 464; *Emerie v. Alvarado*, 90 Cal. 444, 27 Pac. 356; *Summer v. Mitchell*, 29 Fla. 179, 30 Am. St. Rep. 106, 14 L. R. A. 815, 10 South. 562; *Booth v. Cook*, 20 Ill. 129; *Connelly v. Bowie*, 6 Har. & J. (Md.) 141; *Barbee v. Taylor*, 51 N. C. 40; *Johnston v. Haines*, 2 Ohio, 55, 15 Am. Dec. 533; *Downing v. Gallagher*, 2 Serg. & R. (Pa.) 455; *Patton v. Brown*, *Cooke* (3 Tenn.), 126, Fed. Cas. No. 10,832; *Bledsoe v. Haney*, 57 Tex. Civ. App. 285, 122 S. W. 455; *Pearl v. Howard*, 1 D. Chip. (Vt.) 173; *Patton v. Brown*, Brunn. Col. Cas. (U. S.) 185, 18 Fed. Cas. No. 10,832.

⁴⁰ *Jinwright v. Nelson*, 105 Ala. 399, 17 South. 91; *Touchard v. Crow*, 20 Cal. 150, 81 Am. Dec. 108; *Tuten*

to the recording of instruments must be substantially complied with before the record or copy can be admitted as evidence, yet certificates of acknowledgment are to be *liberally construed*, and sustained if possible by fair legal intendment. This is especially true as to forms of acknowledgments which have been long in use, and on which the validity of titles depends.⁴¹ In some cases, *words omitted* from the acknowledgment by mistake have been supplied by reference to the body of the deed;⁴² and in other cases, where the officer's title was not written out in full, but only indicated by abbreviation, the acknowledgment has been held good;⁴³ and in other cases, parol evidence has been received to supply the defect, when there was no designation of the *official title*.⁴⁴ This liberality of construction is extended to acknowledgments taken out of the state.⁴⁵ But while acknowledgments are not rigidly construed, they must comply with express statutory conditions, and when it is so provided that the officer shall *subscribe* the certificate, a failure to do so will render it invalid;⁴⁶

v. Gazan, 18 Fla. 751; Piper v. Chipewewa Iron Co., 51 Minn. 495, 53 N. W. 870; Graham v. Whitely, 26 N. J. L. 254; Williams v. Kerr, 113 N. C. 306, 18 S. E. 501; Johnston v. Haines, 2 Ohio, 55, 15 Am. Dec. 533; Keichline v. Keichline, 54 Pa. 75; Rhoades v. Selin, 4 Wash. C. C. 715, Fed. Cas. No. 11,740; Willink v. Miles, 1 Pet. C. C. 429, Fed. Cas. No. 17,768; Elwood v. Flannigan, 104 U. S. 562, 26 L. Ed. 842.

⁴¹ Hayden v. Westcott, 11 Conn. 129; Jackson v. Gumaer, 2 Cow. (N. Y.) 552; M'Keen v. Delancy, 5 Cranch (U. S.), 22, 3 L. Ed. 25; Mosier v. Momsen, 13 Okl. 41, 74 Pac. 905; Ford v. Ford, 27 App. D. C. 401, 6 L. R. A., N. S., 442. See § 550, *post*.

⁴² Fuhrman v. Loudon, 13 Serg. & R. (Pa.) 386, 15 Am. Dec. 608;

Luffborough v. Parker, 12 Serg. & R. (Pa.) 48. As to parol proof of acknowledgments, see § 490, *ante*.

⁴³ Duval v. Covenhoven, 4 Wend. (N. Y.) 561.

⁴⁴ Rhoades v. Selin, 4 Wash. C. C. 715, Fed. Cas. No. 11,740. See, also, the late case: Davis v. Seybold, 195 Fed. 402, 115 C. C. A. 304 (seal of notary not represented on copy).

⁴⁵ Goree v. Wadsworth, 91 Ala. 416, 8 South. 712; Quimby v. Boyd, 8 Colo. 194, 6 Pac. 462; Wood v. Bewick Lumber Co., 103 Ga. 235, 29 S. E. 820; Sparrow v. Hovey, 41 Mich. 708, 3 N. W. 198; Bowser v. Cravener, 56 Pa. 132; Welles v. Cole, 6 Gratt. (Va.) 645.

⁴⁶ Clark v. Wilson, 127 Ill. 449, 11 Am. St. Rep. 143, 19 N. E. 860; Marston v. Brashaw, 18 Mich. 81, 100 Am. Dec. 152.

as would also the absence of a statute-required seal.⁴⁷ Where a discrepancy exists between the date of the deed and the date of the certificate of acknowledgment, the latter date must prevail; and copy of the record of such deed cannot be objected to on account of such discrepancy.⁴⁸ Under the registry system the due acknowledgment and record of the deed raises a *presumption that the deed was duly executed*, and that the grantor had sufficient seisin to enable him to convey.⁴⁹ But the acknowledgment or other proof of a deed entitling it to registry is an *ex parte* act, and only *prima facie* proof of the execution or of the seisin of the parties, and is liable to be rebutted.⁵⁰ Thus, it may be shown that an acknowledgment was taken by an officer while out of his jurisdiction,⁵¹ or that the person who made the acknowledgment was *non compos*,⁵² or that there was in fact no acknowledgment at all, as in case of forgery or other fabrication of the certificate.⁵³ Where the parties

⁴⁷ *Worsham v. Freeman*, 34 Ark. 55; *Hastings v. Vaughn*, 5 Cal. 315; *Holbrook v. Nichol*, 36 Ill. 161; *Watson v. Clendenin*, 6 Blackf. (Ind.) 477; *Koch v. West*, 118 Iowa, 468, 92 N. W. 663, 96 Am. St. Rep. 394; *Meskimen v. Day*, 35 Kan. 46, 10 Pac. 14; *Burt & Brabb Lumber Co. v. Wilson*, 29 Ky. Law Rep. 488, 93 S. W. 906; *Thompson v. Scheid*, 39 Minn. 102, 12 Am. St. Rep. 619, 38 N. W. 801; *Bratton v. Burris*, 51 S. C. 45, 28 S. E. 13.

⁴⁸ *Buck v. Gage*, 27 Neb. 306, 43 N. W. 110; *Moody v. Hamilton*, 22 Fla. 298. See, also, last section.

⁴⁹ *Clark v. Troy*, 20 Cal. 219; *Knight v. Lawrence*, 19 Colo. 425, 36 Pac. 242; *Currier v. Clark*, 145 Iowa, 613, 124 N. W. 622; *Samuels v. Borrowscale*, 104 Mass. 207; *Ward v. Fuller*, 15 Pick. (Mass.) 185; *Metropolitan Lumber Co. v. McColeman*, 140 Mich. 333, 103 N. W. 809; *Lennon v. White*, 61 Minn. 150, 63 N. W.

620; *Hallohan v. Rempe*, 66 Misc. Rep. 27, 120 N. Y. Supp. 901; *Chamberlain v. Showalter*, 5 Tex. Civ. App. 226, 23 S. W. 1017.

⁵⁰ *New Haven Trust Co. v. Camp*, 81 Conn. 539, 71 Atl. 788; *Alexander v. De Kermel*, 81 Ky. 345; *Hutchins v. Dixon*, 11 Md. 29; *Ward v. Fuller*, 15 Pick. (Mass.) 185; *Wells v. Jackson Iron Mfg. Co.*, 48 N. H. 491; *Jackson v. Schoonmaker*, 4 Johns. (N. Y.) 161.

⁵¹ *Jackson v. Colden*, 4 Cow. (N. Y.) 266; *Jackson v. Humphrey*, 1 Johns. (N. Y.) 498.

⁵² *Jackson v. Schoonmaker*, 4 Johns. (N. Y.) 161. As to "Defective Acknowledgments," see full note to *Trerise v. Bottego*, 108 Am. St. Rep. 525-578.

⁵³ *Chattanooga etc. Assn. v. Vaught*, 143 Ala. 389, 39 South. 215; *Petty v. Grisard*, 45 Ark. 117; *Le Mesnager v. Hamilton*, 101 Cal. 532, 40 Am. St. Rep. 81, 35 Pac. 1054;

have actually appeared and signed an instrument, and afterward attempt to contradict the certificate as to what took place, the evidence to impeach the acknowledgment must be clear and convincing.⁵⁴ But where the parties deny the execution of the instrument and claim neither to have signed nor acknowledged it, their testimony is admissible to impeach the certificate, and will be entitled to as much weight as that of any other interested witness.⁵⁵

§ 521 (533). Defective records—Evidence for some purposes.—It does not follow that because the acknowledgment is imperfect, that its efficiency for any other purpose is impaired. Although an instrument imperfectly acknowledged, or one which is not required by law to be recorded, derives no efficacy from being placed on record, and although the record of such an instrument is not admissible *as a record*, yet it may be received as a *sworn copy* constituting secondary evidence, when verified by the testimony of a witness knowing the facts.⁵⁶ So *certified or exemplified* copies of a record which cannot be found may be used, if the record has been compared with the original.⁵⁷ Such records or copies, though not admissible as records, have been frequently used to prove the originals in connection with other facts and circumstances, generally in those cases where the records were of long standing and other proof was not obtainable, or where they were corroborated by possession of the property in question.⁵⁸ It must be remembered that as between the parties an

Smith v. Ward, 2 Root (Conn.), 374, 1 Am. Dec. 80; People's Gas Co. v. Fletcher, 81 Kan. 76, 105 Pac. 34; O'Neil v. Webster, 150 Mass. 572, 23 N. E. 235; Dodge v. Hollinshead, 6 Minn. 25, 80 Am. Dec. 433; Allen v. Lenoir, 53 Miss. 321; Greenleaf-Johnson Lumber Co. v. Leonard, 145 N. C. 339, 59 S. E. 134; Williamson v. Carskadden, 36 Ohio St. 664; Michener v. Cavender, 38 Pa. 334, 80 Am. Dec. 486; Wheelock v. Cavitt, 91

Tex. 679, 66 Am. St. Rep. 920, 45 S. W. 796.

⁵⁴ Gabbey v. Forgeus, Admr., 38 Kan. 62, 15 Pac. 866.

⁵⁵ People's Gas Co. v. Fletcher, *supra*.

⁵⁶ Winn v. Patterson, 9 Pet. (U. S.) 663, 9 L. Ed. 266.

⁵⁷ Jackson v. Rice, 3 Wend. (N. Y.) 180, 20 Am. Dec. 683.

⁵⁸ Webster v. Harris, 16 Ohio, 490; Allen v. Holkins, 1 Day (Conn.), 17;

imperfect acknowledgment does not affect the validity of the instrument,⁵⁹ except in those cases where a valid acknowledgment is made by statute an essential part of the instrument.⁶⁰ For instance, in Arizona, a deed of real property to be valid under the law there must be signed and acknowledged by the grantor, and until acknowledged it is ineffectual to convey title.⁶¹ But their statutes also contain the provision that when an instrument in writing, which was intended as a conveyance of real estate, or some interest therein, shall fail, either in whole or in part, to take effect as a conveyance by virtue of the provisions of this title, the same shall, nevertheless, be valid and effect-

Rogers v. Hillhouse, 3 Conn. 398; Pond v. Wetherbee, 4 Pick. (Mass.) 312; Price v. Madison, 17 S. D. 247, 95 N. W. 933; Fordtran v. Perry (Tex. Civ. App.), 60 S. W. 1000.

⁵⁹ McRae v. Pegues, 4 Ala. 158; Watson v. Thompson Lumber Co., 49 Ark. 83, 4 S. W. 62; Grant v. Oliver, 91 Cal. 158, 27 Pac. 596, 861; Crane v. Chandler, 5 Colo. 21; Marsh v. Bennett, 49 Fla. 186, 38 South. 237; Roane v. Baker, 120 Ill. 308, 11 N. E. 246; Davidson v. State, 135 Ind. 254, 34 N. E. 972; Slattey v. Slattey, 120 Iowa, 717, 95 N. W. 201; Munger v. Baldridge, 41 Kan. 236, 13 Am. St. Rep. 273, 21 Pac. 159; Robison v. Gray, 29 Ky. Law Rep. 1296, 97 S. W. 347; Fitch v. Lewiston Steam Mill Co., 80 Me. 34, 12 Atl. 732; Hayden v. Peirce, 165 Mass. 359, 43 N. E. 119; Brown v. McCormick, 28 Mich. 215; Hill v. Samuel, 81 Mich. 307; Graves v. St. Louis etc. R. Co., 133 Mo. App. 91, 112 S. W. 736; Middle Creek Ditch Co. v. Henry, 15 Mont. 558, 39 Pac. 1054; Wilson v. Wilson, 85 Neb. 167, 122 N. W. 856; Brown v. Manter, 22 N. H. 468; Kitchen v. Schuster, 14 N. M. 164, 89 Pac. 261; Watson v. Campbell, 28 Barb. (N. Y.) 421;

Hess v. Trigg, 8 Okl. 286, 57 Pac. 159; Moore v. Thomas, 1 Or. 201; Cable v. Cable, 146 Pa. 451, 23 Atl. 223; Montgomery v. Hobson, Meigs (Tenn.), 437; McLane v. Canales (Tex. Civ. App.), 25 S. W. 29; Pierce v. Brown, 24 Vt. 165; Washington County v. Dunn, 27 Gratt. (Va.) 608; Matson v. Johnson, 48 Wash. 256, 125 Am. St. Rep. 924, 93 Pac. 324; Scruggs v. Burruss, 25 W. Va. 670; Leinenkugel v. Kehl, 73 Wis. 238, 40 N. W. 683; Linton v. National Life Ins. Co., 104 Fed. 584, 44 C. C. A. 54; Hepburn v. Dubois, 12 Pet. (U. S.) 345, 9 L. Ed. 1111.

⁶⁰ As a rule, it will be found that these cases are limited in some jurisdictions to such *quasi*-public instruments as sheriffs' deeds, tax titles, and assignments for the benefit of creditors. Statutes, however, frequently contain provisions that the acknowledgment is a necessity as against subsequent purchasers and creditors: See Jacoway v. Gault, 20 Ark. 190, 73 Am. Dec. 494; McDowell v. Stewart, 83 Ill. 538; Snider v. Udell Woodenware Co., 74 Miss. 353, 20 South. 836.

⁶¹ Lewis v. Herrera, 208 U. S. 309, 52 L. Ed. 506, 28 Sup. Ct. Rep. 412.

ual as a contract upon which a conveyance may be enforced, as far as the rules of law will permit.⁶² The mode of authenticating records of deeds and other instruments from other states is discussed elsewhere.⁶³

§ 522 (534). Public documents—Provable by copies—Records of private corporations.—An exception to the general rule that the best evidence must be produced obtains in the case of public writings, as it would be improper to permit them to be transported from place to place.⁶⁴ In England it has been held that the books of the East India Company and the Bank of England are, for some purposes, considered as public writings, from the interest the public have in them, and so far as the books themselves would be evidence, if produced, sworn copies may be admitted in evidence.⁶⁵ The principle as gathered from the authorities is this, that wherever documents or books of a public nature would of themselves be evidence, if produced, their contents may be proved by immediate copies duly verified.⁶⁶ It is a rule of wide application that those documents which are public in their nature, whether judicial or nonjudicial, which the public has the right to inspect, and which could not, without inconvenience to the public interests, be removed from their place of custody, may be proved by copies, exemplified or otherwise duly authenticated.⁶⁷ It

⁶² Ariz. Rev. Stats. 1901. § 732.

⁶³ See § 539 et seq., *post*.

⁶⁴ 1 Phillips, Ev. 428.

⁶⁵ See the authorities referred to by Phillips, at page 428. See, also, 1 Starkie, Ev. 157; *Man v. Cary*, 3 Salk. 155, 91 Eng. Reprint, 748; *Philadelphia Bank v. Officer*, 12 Serg. & R. (Pa.) 49; *Ridgway v. Farmers' Bank of Bucks County*, 12 Serg. & R. (Pa.) 256, 14 Am. Dec. 681.

⁶⁶ *Saxton v. Nimms*, 14 Mass. 315; *Forsaith v. Clark*, 21 N. H. 409; *Jackson v. King*, 5 Cow. (N. Y.) 237, 15 Am. Dec. 468; *McCarty*

v. Sherman, 3 Johns. (N. Y.) 429; *Catlett v. Pacific Ins. Co.*, 1 Wend. (N. Y.) 561; *Peck v. Farrington*, 9 Wend. (N. Y.) 44; *Welsh v. Crawford*, 14 Serg. & R. (Pa.) 440; *Birt v. Barlow*, 1 Doug. 171, 99 Eng. Reprint, 113; *Lynch v. Clarke*, 3 Salk. 154, 91 Eng. Reprint, 748; 1 *Gresley*, Ev. 115; 1 *Greenl. Ev.*, § 484; 1 *Phill. Ev.* 424.

⁶⁷ *Gresley*, Ev. 410. The cases on the point are very numerous, and a few are selected for reference: *Crawford v. Branch Bank at Mobile*, 8 Ala. 79; *Glos v. Boettcher*, 193 Ill. 534, 61 N. E. 1017; *Cooper*

has also been held a test that such copies are not admissible where the law does not require or authorize the recording of the original.⁶⁸ But in the absence of statutory regula-

v. *Armstrong*, 4 Kan. 30; *State v. Lynde*, 77 Me. 561, 1 Atl. 687; *Winham v. Kline*, 77 Mo. App. 36; *State v. Loughlin*, 66 N. H. 266, 20 Atl. 981; *Lyon v. McCadden*, 15 Ohio, 551; *Smithers v. Lowrance*, 100 Tex. 77, 93 S. W. 1064; *State v. White*, 70 Vt. 225, 39 Atl. 1085; *United States v. Johns*, 26 Fed. Cas. No. 15,481, 4 Dall. (Pa.) 412, 1 L. Ed. 888, 1 Wash. C. C. 363. See the late cases: *Dahler v. All Persons*, 163 Cal. 160, 124 Pac. 995; *Pardee v. Johnston*, 70 W. Va. 347, 74 S. E. 721.

⁶⁸ *Fitler v. Shotwell*, 7 Watts & S. (Pa.) 14. The rule has been applied to *deeds* and similar instruments recorded in the registry authorized by statute: *Dick v. Balch*, 8 Pet. (U. S.) 30, 8 L. Ed. 856; *Morton v. Webster*, 2 Allen (Mass.), 352; *Van Cortlandt v. Tozer*, 17 Wend. (N. Y.) 338; *Curry v. Raymond*, 28 Pa. 144; *patents* for lands issued by the United States: *Lane v. Bommelmann*, 17 Ill. 95; *Barton v. Murrain*, 27 Mo. 235, 72 Am. Dec. 259; records in the office of the *collector* of internal revenue: *State v. Loughlin*, 66 N. H. 266, 20 Atl. 981; affidavits as to pre-emption rights, on file in the office of the *register* of the *land office*: *Smith v. Mosier*, 5 Blackf. (Ind.) 51; letters of the commissioner of public lands affecting titles: *Davis v. Freeland*, 32 Miss. 645; *Darcy v. McCarthy*, 35 Kan. 722, 12 Pac. 104; other records, required by law to be filed in the general land office: *Culver v. Uthe*, 133 U. S. 655, 33 L. Ed. 776, 10 Sup. Ct. Rep. 415; *Lee v. Getty*, 26 Ill. 76; *Harris v. Doe*, 4 Blackf. (Ind.) 369; *Har-*

din v. Ho-yo-po-nubby, 27 Miss. 567; *Liddon v. Hodnett*, 22 Fla. 442; as well as those required to be filed in the state land offices: *Franklin v. Woodland*, 14 La. Ann. 188; *Finley v. Woodruff*, 8 Ark. 328, by statute; *Wray v. Ho-ya-pa-nubby*, 10 Smedes & M. (Miss.) 452; *Grant v. Levan*, 4 Pa. 393; *Mason v. McLaughlin*, 16 Tex. 24; *Van Sickle v. Catlett*, 75 Tex. 404, 13 S. W. 31; grants from a state recorded in the office of the *Secretary of State*: *Linning v. Crawford*, 2 Bail. (S. C.) 296; *pardons* by the executive: *Cox v. Cox*, 26 Pa. 375, 67 Am. Dec. 432; books of the *state treasurer* to show payment of the state tax: *Hodgdon v. Wight*, 36 Me. 326; contracts for public works on file with the *state auditor*: *McCoy v. Lightner*, 2 Watts (Pa.), 347; manifests and other records required to be kept at the *custom-house*: *United States v. Johns*, 4 Dall. (Pa.) 412, 1 L. Ed. 888, 1 Wash. C. C. 363, Fed. Cas. No. 15,481; *White v. Kearney*, 2 La. Ann. 639; *Sampson v. Noble*, 14 La. Ann. 347; registries of *marriages, births and deaths*: *Lewis v. Marshall*, 5 Pet. (U. S.) 470, 8 L. Ed. 195; *Jackson v. King*, 5 Cow. (N. Y.) 237, 15 Am. Dec. 468; *Jackson v. Boneham*, 15 Johns. (N. Y.) 226; *Hyam v. Edwards*, 1 Dall. (Pa.) 2, 1 L. Ed. 11; records of warrants for calling town meetings: *State v. Bailey*, 21 Me. 62; records of the acts of towns and *town officers*: *Jay v. Carthage*, 48 Me. 353; *Wiley v. Portsmouth*, 35 N. H. 303; and of the by-laws of cities and towns: *Commonwealth v. Chase*, 6 Cush. (Mass.) 248 (but see *Lumbard v. Aldrich*, 8 N. H. 31, 28 Am. Dec. 381; *Moore v. Newfield*, 4

tions, there is no principle on which copies of records of *private corporations* are admissible, unless by reason of some act of the party they may be regarded as admissions.⁶⁹

§ 523 (535). **Copies of records—Different classes.**—It now becomes necessary to consider the method of proof by those copies referred to in the last section, inasmuch as it is so often necessary to prove original records in this manner. Such copies are classified as follows: *Exemplifications*, or copies verified by the great seal or the seal of the court;⁷⁰ *examined or sworn copies*, or those copies “proved by oral evidence to have been examined with the original and to correspond therewith. The examination may be made either by one person reading both the original and the copy, or by two persons, one reading the original and the other the copy. It is not necessary that each should alternately read both.”⁷¹ Of course, the witness must have knowledge that the copy is correct, or if he gives parol evidence of a lost document, he must show competent knowledge.⁷² *Office copies* are those made by officers intrusted with the original and authorized by law to prepare copies.⁷³ They are thus described by Stephen: “A copy made by an officer of the court, bound by law to make it, is equivalent to an exemplification, though it is sometimes called an office copy.”⁷⁴ *Certified copies* are those signed

Me. 44); *church registers*: Hancock v. Supreme Council etc., 67 N. J. L. 614, 52 Atl. 301; Hunt v. Order of Chosen Friends, 64 Mich. 671, 8 Am. St. Rep. 855, 31 N. W. 576. See, also, cases cited to § 508, *ante*.

⁶⁹ Atlantic Mut. Fire Ins. Co. v. Sanders, 36 N. H. 252.

⁷⁰ Gilbert, Ev. 19.

⁷¹ Steph. Ev., art. 75; Greenl. Ev., § 508; Hill v. Packard, 5 Wend. (N. Y.) 375; Krise v. Neason, 66 Pa. 253; Kellogg v. Kellogg, 6 Barb. (N. Y.) 116; Rice v. Rice (N. J. Eq.), 25 Atl. 321.

⁷² Edisto Phosphate Co. v. Stan-

ford, 112 Ala. 493, 20 South. 613; Propst v. Mathis, 115 N. C. 526, 20 S. E. 710; In re Gazett, 35 Minn. 532, 29 N. W. 347.

⁷³ Greenl. Ev., § 507; Best, Ev., 10th ed., § 486. See § 622, *post*. As to *press copies*: Ford v. Cunningham, 87 Cal. 209, 25 Pac. 403.

⁷⁴ Reynolds' Steph. Dig., art. 77. In the note to that article the reader is referred for the learning as to exemplifications and office copies to Gilbert's Law of Evidence, 11-20; Buller, Nisi Prius, 228; Starkie, Ev., 256-265, fully and very conveniently, and 2 Phill. Ev. 196-200.

and certified as true by the officers to whose custody the original is intrusted.⁷⁵ Exemplifications are proved by their own production, since the courts take judicial notice of the seal.⁷⁶ "They are deemed of higher credit than examined copies, being presumed to have undergone a more critical examination."⁷⁷ Although certified copies are official and more often used, they are of no higher grade than sworn copies.⁷⁸ *Copies of certified or examined copies* are clearly not admissible,⁷⁹ unless the original and first copy are lost or inaccessible, and it is necessary to produce secondary evidence.⁸⁰ For example, in the Massachusetts case cited to this proposition copies of certified copies of the charters of two corporations were admitted in evidence. Holmes, C. J., pointed out that as the law required a copy of the charter to be filed with the commissioner of corporations, and also provided that copies of documents in the executive and other departments of the commonwealth duly authenticated should be competent evidence equally with the originals, such copies were admissible. The word "originals" in such connection meant the documents in the hands of the certifying officer whatever they might be, and hence that though the documents were in one sense copies of other copies, they were under these circumstances copies of "original" documents according to the interpretation referred to, and that the copies had the same effect as the documents themselves.

§ 524 (536). Examined and certified copies as evidence. The term "examined copy" is rapidly falling into disuse

⁷⁵ Best, Ev., 10th ed., § 486; Stamper v. Gay, 3 Wyo. 322, 23 Pac. 69.

⁷⁶ See § 111, *ante*.

⁷⁷ Taylor, Ev., 10th ed., § 1537.

⁷⁸ Union R. & T. Co. v. Shacklet, 119 Ill. 232, 10 N. E. 896; State v. Lynde, 77 Me. 561, 1 Atl. 687; State v. Collins, 68 N. H. 299, 44 Atl. 495; Otto v. Trump, 115 Pa. 425, 8 Atl. 786.

⁷⁹ Goodrich v. Weston, 102 Mass. 362, 3 Am. Rep. 469; Lasater v. Van Hook, 77 Tex. 650, 14 S. W. 270; State v. Cohen, 108 Iowa, 208, 75 Am. St. Rep. 213, 78 N. W. 857.

⁸⁰ Commonwealth v. Corkery, 175 Mass. 460, 56 N. E. 711; Cornett v. Williams, 20 Wall. (U. S.) 226, 22 L. Ed. 254; Knoxville Nursery Co. v. Commonwealth, 108 Ky. 6, 55 S. W. 691.

in this country as a technical term, although, of course, in its literal sense every office copy purports to have been compared with the original which is practically an examination. Although the examined copy as such has been superseded by the certified copy, it may still be used except the statute makes the proof by certified copy exclusive. At the same time, proof by examined copy is open to certain risks and calls for more proof than the more modern certified copy. This was pointed out in a Texas case. In that case an examined copy having been objected to, the court said that while provision was made for examining public records with the consent of the commissioner who should detail a clerk to be present and superintend the examination, it did not follow, however, that the person allowed to make an examination would be entitled to make a copy of the record so examined, and thus avoid the payment of the fee fixed by law for making certified copies. "Nor are we called on in this instance to determine whether the genuineness of the classification and appraisement record, an examined copy of which was offered, could properly be established without the evidence of the commissioner or some clerk in the land office; for no such objection was made. We will add, however, that we do not very well see how an outsider could know such fact."⁸¹ Stephen lays down the rule that "the contents of any public document whatever may in all cases be proved by an *examined copy*."⁸² This is the mode most commonly adopted in England. But, although such copies are used in the United States, the usual method of proof, when copies are used, is by exemplified or *certified* copies. If an examined copy is used, it should be an accurate and complete copy; and it is not admissible if abbreviations are used in the copy

⁸¹ *Smithers v. Lowrance*, 35 Tex. Civ. App. 25, 79 S. W. 1088. The court added: "It has been held that the custodian of a public record or document, to the exclusion of those not connected with the office, should

be called to prove the loss of such record or document; and we incline to the opinion that the genuineness of said record or document ought to be proved in the same way."

⁸² *Steph. Ev.*, art. 75.

for words written out at length in the original.⁸³ *Office copies* are seldom used in this country, and have been for the most part superseded by exemplified and certified copies. The copies now most frequently used in the United States are *certified copies*. In most of the states there are statutes providing for the introduction of certified copies of judicial and nonjudicial records.⁸⁴ These statutes are in some states very general and sweeping, admitting certified copies by every public officer having custody of any public writing which a citizen has a right to inspect. In others there are general statutes and also special statutes covering in great and unnecessary detail almost every kind of public writing as well as large classes of documents of private corporations. Where copies of this class are offered, it is clear that the *mode of authentication* provided by the statute *must be substantially followed*, or the copy is inadmissible;⁸⁵ for such certificates are evidence only so far as they are made so by statute.⁸⁶ Thus, where a statute provided, as the mode of certifying, that "such copy shall be certified by the officer, in whose custody the same is required by law to be, to have been compared by him with the original, and to be a correct transcript therefrom," it was held that a single certificate of the officer annexed to several deeds was insufficient, and that each document should be authenticated.⁸⁷ So a copy verified by comparison with a certified copy has been held inadmissible.⁸⁸ It

⁸³ Reg. v. Christian, Car. & M. 388.

⁸⁴ See statutes of the jurisdiction. In the absence of statute it may be presumed that clerks of courts of record have authority to furnish certified copies: Gunn v. Peakes, 36 Minn. 177, 1 Am. St. Rep. 661, 30 N. W. 466.

⁸⁵ Greene v. Durfee, 6 Cush. (Mass.) 362; People v. Toby, 153 N. Y. 381, 47 N. E. 800.

⁸⁶ Smith v. United States, 5 Pet. (U. S.) 292, 8 L. Ed. 130; Smith v. Brannan, 13 Cal. 107; Brown v. Cady, 11 Mich. 535; Maxwell v.

Light, 1 Call (Va.), 117; Byers v. Wallace, 87 Tex. 503, 28 S. W. 1056, 29 S. W. 760; Dixon v. Thatcher, 14 Ark. 141; Billingsley v. Hilles, 6 S. D. 445, 61 N. W. 687. See the *late cases*: De Garmo v. Prater, 125 Tenn. 497, Ann. Cas. 1913C, 346, 146 S. W. 144; Hamon v. Foust (Tenn.), 150 S. W. 418.

⁸⁷ Newell v. Smith, 38 Wis. 39. Excluded if the officer fails to state that the copy is a correct one: Naanes v. State, 143 Ind. 299, 42 N. E. 609.

⁸⁸ Lasater v. Van Hook, 77 Tex. 650, 14 S. W. 270.

was formerly held and in some jurisdictions is still held, that an officer has no implied authority to make certified copies.⁸⁹ But the modern tendency is toward the rule that a copy certified by a public officer whose duty it is to keep the original should be received.⁹⁰ "Whether these acts be or be not construed to authorize the admission of the copies offered in this cause, we think that, on general principles of law, a copy given by a public officer whose duty it is to keep the original, ought to be received in evidence."⁹¹ A certified copy of a record, by a public officer authorized to make it, not only vouches for its own correctness, but, as Mr. Justice Catron declared, it proves *prima facie* the original to have been in the public office when it was made.⁹² The officer's certificate is accorded the sanctity of a deposi-

⁸⁹ *State v. Cake*, 24 N. J. L. 516; *West Jersey Traction Co. v. Board of Public Works*, 57 N. J. L. 313, 30 Atl. 581; *Taylor v. Simmons*, 75 Ga. 13; *Dudley v. Grayson*, 6 T. B. Mon. (Ky.) 259. The point was not squarely presented in *Sykes v. Beck*, 12 N. D. 242, 96 N. W. 844, in that the certificate did not express the matter to be a true copy of the original, but the court took the view that the certificate must be authorized by statute.

⁹⁰ *Phillips v. Poindexter*, 18 Ala. 579; *People v. Williams*, 64 Cal. 87, 27 Pac. 939; *Star Loan Assn. v. Moore*, 4 Penne. (Del.) 308, 55 Atl. 946; *Town of Ormond v. Shaw*, 50 Fla. 445, 39 South. 108; *Cannon v. Gorham*, 136 Ga. 167, Ann. Cas. 1912C, 39; *National Council etc. of Security v. O'Brien*, 112 Ill. App. 40; *Mitchelltree School Tp. v. Hall* (Ind. App.), 68 N. E. 919; *International Harvester Co. v. Commonwealth*, 144 Ky. 403, 138 S. W. 248; *State v. Marks*, 127 La. 1031, 54 South. 340; *Parker v. Carrier*, 24 Me. 168; *Wilcoxson v. Darr*, 139

Mo. 660, 41 S. W. 227; *Ferguson v. Clifford*, 37 N. H. 86; *Erickson v. Smith*, 2 Abb. Dec. (N. Y.) 64, 38 How. Pr. 454; *Barcello v. Hapgood*, 118 N. C. 712, 24 S. E. 124; *Scott v. Leather*, 3 Yeates (Pa.), 184; *Kellogg v. Finn*, 22 S. D. 578, 133 Am. St. Rep. 945, 18 Ann. Cas. 363, 119 N. W. 545; *State v. True*, 116 Tenn. 294, 95 S. W. 1028; *Finberg v. Gilbert* (Tex. Civ. App.), 124 S. W. 979; *Wellman v. Hoge*, 66 W. Va. 234, 66 S. E. 357; *United States v. Brelin*, 166 Fed. 104, 92 C. C. A. 88; *Amoskeag Nat. Bank v. Ottawa*, 105 U. S. 667, 26 L. Ed. 1204; *United States v. Percheman*, 7 Pet. (U. S.) 51, 8 L. Ed. 604.

⁹¹ *Marshall, C. J.*, in *United States v. Percheman*, *supra*.

⁹² *United States v. Wiggins*, 14 Pet. (U. S.) 334, 10 L. Ed. 481. See, also, the interesting case of *New York etc. R. Co. v. Horgan*, 26 R. I. 448, 59 Atl. 310, as to certified copy of copy of town records, where such copy had been used as the original since the Revolutionary War.

tion.⁹³ It is not conclusive; but when no especial incentive for falsification appears, and the records are shown to have been carelessly kept, it should prevail over the bare fact that seven years later an original record cannot be found.⁹⁴ But while due weight is given to the utterance of Marshall, C. J., referred to, the proposition that such copies are admissible "on general principles" has not been allowed to pass unchallenged. In a New Jersey case,⁹⁵ we find it laid down that a paper purporting to be a certified copy of a public document, although certified by the officer in whose custody it is placed, whether under seal or not, is not receivable in evidence unless such certification is enjoined or permitted by statute.⁹⁶ "The existence of this general rule of evidence," said the court, "accounts for, and is evidenced by, the number of special statutes empowering officers to certify copies of papers which are enrolled or on file in their offices."⁹⁷ A certified copy of a document should not be received when the original, if produced, could not be received,⁹⁸ whether from being irrelevant or intrinsically incompetent by reason of being either wanting in legal formality or otherwise contrary to law. For example, where the original record was a notice of water appropriation made when there was no law authorizing such record, a certified copy was inadmissible.⁹⁹ Where the record was of the translated copy of a "*testimonio*," which purported to be a grant of land, the instrument not

⁹³ United States v. Hanson, 16 Pet. (U. S.) 196, 201, 10 L. Ed. 935; United States v. Acosta, 1 How. (U. S.) 24, 26, 11 L. Ed. 33.

⁹⁴ United States v. Brélin, 166 Fed. 104, 92 C. C. A. 88.

⁹⁵ West Jersey Traction Co. v. Board of Public Works, 57 N. J. L. 313, 30 Atl. 581. In this case, too, it is pointed out that Greenleaf in his earlier editions said that the weight of authority was that a copy given by a public officer whose duty it was to keep the original ought to be received in evidence. Of the two cases he

cited one was a sworn copy, and the other certified to facts, not the record. Other cases are referred to based on Marshall, C. J.'s, statement. The correction appears to have been made in the later editions.

⁹⁶ Notes to 2 Phill. Ev., 5th ed., marg. p. 444; 1 Starkie, Ev., p. 154.

⁹⁷ See, also, New Jersey etc. Transp. Co. v. Suydam, 17 N. J. L. 25; State v. Cake, 24 N. J. L. 516.

⁹⁸ Donohue v. Whitney, 133 N. Y. 178, 30 N. E. 848;—State v. Wells, 11 Ohio, 261.

⁹⁹ Cruse v. McCauley, 96 Fed. 369.

being properly recorded, a copy was not admissible as a certified copy of a legal record.¹⁰⁰ In the trial of a criminal contempt proceeding for the violation of an injunctive order enjoining the maintenance of a liquor nuisance, and the state, over the objection of defendant, was allowed to introduce in evidence a purported copy of a United States stamp for special tax certified to by the city auditor of Mandan, it was held error, for the reason that the statute under which a copy of such special tax stamp was filed with said officer being unconstitutional,¹ a copy thereof certified to by the city auditor was incompetent evidence for any purpose.² In an Oregon case,³ it was sought to introduce a certified copy of a certified copy of a map. "Its admissibility as evidence," said the court, "is therefore to be determined by the effect to be given it simply as a certified copy of a certified copy of an original; and in this view it is clearly incompetent and cannot be considered. Nothing short of an express provision by statute could render such a copy competent evidence and no such provision exists." On proper foundation, of course, such a copy could be used as secondary evidence.⁴

§ 525 (537). Effect of copies as evidence—Cannot exclude originals—By whom certified.—Although examined or exemplified copies or, under some statutes, certified copies of certain records are competent evidence, this mode of proof is not exclusive. In other words, in such cases *either the original or the authenticated copy* may be used. Although the courts may not compel the production of public records as evidence, such records, when produced, are at least of as high a nature as copies. No authentication can make the copy of higher dignity than the original.⁵

¹⁰⁰ West v. Houston Oil Co., 46 Tex. Civ. App. 102, 102 S. W. 927.

¹ See State v. Hanson, 215 U. S. 515, 54 L. Ed. 307, 30 Sup. Ct. Rep. 179.

² State v. Winbauer, 21 N. D. 70, Ann. Cas. 1913B, 564, 128 N. W. 679.

³ Goddard v. Parker, 10 Or. 102.

⁴ Joslyn v. Rockwell (Pulver), 59 Hun, 129, 13 N. Y. Supp. 311.

⁵ Goodwyn v. Goodwyn, 25 Ga. 203; Davis v. City of Clinton, 25 Ky. Law Rep. 2021, 79 S. W. 259; Vose v. Manly, 19 Me. 331; Day v.

Nor do statutes enabling parties to use copies interfere with or exclude the common-law rules which allow the execution and contents of documents to be shown by other kinds of *secondary evidence*. The statutory method is merely an additional mode to that provided by the common law, and a party has his election to adopt either mode of proof.⁶ The certificate of a copy from an official record must be *by the officer having the record in charge* and authorized to certify. A copy certified by a stranger, or by an officer, wholly unauthorized, cannot be received.⁷ To certify copies is, however, within the ordinary powers of a duly appointed *deputy* of the officer named by law to keep the charge of a record; and a copy certified by a deputy acting for his principal is good.⁸ On principles already stated, a certifying officer has no authority to state facts explanatory of or *collateral* to the record certified by him, or mere conclusions, not required to be certified,⁹ or facts

Moore, 13 Gray (Mass.), 522; Sheehan v. Davis, 17 Ohio St. 571; Miller v. Hale, 26 Pa. 432; Brush v. Taggart, 7 Johns. (N. Y.) 19; Otto v. Trump, 115 Pa. 425, 8 Atl. 786; State v. Voight, 90 N. C. 741; Smith v. Veysey, 30 Wash. 18, 70 Pac. 94. This rule has been applied to *letters of administration* and *letters testamentary*: Greene v. Durfee, 6 Cush. (Mass.) 362; *records of suits*: Lawson v. Orear, 4 Ala. 156; *records of deeds*: Davis v. City of Clinton, 25 Ky. Law Rep. 2021, 79 S. W. 259; *writs* and *executions*: Day v. Moore, 13 Gray (Mass.), 522; *orders of court*: Sheehan v. Davis, 17 Ohio St. 571; and of *courts-martial*: Brooks v. Daniels, 22 Pick. (Mass.) 498; as well as an insolvent's *discharge*: Greene v. Durfee, 6 Cush. (Mass.) 362.

⁶ United States v. Laub, 12 Pet. (U. S.) 1, 9 L. Ed. 977; Loftin v. Nally, 24 Tex. 565; Greene v. Durfee, 6 Cush. (Mass.) 362.

⁷ State v. Dooris, 40 Conn. 145; Anderson v. Blair, 121 Ga. 120, 2 Ann. Cas. 165, 48 S. E. 951; Bergman v. Bullitt, 43 Kan. 709, 23 Pac. 938; Foxcroft v. Crooker, 40 Me. 308; Rich v. Lancaster R. Co., 114 Mass. 514; Woods v. Banks, 14 N. H. 101; State v. Cake, 24 N. J. L. 516; Devling v. Williamson, 9 Watts (Pa.), 311; York v. Gregg, 9 Tex. 85.

⁸ Hague v. Porter, 45 Ill. 318; Greasons v. Davis, 9 Iowa, 219; Triplett v. Gill, 7 J. J. Marsh. (Ky.) 438; Cook v. Hunter, 2 Overt. 113, Fed. Cas. No. 3161. See, also, Clark v. Empire Lumber Co., 87 Ga. 742, 13 S. E. 826.

⁹ Enfield v. Ellington, 67 Conn. 459, 34 Atl. 818; McMillan v. Savannah Guano Co., 133 Ga. 760, 66 S. E. 943; Lamar v. Pearre, 90 Ga. 377, 17 S. E. 92; Martin v. Anderson, 21 Ga. 301; Mandel v. Swan Land etc. Co., 154 Ill. 177, 45 Am. St. Rep. 124, 27 L. R. A. 313, 40

as to which his statements are *hearsay*.¹⁰ Nor has he the right to certify negatively or create proof of the nonexistence of any fact or record by his official certificate. Such negative proof requires oral testimony, under oath, of a search made and its results.¹¹ There are, however, authorities for the reception of negative certificates as a foundation for the introduction of secondary evidence.¹² When copies of records are admissible in evidence, the handwriting of the recording or attesting officer is *prima facie* presumed to be genuine.¹³ The seal on the original instrument need not be reproduced. The letters "L.S." or other indication that there is a seal are sufficient.¹⁴ It has frequently been held that the certificate affords at least *prima facie* evidence of the *genuineness* of the original document thus certified to.¹⁵ No particular form of cer-

N. E. 462; Bemis v. Becker, 1 Kan. 226; Cornelison v. Browning, 9 B. Mon. (Ky.) 50; Gill v. Phillips, 6 Mart. (La.), N. S., 298; Jay v. East Livermore, 56 Me. 107; Commonwealth v. Richardson, 142 Mass. 71, 7 N. E. 26; Preiner v. Meyer, 67 Minn. 197, 69 N. W. 887; French v. Ladd, 57 Miss. 678; Major v. Watson, 73 Mo. 661; Littleton v. Christy, 11 Mo. 390; Francis v. Newark, 58 N. J. L. 522, 33 Atl. 853; Wood v. Knapp, 100 N. Y. 109, 2 N. E. 632; State v. Champion, 116 N. C. 987, 21 S. E. 700; State v. Gottlieb, 21 N. D. 179, 129 N. W. 460; Davis v. Gray, 17 Ohio St. 330; Northern Pac. Terminal Co. v. City of Portland, 14 Or. 24, 13 Pac. 705; Stewart v. Allison, 6 Serg. & R. (Pa.) 324, 9 Am. Dec. 433; Hopkins v. Millard, 9 R. I. 37; Treasurers v. Witsall, 1 Speers (S. C.), 220; Smithers v. Lowrance, 100 Tex. 77, 93 S. W. 1064, (Tex.), 91 S. W. 606; Fisher v. Ullman, 3 Tex. Civ. App. 322, 22 S. W. 523; Lavin v. Mutual Aid Soc., 74 Wis. 349, 43 N. W. 143;

Hudkins v. Bush, 69 W. Va. 194, Ann. Cas. 1913A, 533, 71 S. E. 106; Fagan v. United States, 24 Ct. of Cl. 217; Brown v. Galloway, Fed. Cas. No. 2006, Pet. C. C. 291; Blackley v. Kenney, 19 Ont. 169.

¹⁰ Garwood v. Dennis, 4 Binn. (Pa.) 314.

¹¹ Boyd v. Chicago etc. R. Co., 103 Ill. App. 199. See, also, Parker v. Cleveland, 37 Fla. 39, 19 South. 344; Chicago etc. R. Co. v. Vance, 64 Kan. 686, 68 Pac. 606; Ayres v. Stewart, 1 Overt. (1 Tenn.) 221. See 543, *post*.

¹² Struthers v. Reese, 4 Pa. 129, citing Ruggles v. Gaily, 2 Rawle (Pa.), 232.

¹³ Commonwealth v. Chase, 6 Cush. (Mass.) 248.

¹⁴ Holbrook v. Nichol, 36 Ill. 161; State v. Bailey, 7 Iowa, 390; Hedden v. Overton, 4 Bibb (Ky.), 406; Wilson v. Braden, 56 W. Va. 372, 107 Am. St. Rep. 927, 49 S. E. 409.

¹⁵ Krom v. Vermillion, 143 Ind. 75, 41 N. E. 539; Webb v. Holt, 113

tificate is, in the absence of statutory requirement, called for, but the certificate should be capable of the construction that the copy of the document referred to is a copy of the original instrument in the custody of the one certifying.¹⁶ Clerical errors¹⁷ and even the omission of the date will not invalidate the certificate,¹⁸ but a certificate that a map as far as it went into detail was a correct one is insufficient.¹⁹ So far as the statutory requirement of form of certificate goes, it seems that substantial compliance will be held sufficient,²⁰ though the supreme court of the United States utters a proper word of warning that "where copies are made evidence by statute, the mode of authentication required must be strictly pursued. The legislature may establish new rules of evidence in derogation of the common law, but the judicial power is limited to the rule laid down."²¹

§ 526 (538). Proof of execution of documents.—The general rule in respect to the proof of private writings is that, before they are admissible in evidence, their execution must be proved.²² If the instrument is *not attested by a subscribing witness*, its execution is sufficiently proven to

Mich. 338, 71 N. W. 637; Griffith v. Richmond, 126 N. C. 377, 35 S. E. 620.

¹⁶ Naanes v. State, 143 Ind. 299, 42 N. E. 609; Huntoon v. O'Brien, 79 Mich. 227, 44 N. W. 601; Bills v. Keesler, 36 Mich. 69; Nedford v. Snow, 46 Hun (N. Y.), 370; Cope-
lin v. Shuler (Tex. Sup.), 6 S. W. 668; Johnson v. Bolton, 43 Vt. 303; Carbee v. Hopkins, 41 Vt. 250; Robinson v. Lowe, 50 W. Va. 75, 40 S. E. 454; Newell v. Smith, 38 Wis. 39; Stevens v. Clark County Super-
visors, 43 Wis. 36. See, also, Natoma Water etc. Co. v. Clarkin, 14 Cal. 544; Sykes v. Beck, 12 N. D. 242, 96 N. W. 844; Commonwealth v. Quigley, 170 Mass. 14, 48 N. E. 782.

¹⁷ Harper v. Marion County, 33 Tex. Civ. App. 653, 77 S. W. 1044.

¹⁸ Collison v. Illinois Cent. R. Co., 239 Ill. 532, 88 N. E. 251.

¹⁹ Brecker v. Fillingham, 209 Mo. 578, 108 S. W. 41.

²⁰ Huntoon v. O'Brien, 79 Mich. 227, 44 N. W. 601. It was said in Bliss v. Keesler, 36 Mich. 69, that it is not necessary that the certificate shall be in exact verbal conformity with the statute. It will be sufficient if it contains in substance what the section requires.

²¹ Smith v. United States, 5 Pet. (U. S.) 292, 8 L. Ed. 130.

²² Ensley v. Hollingsworth, 170 Ala. 396, Ann. Cas. 1912D, 652, 54 South. 95; Lane v. Farmer, 13 Ark. 63; People v. Lanterman, 9 Cal.

warrant its introduction by proof of the signature. It is then presumed that the date is correct and the document genuine,²³ although the other party is not concluded thereby.²⁴ Where there is *prima facie* proof of execution, the document must go to the jury,²⁵ for the court will not allow the other party to introduce counter evidence before the instrument is read, and then exclude it from the jury.²⁶ Where a deed or other instrument is introduced only to prove some *collateral fact*, slight proof of execution is sufficient;²⁷ and in such cases the subscribing witness need not be called; the proof may be made by means of any other competent testimony.²⁸ If the instrument purports

App. 674, 100 Pac. 720; Williams v. Keyser, 11 Fla. 234, 89 Am. Dec. 243; Gilpin v. Smith, 9 Ga. App. 583, 71 S. E. 944; Baker v. Massengale, 83 Ga. 137, 10 S. E. 347; Hinchshaw v. Security Trust Co., 48 Ind. App. 351, 93 N. E. 507; Burgen v. Commonwealth, 8 Ky. Law Rep. 613; Francis v. Hazlerigg, 1 A. K. Marsh. (Ky.) 93; Sallier's Succession, 115 La. 97, 38 South. 929; Dunlap v. Glidden, 31 Me. 510; Richardson v. Anderson, 109 Md. 641, 130 Am. St. Rep. 543, 25 L. R. A., N. S., 393, 72 Atl. 485; Equitable Endowment Assn. v. Fisher, 71 Md. 430, 18 Atl. 808; Bugbee v. Davis, 167 Mass. 33, 44 N. E. 1055; Massillon Engine etc. Co. v. Holdridge, 68 Minn. 393, 71 N. W. 399; United States Water etc. Co. v. Jacobia, 156 Mo. App. 597, 137 S. W. 906; Walden v. Bankers' Life Assn., 89 Neb. 546, 131 N. W. 962; Tonopah Lumber Co. v. Riley, 30 Nev. 312, 95 Pac. 1001; Bean v. Smith, 20 N. H. 461; Corkran v. Taylor, 77 N. J. L. 195, 71 Atl. 124; Linn v. Ross, 16 N. J. L. 55; Lovett v. Gibb, 128 N. Y. Supp. 1047; Tyson v. Joyner, 139 N. C. 69, 51 S. E. 803; Baum v. Rainbow Smelting Co.,

42 Or. 453, 71 Pac. 538; Bomgardner v. Swartz, 26 Pa. Sup. Ct. 263; Mahoney v. Southern Ry. Co., 82 S. C. 215, 64 S. E. 228; State v. Pirkey, 22 S. D. 550, 18 Ann. Cas. 192, 118 N. W. 1042; McConico v. State, 61 Tex. Cr. App. 48, 133 S. W. 1047; Robertson v. Du Bose, 76 Tex. 1, 13 S. W. 300; Tarbell v. Gifford, 82 Vt. 222, 17 Ann. Cas. 1143, 72 Atl. 921; Rasmussen v. Wisconsin Tract. etc. Co., 133 Wis. 205, 113 N. W. 453; Hammond Packing Co. v. Dickey, 183 Fed. 977, 106 C. C. A. 317. In some states, however, such preliminary proof of execution is not required unless the execution is denied: Mobile & M. Ry. Co. v. Gilmer, 85 Ala. 422, 5 South. 138; Belton v. Smith, 45 Ind. 291.

²³ Pullen v. Hutchinson, 25 Me. 249; Glenn v. Grover, 3 Md. 212; Savery v. Browning, 18 Iowa, 246.

²⁴ Pressly v. Hunter, 1 Speers (S. C.), 133.

²⁵ Hamsher v. Kline, 57 Pa. 397.

²⁶ Flournoy v. Warden, 17 Mo. 435.

²⁷ Means v. Means, 7 Rich. (S. C.) 533.

²⁸ Kitchen v. Smith, 101 Pa. 452.

to be executed by an *agent* or attorney in fact, and the execution is denied, the authority must be proved.²⁹ Although instruments cannot be read without some proof of authenticity, such proof may consist of facts and circumstances from which the jury may infer the execution;³⁰ in other words, the execution may be proved by *circumstantial evidence*,³¹ or by *admissions*,³² and the document may furnish internal evidence of the source from which it was derived.³³ It is a general rule that the execution of the instruments by all the parties thereto should be proved, but there are instances in which it has been held sufficient to prove the execution *by those sought to be charged*.³⁴ The best evidence of execution is, of course, the testimony of one who saw the signatory write his name.³⁵ Next to that is the evidence of the signatory himself,³⁶ or someone who, without having seen him make that particular signature, has seen him write it at other times and can therefore say that it is his signature. Such evidence is as competent and valid as the testimony of the writer himself.³⁷ It is well

²⁹ Elliott v. Pearce, 20 Ark. 508; James v. Gordon, 1 Wash. C. C. 333, Fed. Cas. No. 7181; Carnall v. Duval, 22 Ark. 136; Hughes v. Holliday, 3 G. Greene (Iowa), 30; Yarborough v. Beard, 1 N. C. 117; Darst v. Doom, 38 Ill. App. 397. As well as the execution: Ruckman v. R. C. Stone Mill. Co., 139 Mo. App. 256, 123 S. W. 69.

³⁰ Sigfried v. Levan, 6 Serg. & R. (Pa.) 308, 9 Am. Dec. 427; Stahl v. Berger, 10 Serg. & R. (Pa.) 170, 13 Am. Dec. 666; Pigott v. Holloway, 1 Binn. (Pa.) 436; Dodge v. Bank of Kentucky, 2 A. K. Marsh. (Ky.) 610; Curtis v. Hall, 4 N. J. L. 148.

³¹ See cases last cited.

³² Wright v. Wood, 23 Pa. 120; Powell v. Adams, 9 Mo. 766.

³³ Singleton v. Bremar, 1 Harp. (S. C.) 201.

³⁴ Conrad v. Atlantic Ins. Co., 1 Pet. (U. S.) 386, 7 L. Ed. 189; Kingwood v. Overseers of Bethlehem, 13 N. J. L. 221; St. John v. Kidd, 26 Cal. 263, 4 Morr. Min. Rep. 454.

³⁵ Stoddard v. Hill, 38 S. C. 385, 17 S. E. 138; Meuley v. Zeigler, 23 Tex. 88; Mosely v. Gordon, 16 Ga. 384; Lefkovitz v. First Nat. Bank, 152 Ala. 521, 44 South. 613; State v. Matlack, 5 Penne. (Del.) 401, 64 Atl. 259 (proof of signatures to a bail bond).

³⁶ Lowman v. Aubery, 72 Ill. 619; White v. Solomon, 164 Mass. 516, 30 L. R. A. 537, 42 N. E. 104; Gibbs v. Linabury, 22 Mich. 479, 7 Am. Rep. 675; Eichhold v. Tiffany, 20 Misc. Rep. 681, 46 N. Y. Supp. 534; Burraston v. Nephi First Nat. Bank, 22 Utah, 328, 62 Pac. 425.

³⁷ Rutherford v. Dyer, 146 Ala. 665, 40 South. 974; Royce v. Gaxan,

recognized that the execution of a contested paper and the genuineness of the signature of the purported signer may be established by a comparison of the disputed writing with other writings, proved or admitted to be genuine. This character of evidence is secondary only when there is a subscribing witness.³⁸

§ 527 (539, 540). Proof of attested documents—Attesting witnesses to be called.—The common-law rules for the proof of attested documents have formed the foundation for the majority of the statutes which have been framed, not only to declare them, but to ameliorate in some instances some of the hardships which their strict and rigid observance demanded. It is an ancient rule of the law that, where an instrument is attested, the attesting or subscribing witness should be produced, if possible, at the trial to prove the execution. The law requires the best evidence which the nature of the case admits of. It has long been held, upon that principle, that when there is a subscribing witness to a written instrument, he must be produced, as furnishing the best evidence of its execution.³⁹ Among the

76 Ga. 79; Haynes v. Thomas, 7 Ind. 38; United States v. Moreno, 1 Wall. (U. S.) 400, 17 L. Ed. 633.

³⁸ Paulk v. Creech, 8 Ga. App. 738, 70 S. E. 145. See, also, Dillingham v. Brown, 38 Ala. 311; Bauer v. State, 144 Cal. 740, 78 Pac. 280; Dancey v. Sugg, 46 Miss. 606; Rogers v. Trustees New York etc. Bridge, 159 N. Y. 556, 54 N. E. 1094; Clark v. Freeman, 25 Pa. 133; Ashlock v. Commonwealth, 108 Va. 877, 61 S. E. 752.

³⁹ Lewis v. Glass (Ala.), 39 South. 771; Richmond & D. Ry. Co. v. Jones, 92 Ala. 218, 9 South. 276; Brock v. Saxton, 5 Ark. 708; Stevens v. Irwin, 12 Cal. 306; Mallet v. Mallet, 1 Root (Conn.), 501; Kelsey v. Hanmer, 18 Conn. 311; Thompson v. Wilkinson, 9 Ga.

App. 367, 71 S. E. 678; Hudson v. Puett, 86 Ga. 341, 12 S. E. 640; Coody v. Gress Lumber Co., 82 Ga. 793, 10 S. E. 218; Pence v. Makepeace, 65 Ind. 345; Goodall v. Goodall, 5 J. J. Marsh. (Ky.) 596; Handy v. State, 7 Har. & J. (Md.) 42; Whitaker v. Salisbury, 15 Pick. (Mass.) 534; Glasgow v. Ridgeley, 11 Mo. 34; Nason v. Nason, 79 Neb. 582, 113 N. W. 139; Kalmes v. Gerrish, 7 Nev. 31; Foye v. Leighton, 24 N. H. 29; Boyle v. Knauss, 81 N. J. L. 330, 79 Atl. 1025; Kayser v. Sichel, 34 Barb. (N. Y.) 84; McPherson v. Rathbone, 11 Wend. (N. Y.) 96; Jackson v. Waldron, 13 Wend. (N. Y.) 178; Willoughby v. Carleton, 9 Johns. (N. Y.) 136; Jackson v. Gager, 5 Cow. (N. Y.) 383; Johnston v.

reasons that have been given as the foundation of this rule are that the subscribing witnesses have been agreed upon by the parties as the persons first to be called upon for proof of the execution of the instrument;⁴⁰ that such witnesses are presumed to have better knowledge as to the facts than other persons,⁴¹ and that some fact may be known to the subscribing witness, not within the knowledge or recollection of the party.⁴² The rule at common law is of very wide application, and relates not only to deeds and similar instruments of a formal character, but generally to written instruments having subscribing witnesses.⁴³

Knight, 5 N. C. 293; Warner v. Baltimore etc. R. Co., 31 Ohio St. 265; Hannan v. Greenfield, 36 Or. 97, 58 Pac. 888; North Penn. Iron Co. v. International Lithoid Co., 217 Pa. 538, 66 Atl. 860; Petit v. McAdam, 2 Serg. & R. (Pa.) 420; Kinney v. Flynn, 2 R. I. 319; Trammell v. Roberts, 1 McMul. (S. C.) 305; Hightower Bros. v. Taylor Co. (Tex. Civ. App.), 126 S. W. 621; International & G. N. Ry. Co. v. McRae, 82 Tex. 614, 27 Am. St. Rep. 926, 18 S. W. 672; Harding v. Cragie, 8 Vt. 501; Carrington v. Eastman, 1 Pinn. (Wis.) 650; Clarke v. Courtney, 5 Pet. (U. S.) 319, 8 L. Ed. 140; Greenl. Ev., § 569. See full note to Garrett v. Hanshue, 35 L. R. A. 321-351.

⁴⁰ Henry v. Bishop, 2 Wend. (N. Y.) 575; Clark v. Sanderson, 3 Binn. (Pa.) 192, 5 Am. Dec. 368; McMurtry v. Frank, 4 T. B. Mon. (Ky.) 39; Handy v. State, 7 Har. & J. (Md.) 42; Kinney v. Flynn, 2 R. I. 319; Jones v. Phelps, 5 Mich. 218; Hollenback v. Fleming, 6 Hill (N. Y.), 303; Melcher v. Flanders, 40 N. H. 139; Davis v. Alston, 61 Ga. 225; Barry v. Ryan, 4 Gray (Mass.), 523; Chaplain v. Briscoe, 19 Miss. 372.

⁴¹ McMurtry v. Frank, 4 T. B. Mon. (Ky.) 39; Handy v. State, 7 Har. & J. (Md.) 42; McPherson v. Rathbone, 11 Wend. (N. Y.) 96; Whittemore v. Brooks, 1 Me. 57; Cooke v. Woodrow, 5 Cranch (U. S.), 13, 3 L. Ed. 22.

⁴² Call v. Dunning, 4 East, 53, 102 Eng. Reprint, 750; Manners v. Postan, 4 Esp. 239. For cases criticising these reasons see Hall v. Phelps, 2 Johns. (N. Y.) 451; Garratt v. Hanshue, 53 Ohio St. 482, 35 L. R. A. 321, 42 N. E. 256; Swanney v. Parrish, 62 S. C. 240, 40 S. E. 554.

⁴³ As *notices to quit*: Doe v. Durnford, 2 Maule & S. 62; *releases*: Citizens' Bank v. Nantucket Steamboat Co., Fed. Cas. No. 2730, 2 Story, 16; Barry v. Ryan, 4 Gray (Mass.), 523; *contracts*, sealed or unsealed: Bennet v. Robinson, 3 Stew. & P. (Ala.) 227; Henry v. Bishop, 2 Wend. (N. Y.) 575; Trammell v. Roberts, 1 McMul. (S. C.) 305; King v. Smith, 21 Barb. (N. Y.) 158; *receipts*: McMahan v. McGrady, 5 Serg. & R. (Pa.) 314; and *leases*: Barry v. Ryan, 4 Gray (Mass.), 523; *mortgage of personalty*: Jones v. State, 113 Ala. 95, 21 South. 229; *chattel mortgage* required by statute

So stringent is the common-law rule that the execution of a document cannot be otherwise proved, if it is possible to produce the subscribing witnesses, that even proof of extrajudicial admission of the maker is inadmissible until it is first shown that the subscribing witnesses cannot be had.⁴⁴ A judicial admission obviates the necessity for the proof. The very effect of such an admission is to avoid the necessity of proving the fact admitted.⁴⁵ In England the

to be attested: *Brynjolfson v. Northwestern Elev. Co.*, 6 N. D. 450, 66 Am. St. Rep. 612, 71 N. W. 555; *agency contract*: *Hannan v. Greenfield*, 36 Or. 97, 58 Pac. 888. Where suit is brought upon a *promissory note*, and a plea of *non est factum* is filed, it is not proper to admit the note in evidence until *prima facie* proof of execution has been made. If there be a subscribing witness, he should be called or accounted for. If the inaccessibility of the subscribing witness is shown, or if, when he is called, he fails to remember the signing of the note, or if he testifies that the alleged maker did not execute it, the party offering the note may then proceed to other proof to show that it was in fact executed: *Thompson v. Wilkinson*, *supra*. This rule applies if the witnesses are known where the document has been burned: *Gillies v. Smither*, 2 Stark. 528; or canceled: *Breton v. Cope*, Peake, 43; or lost: *Hewitt v. Morris*, 5 Jones & S. (37 N. Y. Sup. Ct.) 18; *Kelsey v. Hammer*, 18 Conn. 311; *Porter v. Wilson*, 13 Pa. 641; and although the subscribing witness is blind: *Cronk v. Frith*, 9 Car. & P. 197; or the person who executed the document is prepared to testify to his own execution of it: *Rex v. Harringworth*, 4 Maule & S. 350, 105 Eng. Reprint, 863.

⁴⁴ *Richmond & D. Ry. Co. v.*

Jones, 92 Ala. 218, 9 South. 276; *Equitable Mfg. Co. v. Davis*, 130 Ga. 67, 60 S. E. 262; *Ellis v. Doe*, 10 Ga. 253; *Cartmell v. Walton*, 4 Bibb (Ky.), 488; *Hogland v. Sebring*, 4 N. J. L. 105; *Fox v. Reile*, 3 Johns. (N. Y.) 477; *Shaver v. Ehle*, 16 Johns. (N. Y.) 201; *Zerby v. Wilson*, 3 Ohio, 42, 17 Am. Dec. 577; *Kinney v. Flynn*, 2 R. I. 319; *Smith v. Carolin*, 1 Cranch C. C. 99, Fed. Cas. No. 13,020; *Turner v. Green*, 2 Cranch C. C. 202, Fed. Cas. No. 14,256; 1 Greenleaf, § 569b.

⁴⁵ *Blake v. Sawin*, 10 Allen (Mass.), 340, where the admission was made to prevent the demandants from obtaining a postponement, and the court held that its effect was not altered, and proof by the attesting witness could not be insisted upon. See, also, *Smith v. Gale*, 144 U. S. 509, 36 L. Ed. 521, 12 Sup. Ct. Rep. 674. When a party to a civil action has made admissions of facts material to the issue in the action, it is always competent for the adverse party to give them in evidence, and it matters not whether the admissions were in writing or by parol, nor when nor to whom they were made. Admissions do not furnish conclusive evidence of the facts admitted, unless they were made under such circumstances as to constitute an estoppel, or were made in the pleadings in an action, when they are

rule has been so changed as to apply only to those documents *required by law to be attested*; and unless the document comes within this description, although it is in fact attested, it may be proved as if unattested.⁴⁶ In this country similar statutes have been enacted in some states.⁴⁷ Of course, special provisions apply to *wills*, and statutes on the subject exist in most states. "An attesting or subscribing witness is one who was present when the instrument was executed, and who, at that time, at the request and with the assent of the party, subscribed his name to it as a witness of the execution. If his name is signed, not by himself, but by the party, it is no attestation. Neither is it such if, though present at the execution, he did not subscribe the instrument at that time, but did it afterward, and without request, or by the fraudulent procure-

conclusive in that action. "And I am unable to see why the rule does not apply to admissions contained in the pleadings in an action under our system of practice, which requires the facts to be alleged truly in the pleadings. *It must first be shown*, however, by the *signature of the party, or otherwise*, that the facts were inserted with his knowledge, or under his direction, and with his sanction": *Cook v. Barr*, 44 N. Y. 156. Where the defendant in an action of ejectment admits in his plea the execution by him of an instrument which forms a part of the plaintiff's abstract of title, it is not a good objection to the admission of the instrument in evidence that its execution has not been proved. The same principle governs as to proof of the execution of a deed when the maker of the deed appears in court, and testifies that he signed the instrument and that the deed is his: *Vizard v. Moody*, 119 Ga. 918, 47 S. E. 348. Parties may *waive* such proof by express admissions in the

pleadings: *Thorp v. Keokuk Coal Co.*, 48 N. Y. 253; or by failing in the answer to deny the allegations as to execution: *Robert v. Good*, 36 N. Y. 408.

⁴⁶ 17 & 18 Vict., c. 125, § 26; 28 & 29 Vict. c. 18, §§ 1, 7; *Steph. Ev.*, arts. 66, 69.

⁴⁷ N. Y. Laws 1883, c. 195; *Gen. Laws R. I.* 1896, c. 244, § 43. Though the common-law rule applies to private writings generally bearing the signature of an attesting witness, it has not been adhered to very strictly in this country in the case of instruments not required by law to be witnessed, even if witnessed in fact. As a result of the recording acts and the provisions as to acknowledgment, the rule has lost some of its importance as to a large class of documents, because of the enactment of statutes either changing the method of proof or permitting instruments executed with certain formalities to be introduced without preliminary proof of execution: *Boswell v. First Nat. Bank*, 16 Wyo. 161, 92 Pac. 624, 93 Pac. 661.

ment of the other party. But it is not necessary that he should have actually seen the party sign, or have been present at the very moment of signing; for if he is called in immediately afterward, and the party acknowledges his signature to the witness, and requests him to attest it, this will be deemed part of the transaction, and therefore a sufficient attestation."⁴⁸ The attestation to a signature by mark⁴⁹ stands on a different footing. To prove the execution of a writing, the signature of the maker must, of course, be proved. Where the maker cannot write his name to the paper, its execution is effected by his setting his mark against his name as written for him, and by the attestation of a witness who can and does write his name. When this is done, the signature of the maker is not merely his name thus written, with his mark set against it, but an essential and inherent part of his signature is the signature of the other person as a witness. It requires all of this to constitute the signature of such illiterate maker, and all of it must be proved before it can be said that the execution of the paper is proved.⁵⁰ If the subscribing witness himself has attested by mark, proof as to the mark has been dispensed with. For, although in some very extraordinary instances the mark of an illiterate person may become so well known as to be susceptible of proof, like handwriting, yet, generally, a mark, a mere cross, cannot be identified, and, therefore, *prima facie*, it stands *per se* upon the same reason with the case in which the party, after due inquiry, has been unable to prove the signature of the person, who, upon the face of the instrument appears

⁴⁸ Greenl. Ev., § 569a; Hollenback v. Fleming, 6 Hill (N. Y.), 303; Cussons v. Skinner, 11 Mees. & W. 168, 12 L. J. Ex. 347. This applies also to signatures by mark: Elston v. Roop, 133 Ala. 331, 32 South. 129.

⁴⁹ See § 546, *post*.

⁵⁰ McClellan, C. J., in Ballow v. Collins, 139 Ala. 543, 36 South. 712;

Hess v. Griggs, 43 Mich. 397, 5 N. W. 427 (he is made a witness to the instrument for the very purpose of having a disinterested person in position to speak of the very facts where the parties concerned might, perhaps, distort or falsify them). See, also, Campbell v. State, 150 Ala. 70, 43 South. 743.

to have written his name as subscribing witness—in which case the instrument may be read upon proof of the handwriting of the party.⁵¹ It is difficult to conceive how an illiterate person can testify to the signature of another person at all. At the same time it may well be that one who is unable to read and write may yet be able to recognize and identify a given paper not only by some distinguishing mark or peculiarity apart from the writing itself, but from the possession of a phenomenal memory which enables him to recollect that which is the signature from having seen it made in much the same way as he could remember a picture or a locality. Such instances would be very rare.

§ 528 (541). Exceptions to the general rule—Absence or disability of witnesses.—By the strict rule of the common law the primary or best evidence to prove the execution of a deed or other private writing having a subscribing witness is generally the testimony of such witness, if available, or, if not, then proof of his handwriting, if that be feasible.⁵² Although the rule under discussion was declared by Lord Ellenborough to be “as fixed, formal and universal as any that can be stated in a court of justice,”⁵³ yet it has several important *qualifications or exceptions*. The rule does not apply if the subscribing witness is dead,⁵⁴ or cannot be found,⁵⁵ or is without the jurisdiction of the

⁵¹ Ruffin, C. J., in *Carrier v. Hampton*, 33 N. C. 307. See, also, *Gilliam v. Perkinson*, 4 Rand. (Va.) 325.

⁵² *Boswell v. First Nat. Bank*, 16 Wyo. 161, 92 Pac. 624, 93 Pac. 661.

⁵³ *Rex v. Harringworth*, 4 Maule & S. 325, 105 Eng. Reprint, 863.

⁵⁴ *Adam v. Kerr*, 1 Bos. & P. 360, 126 Eng. Reprint, 952; *Mott v. Doughty*, 1 Johns. Cas. (N. Y.) 230; *Mardis v. Shackelford*, 4 Ala. 493; *Waldo v. Russell*, 5 Mo. 387; *McGowan v. Laughlan*, 12 La. Ann.

242; *Howard v. Snelling*, 32 Ga. 195; *Fitzhugh v. Croghan*, 2 J. J. Marsh. (Ky.) 429, 19 Am. Dec. 139; *Armstrong v. Den*, 15 N. J. L. 186.

⁵⁵ *Falmouth v. Roberts*, 9 Mees. & W. 469, 11 L. J. Ex. 180; *Parker v. Hoskins*, 2 Taunt. 223, 127 Eng. Reprint, 1062; *Burt v. Walker*, 4 Barn & Ald. 697, 106 Eng. Reprint, 1092; *Clark v. Courtney*, 5 Pet. (U. S.) 319, 8 L. Ed. 140; *Spring v. South Carolina Ins. Co.*, 8 Wheat. (U. S.) 268, 5 L. Ed. 614; *Henry v. Bishop*, 2 Wend. (N. Y.) 575;

court.⁵⁶ If neither the testimony of the attesting witness nor proof of his handwriting be attainable, then it is competent to prove the signature of the grantor or maker of the instrument, and that will be sufficient.⁵⁷ Nor does the rule apply if the subscribing witness is insane,⁵⁸ or incompetent,⁵⁹ or otherwise incapable of being produced as a witness.⁶⁰ Nor does it apply if the instrument is lost, and the name of the subscribing witness is unknown,⁶¹ or

Jackson v. Chamberlain, 8 Wend. (N. Y.) 620; *Clark v. Sanderson*, 3 Binn. (Pa.) 192, 5 Am. Dec. 368; *Gallagher v. London Assurance Corp.* 149 Pa. 25, 24 Atl. 115.

⁵⁶ *Mobile etc. R. Co. v. Hawkins*, 163 Ala. 565, 51 South. 37; *Smith v. Keyser*, 115 Ala. 455, 22 South. 149; *Tatum v. Mohr*, 21 Ark. 349; *McMinn v. Wheelan*, 27 Cal. 300; *Terry v. Broadhurst*, 127 Ga. 212, 56 S. E. 282; *Harris v. Cannon*, 6 Ga. 382; *Skinner v. Fulton*, 39 Ill. 484; *Mariner v. Saunders*, 10 Ill. 113; *State v. Bodly*, 7 Blackf. (Ind.) 355; *Gordon v. Miller*, 1 Ind. 531; *Ballinger v. Davis*, 29 Iowa, 512; *Kremper v. Pryor*, 1 J. J. Marsh. (Ky.) 598; *Carpenter v. Featherston*, 15 La. Ann. 235; *Emery v. Twombly*, 17 Me. 65; *Dorsey v. Smith*, 7 Har. & J. (Md.) 345; *Valentine v. Piper*, 22 Pick. (Mass.) 85, 33 Am. Dec. 715, and note; *Trustees of Smith Charities v. Connolly*, 157 Mass. 272, 31 N. E. 1058; *Troedor v. Hyams*, 153 Mass. 536, 27 N. E. 775; *Clardy v. Richardson*, 24 Mo. 295; *Buchanan v. Wise*, 34 Neb. 695, 52 N. W. 163; *Beattie v. Hilliard*, 55 N. H. 428; *Dunbar v. Marden*, 13 N. H. 311; *Gould v. Kelley*, 16 N. H. 551; *New Jersey Zinc etc. Co. v. Lehigh Zinc etc. Co.*, 59 N. J. L. 189, 35 Atl. 915; *Teall v. Van Wyck*, 10 Barb. (N. Y.) 376; *Edwards v. Sullivan*, 30

N. C. 302; *Selby v. Clark*, 4 Hawks (11 N. C.), 265; *Richards v. Skiff*, 8 Ohio St. 586; *Clark v. Sanderson*, 3 Einn. (Pa.) 192, 5 Am. Dec. 368; *Swancey v. Parrish*, 62 S. C. 240, 40 S. E. 554; *Stump v. Hughes*, 5 Hayw. (Tenn.) 93; *Teal v. Sevier*, 26 Tex. 516; *Lapowski v. Taylor*, 13 Tex. Civ. App. 624, 35 S. W. 934; *Boswell v. First Nat. Bank*, *supra*; *Hanrick v. Patrick*, 119 U. S. 156, 30 L. Ed. 396, 7 Sup. Ct. Rep. 147; *Prince v. Blackburn*, 2 East, 250, 102 Eng. Reprint, 364; *Glubb v. Edwards*, 2 Moody & R. 300.

⁵⁷ *Greenleaf on Ev.*, §§ 569-575.

⁵⁸ *Beunett v. Taylor*, 9 Ves. 381, 32 Eng. Reprint, 649; *Currie v. Child*, 3 Camp. 283; *Neely v. Neely*, 17 Pa. 227. See note to *Garrett v. Hanshue*, 35 L. R. A. 336.

⁵⁹ *Goss v. Tracy*, 1 P. Wms. 289, 24 Eng. Reprint, 392; *Haynes v. Rutter*, 24 Pick. (Mass.) 242; *Packard v. Dunsmore*, 11 Cush. (Mass.) 282; *Hamilton v. Marsden*, 6 Binn. (Pa.) 45; *Keefer v. Zimmerman*, 22 Md. 274; *Robertson v. Allen*, 16 Ala. 106; *Tinnin v. Price*, 31 Miss. 422.

⁶⁰ *Clarke v. Courtney*, 5 Pet. (U. S.) 343, 8 L. Ed. 140; *Steph. Ev.*, art. 66. See note to *Garrett v. Hanshue*, 35 L. R. A. 326 et seq.

⁶¹ *Hewitt v. Morris*, 5 Jones & S. (37 N. Y. Sup. Ct.) 18; *Kelsey v. Hanmer*, 18 Conn. 311; *Porter v. Wilson*, 13 Pa. 641.

if the witness is unable to remember the fact or denies that he was present.⁶² Although it has been held in many cases that secondary evidence is admissible where the subscribing witness is proved to reside beyond the jurisdiction of the court,⁶³ yet the mere temporary absence of the witness beyond the jurisdiction of the court,⁶⁴ or his absence in a distant part of the state, are not sufficient.⁶⁵ The absence of the witness is sufficiently accounted for if, after diligent inquiry, he cannot be found.⁶⁶ As so much depends upon the degree of diligence exhibited, it will be more fully considered in the next section.

§ 529 (542). Diligence necessary, if witness is absent.—What is due diligence must, of course, depend somewhat upon the circumstances of each case. The proof should show satisfactorily that a reasonable, *honest and diligent inquiry* has been made. After such proof is given, the decision of the question depends to a considerable extent upon the sound *discretion of the court*.⁶⁷ As we have

⁶² Dewey v. Dewey, 1 Met. (Mass.) 349, 35 Am. Dec. 367; Whittaker v. Salisbury, 15 Pick. (Mass.) 534; Wynne v. Small, 102 N. C. 133, 8 S. E. 912.

⁶³ See cases cited under note 56, to this section.

⁶⁴ Mills v. Twist, 8 Johns. (N. Y.) 121. But where a witness leaves the state in the exercise of a public duty (as in the case of a member of Congress), all presumption of collusion is repelled, and his handwriting may be proved: Selby v. Clark, 4 Hawks (N. C.), 265.

⁶⁵ McCord v. Johnson, 4 Bibb (Ky.), 531; Tams v. Hitner, 9 Pa. 441; Jackson v. Root, 18 Johns. (N. Y.) 60.

⁶⁶ Clark v. Sanderson, 3 Binn. (Pa.) 192, 5 Am. Dec. 368; Jackson v. Cody, 9 Cow. (N. Y.) 140; Whittemore v. Brooks, 1 Me. 57; Jackson

v. Chamberlain, 8 Wend. (N. Y.) 620.

⁶⁷ Jackson v. Burton, 11 Johns. (N. Y.) 64; Jackson v. Waldron, 13 Wend. (N. Y.) 178; Pelletreau v. Jackson, 11 Wend. (N. Y.) 110; Troeder v. Hyams, 153 Mass. 536, 27 N. E. 775. Cases illustrating what is due diligence: Cunliffe v. Sefton, 2 East, 183, 102 Eng. Reprint, 338; Crosby v. Percy, 1 Taunt. 364, 127 Eng. Reprint, 874; Dudley v. Sumner, 5 Mass. 438; Morgan v. Morgan, 9 Bing. 359, 131 Eng. Reprint, 650; Evans v. Curtis, 2 Car. & P. 296; Spring v. South Carolina Ins. Co., 8 Wheat. (U. S.) 268, 5 L. Ed. 614; Holman v. Bank of Norfolk, 12 Ala. 369 (witness never heard of in locality); Nicks v. Rector, 4 Ark. 251 (four years' absence, unheard of). As to "Evidence Admissible to Show Unsuccessful Search for Wit-

shown in the preceding section, the absence of the witness is sufficiently accounted for if after diligent inquiry he cannot be found. But in such case inquiry should be made in due season⁶⁸ and in good faith at the place of residence of the witness, if known, and of the persons most likely to know of his whereabouts.⁶⁹ The answers to such inquiries are treated as part of the *res gestae*, and may be given in evidence.⁷⁰ It will not be sufficient to prove that the witness has "heard" of the attesting witness' absence from the jurisdiction or that he has "heard" such witness was dead.⁷¹ What is sufficient proof of the search for an absent witness, in order to admit secondary evidence of the signature, depends somewhat upon circumstances. Where the witness has a fixed residence within the county, the rule should be more strict than where the defendant had no known fixed residence, and was a laboring man, working about from place to place, as he could obtain employment.⁷² As regards endeavors to procure the subscribing witnesses, the rule is not to be strained beyond the requirements of convenience. When a party finds names subscribed to the attestation, without a visible ligament of connection with anything in the known world, what is he to do? Certainly not to inquire of everyone in the world. In the investigation of old transactions, the witnesses sometimes seem to have dropped for the occasion from the clouds; sometimes to have vanished entirely from human

ness," see note to *Cuff v. Frazee Storage etc. Co.*, 8 Ann. Cas. 468.

⁶⁸ *Mills v. Twist*, 8 Johns. (N. Y.) 121.

⁶⁹ *Jackson v. Waldron*, 13 Wend. (N. Y.) 178; *Clark v. Sanderson*, 3 Binn. (Pa.) 192, 5 Am. Dec. 368; *Greenl. Ev.*, § 574.

⁷⁰ *Greenl. Ev.*, § 574.

⁷¹ *Delony v. Delony*, 24 Ark. 7. *To Whittemore v. Brooks*, 1 Me. 57, there is a useful little note containing a list of cases of admission of secondary proof in the case of at-

testing witnesses. In an early Pennsylvania case (*Tams v. Hitner*, 9 Pa. 441), where little or no diligence had been used to find a subscribing witness, a witness was tendered who could prove he saw the execution of the document, and it was sought that he be permitted to sign as an attesting witness and then give evidence of the due execution!

⁷² *Gallagher v. London Assur. Corp.*, 149 Pa. 25, 24 Atl. 115.

sight and knowledge; and where no particular avenue to a knowledge of them promises to be more productive than another, it is hard for a party to determine what to do. No judicial tribunal would expect him to stand at the wayside inquiring of everyone who passed.⁷³ Parties will be required to use a less degree of effort to produce the subscribing witness if the proof shows that the witness is seeking to avoid appearing.⁷⁴ If it is shown that there is *collusion* between the witness and the adverse party, or that such party has prevented the attendance of the witness, the rule will not be enforced;⁷⁵ nor is the rule enforced where the one party relies upon the document which is *wrongfully withheld by the other*.⁷⁶ If the absent witness is out of the state, it is not necessary to take his *deposition*, for parties are not bound to send original documents out of the state to be proved by the subscribing witness.⁷⁷ If the document was *executed outside the state*, the presumption is that the subscribing witnesses are non-residents, and the rule does not apply;⁷⁸ and in such cases it is sufficient to prove the handwriting of the party to the instrument.⁷⁹ An attesting witness who is not within the jurisdiction of the court is universally regarded as unavailable, and proof of that fact lets in secondary evidence; and it is equally well settled that, where a document produced at a trial discloses that the execution and attestation occurred out of the jurisdiction, it is to be presumed, at least in the absence of contrary evidence, that the subscribing witness is then out of the

⁷³ *Conrad v. Farrow*, 5 Watts (Pa.), 536. In this case the confession that the defendant had executed a bill of sale in question was received.

⁷⁴ *Wardell v. Fermor*, 2 Camp. 282.

⁷⁵ *Mills v. Twist*, 8 Johns. (N. Y.) 121.

⁷⁶ *Davis v. Spooner*, 3 Pick. (Mass.) 284.

⁷⁷ *Clark v. Houghton*, 12 Gray (Mass.), 38; *Clark v. Boyd*, 2 Ohio, 56.

⁷⁸ *McMinn v. O'Connor*, 27 Cal. 238; *Sherman v. Champlain Transp. Co.*, 31 Vt. 162; *Valentine v. Piper*, 22 Pick. (Mass.) 85, 33 Am. Dec. 715, and note.

⁷⁹ *McMinn v. Whelan*, 27 Cal. 300; *Valentine v. Piper*, 22 Pick. (Mass.) 85, 33 Am. Dec. 715 (witness to a deed executed in foreign country).

jurisdiction.⁸⁰ But if the subscribing witness is in the state and capable of testifying, although very aged and probably incapable of attending the trial, his testimony will not be dispensed with, as he could be examined by an order of court.⁸¹ "An instrument, purporting to be attested by a subscribing witness, may be proved as if there were no subscribing witnesses, where the *name* of a *fictitious* person is inserted as the name of the attesting witness, or where the person who has put his name as attesting witness did so without the knowledge or consent of the parties, or where the attesting *witness*, on being called, *denies* having any *knowledge* of the execution."⁸²

§ 530 (543). Exception where adverse party claims under the document.—Another exception to the general rule is that, where the adverse party claims a beneficial interest under the document in the same cause, and produces it pursuant to a notice, he practically admits the execution of the instrument, and cannot insist upon proof thereof,⁸³ as, for example, where both parties claim the same interest under the same deed.⁸⁴ The mere fact that the document comes from the possession of the adverse

⁸⁰ Boswell v. First Nat. Bank, 16 Wyo. 161, 92 Pac. 624, 93 Pac. 661.

⁸¹ Jackson v. Root, 18 Johns. (N. Y.) 60.

⁸² 2 Phill. Ev. 214; Jackson v. Waldron, 13 Wend. (N. Y.) 178; Pelletreau v. Jackson, 11 Wend. (N. Y.) 110; Clark v. Sanderson, 3 Binn. (Pa.) 192, 5 Am. Dec. 368; Handy v. State, 7 Har. & J. (Md.) 42; Whittemore v. Brooks, 1 Me. 57; Holloway v. Lawrence, 1 Hawks (N. C.), 49; Gilliam v. Perkinson, 4 Rand. (Va.) 325; Farnsworth v. Briggs, 6 N. H. 561; Bennet v. Robinson, 3 Stew. & P. (Ala.) 227. See § 535, *post*.

⁸³ Woodstock Iron Co. v. Reed, 84 Ala. 493, 4 South. 369; Williams v. Keyser, 11 Fla. 234, 89 Am. Dec.

243; Campbell v. Roberts, 66 Ga. 733; Herring v. Rogers, 30 Ga. 615; McGregor v. Wait, 10 Gray (Mass.), 72, 69 Am. Dec. 305; Jackson v. Kingsley, 17 Johns. (N. Y.) 158; Izlar v. Haitley, 24 S. C. 382; Rhoades v. Selin, 4 Wash. C. C. 715, Fed. Cas. No. 11,740; Pearce v. Hooper, 3 Taunt. 60, 128 Eng. Reprint, 25; Carr v. Burdis, 1 Cromp. M. & R. 782, 3 Tyr. 136, 4 L. J. Ex. 60; Bradshaw v. Bennett, 1 Moody & R. 143, 5 Car. & P. 48; Reardon v. Minter, 5 Man. & G. 205, 12 L. J. C. P. 139. See note to Garrett v. Hanshue, 35 L. R. A. 348.

⁸⁴ Greenl. Ev., § 571; Roe v. Wilkins, 4 Ad. & E. 86, 111 Eng. Reprint, 720; Knight v. Martin, 1 Gow. 26.

party, under notice to produce, is not enough to dispense with the rule. It is essential that the one producing the paper should claim a beneficial interest under it.⁸⁵ It has been clearly put in a well-known case⁸⁶ that if a defendant calls on a plaintiff to produce at the trial a deed in his custody, to which the plaintiff is a party, and under which he claims a beneficial estate, it is not necessary that the defendant should call the attesting witness to prove the due execution of the deed, when produced. But this rule does not authorize a party to call for the production of, and to put in, evidence a paper that has of itself no connection with, or relevancy to, the issue, for the sole purpose of laying a foundation to get in evidence, without proof of execution, another paper that is pertinent to the issue. In a Georgia case, a receipt was produced by the plaintiff upon notice, which receipt recited a bond, and the trial court allowed over objection the introduction of the bond in evidence without proof of its execution. The court of appeal properly held this to be error.⁸⁷ If a party admits on cross-examination that a document under which he claims title is in his possession, the instrument may be ordered to be produced, and put in evidence without calling the attesting witnesses.⁸⁸

§ 531 (544). **Exception—Ancient documents.**—We have already dealt with the subject of ancient documents in the chapter on hearsay and with the proper custody from which they should be produced.⁸⁹ We have now to consider them with regard to their exceptional character in the production of documentary evidence. That exception to the general rule requiring the proof of execution of attested instruments by the subscribing witness is that ancient documents, or those thirty years old or more, prove

⁸⁵ *Doe v. Cleveland*, 9 Barn. & C. 864, 109 Eng. Reprint, 321.

⁸⁶ *Pearce v. Hooper*, 3 Taunt. 60, 128 Eng. Reprint, 25.

⁸⁷ *McGee v. Guthry*, 32 Ga. 307.

⁸⁸ *McGregor v. Wait*, 10 Gray (Mass.), 72, 69 Am. Dec. 305. See note to *Garrett v. Hanshue*, 35 L. R. A. 346 et seq.

⁸⁹ §§ 308, 309, *ante*.

themselves.⁹⁰ The obvious difficulty of producing witnesses after so long a period rendered it necessary to fix some limit in cases of this character; and although the exception has often been said to be based upon the presumption of the death of the subscribing witnesses,⁹¹ there are cases in which after thirty years have elapsed, it has been held unnecessary to call the subscribing witnesses, although they were proved to be living,⁹² or even in court.⁹³ This exception to the general rule would, therefore, seem to be based on grounds of *public expediency* or necessity, rather than on the presumption that the witnesses are dead.⁹⁴ There is, however, an important qualification of this exception. If the writing presented for admission as an ancient document appears to have been executed under special authority, which is itself of record, in such case the authority will not be presumed. The best evidence rule must be observed. Where from lapse of time or other cir-

⁹⁰ Doe v. Davies, 10 Q. B. 314, 116 Eng. Reprint, 122; Green v. Chelsea, 24 Pick. (Mass.) 71; Jackson v. Christman, 4 Wend. (N. Y.) 277; Clark v. Owens, 18 N. Y. 434; Rex v. Farrington, 2 Term Rep. 466, 100 Eng. Reprint, 251; Doe v. Wolley, 8 Barn. & C. 22, 108 Eng. Reprint, 951; Chelsea Waterworks v. Cowp, 1 Esp. 275; Rex v. Buckby, 7 East, 45, 103 Eng. Reprint, 18; Winn v. Patterson, 9 Pet. (U. S.) 663, 9 L. Ed. 266; Aldrich v. Griffith, 66 Vt. 390, 29 Atl. 376; Baldwin v. Goodfrank, 88 Tex. 249, 31 S. W. 1064; Davidson v. Morrison, 86 Ky. 397, 9 Am. St. Rep. 295, 5 S. W. 871; Woods v. Montevallo Coal etc. Co., 84 Ala. 560, 5 Am. St. Rep. 393, 3 South. 475; McGuire v. Blount, 199 U. S. 142, 50 L. Ed. 125, 26 Sup. Ct. Rep. 1; Bradley v. Lightcap, 201 Ill. 511, 66 N. E. 546; Ford v. Ford, 27 App. D. C. 401, 6 L. R. A., N. S., 442. See note to Garrett v. Han-shue, 35 L. R. A. 341 et seq. See,

also, cases cited to §§ 308, 309, *ante*, and the late cases: Brannan v. Henry (Ala.), 57 South. 967; De Gentile v. White Castle etc. Co., 130 La. 705, 58 South. 517; Asken v. Cantwell (Tex. Civ. App.), 146 S. W. 720. When the corroborating evidence is strong, the rule has been applied to instruments twenty-five years old: Blackburn v. Norman (Tex. Civ. App.), 30 S. W. 718. This applies also to maps: Whitman v. Shaw, 166 Mass. 451, 44 N. E. 333.

⁹¹ 1 Greenl. Ev., § 570; 1 Selw. N. P. 540, note.

⁹² Marsh v. Collnet, 2 Esp. 665, 5 R. R. 763; Doe v. Burdett, 4 Ad. & E. 1, 111 Eng. Reprint, 687; Doe v. Wolley, 8 Barn. & C. 22, 108 Eng. Reprint, 951; Doe v. Deakin, 3 Car. & P. 402; Jackson v. Christman, 4 Wend. (N. Y.) 277.

⁹³ Marsh v. Collnet, 2 Esp. 666, 5 R. R. 763.

⁹⁴ See cases above cited.

cumstances it appears that a party has it not in his power to produce the evidence, usually required to prove certain facts, such facts may often be legally presumed from other facts and circumstances, the existence of which cannot fairly be accounted for, without such presumption. But this presumption does not legally arise where there is nothing in the case from which to infer that the regular evidence is not in existence, or not accessible to the party intrusted to establish the facts in question. On the contrary, and as has frequently been hereinbefore referred to,^{94a} a failure to produce the best evidence in the power of the party justly creates a suspicion that its effect might not be favorable to him, if produced. Legal presumptions generally apply to facts of a transitory character, the proper evidence of which is not usually preserved with care; but not to records or public documents, in the custody of officers, charged with their preservation and safe-keeping, unless proved to have been lost or destroyed.⁹⁵ Parker, C. J., has expressed himself clearly with regard to instruments executed under powers. "If a power be recorded," said the learned judge, "so that the evidence is perpetuated, there can be no reason for admitting the deed without the power, however ancient it may be, for there is certain proof to be obtained, for which a mere presumption ought not to be substituted. For the presumption is of an authority coextensive with the act, whereas the power may show a limited or particular authority which has been transgressed; and then the case would stand upon a presumption contrary to the fact, which fact it is entirely within the power of the party to prove. The case

^{94a} See vol. 1, "Presumptions."

⁹⁵ First Parish in Brunswick v. McKean, 4 Greenl. (Me.) 508. In Green v. Blake, 10 Me. 16, a deed over thirty years old was offered as an ancient document. It purported to be a deed of sale by virtue of a license from the supreme judicial court of Massachusetts. Mellen, C.

J., said that though the deed was executed forty-three years ago, still, as the alleged license, if ever granted, was a matter of record, accessible to all, the antiquity of the transaction did not furnish a sufficient reason for the nonproduction of a copy of the license.

before us is of a grant from the legislature by a committee. The authority must necessarily have been expressed and defined by a legislative act, which must, of course, be a matter of record, and the presumption is that the record exists, there being no evidence of any search for it in its proper place."⁹⁶ It is also an important qualification of the rule that ancient documents prove themselves that they must on their face be *free from suspicion*,⁹⁷ come from the *proper custody*, and be accompanied by some *corroborating evidence*. If there are erasures or interlineations, or other facts giving rise to suspicion, the ancient document should be proved, like other documents, by the subscribing witnesses, or by proof of their handwriting.⁹⁸ In England, it seems to be sufficient if the document is ancient, comes from proper custody and is otherwise free from suspicion.⁹⁹ But in this country, the clear weight of authority sustains the proposition that there must be some corroborating evidence beyond the mere production of the instrument from the proper custody.¹⁰⁰ This principle is recognized in most of the cases cited to other propositions in the next section.

⁹⁶ Tolman v. Emerson, 4 Pick. (Mass.) 160. See, also, Fowler v. Savage, 3 Conn. 90; Fell v. Young, 63 Ill. 106; French v. McGinnis, 69 Tex. 19, 9 S. W. 323, 10 Tex. Civ. App. 7, 29 S. W. 656. See the late case of Butterfield v. Miller, 195 Fed. 200, 115 C. C. A. 152.

⁹⁷ On "Instrument Insufficient on Face Inadmissible as Ancient Document," see note to O'Neal v. Tennessee Coal etc. R. Co., 1 Ann. Cas. 322.

⁹⁸ 1 Stark. Ev., 6th Am. ed., 330. See, also, the late case of Crosby v. Ardoin (Tex. Civ. App.), 145 S. W. 709.

⁹⁹ Tayl. Ev., 10th ed., § 871; Steph. Ev., art. 88.

¹⁰⁰ Homer v. Cilley, 14 N. H. 85; Bank of Middlebury v. Rutland, 33 Vt. 414; Caruthers v. Eldridge, 12 Gratt. (Va.) 670; Jackson v. Luquere, 5 Cow. (N. Y.) 221; Willson v. Betts, 4 Denio (N. Y.), 201; Clark v. Owens, 18 N. Y. 434; Willson v. Simpson, 80 Tex. 279, 16 S. W. 40; Pridgen v. Green, 80 Ga. 737, 7 S. E. 97. As to *what places* are *proper custody*: Whitman v. Shaw, 166 Mass. 451, 44 N. E. 333; Applegate v. Lexington & C. C. Min. Co., 117 U. S. 255, 29 L. Ed. 892, 6 Sup. Ct. Rep. 742; Templeton v. Luckett, 75 Fed. 254, 21 C. C. A. 325.

§ 532 (545). **Same — Possession of property — Office bonds, etc.**—As may have been reasonably anticipated, *possession of the property claimed to have been conveyed by the instrument is the most usual evidence offered to confirm the instrument in case of the conveyance of property.*¹ It has been intimated in some cases that proof of such possession is indispensable.² But the clear weight of authority sustains the view that proof of possession is not indispensable, and that *other corroborative circumstances* may be sufficient to establish the authenticity of the document, though circumstantial in their character. In other words, an ancient deed, that is, one more than thirty years old, having nothing suspicious about it, is presumed to be genuine, without express proof; and if it is found in the proper custody, and corroborated by evidence of ancient or modern corresponding enjoyment, or by other equivalent or explanatory proof, it is presumed that the deed constituted part of the transfer of property therein mentioned, because this is the usual and ordinary course of such transactions among men.³ A Virginia case, which covers

¹ Roberts v. Stanton, 2 Munf. (Va.) 129, 5 Am. Dec. 463; Carroll v. Norwood, 1 Har. & J. (Md.) 167; Middleton v. Mass, 2 Nott & McC. (S. C.) 55; Waldron v. Tuttle, 4 N. H. 371; McGennis v. Allison, 10 Serg. & R. (Pa.) 197; Tolman v. Emerson, 4 Pick. (Mass.) 160; Bell v. McCawley, 29 Ga. 355; Taylor v. Cox, 2 B. Mon. (Ky.) 429; Stockbridge v. West Stockbridge, 14 Mass. 257; Hewlett v. Cock, 7 Wend. (N. Y.) 371; Havens v. Seashore Land Co., 47 N. J. Eq. 365. See, also, cases cited to § 308, *ante*.

² Jackson v. Blanshan, 3 Johns. (N. Y.) 292, 3 Am. Dec. 485; Jackson v. Laroway, 3 Johns. Cas. (N. Y.) 283 (dissenting opinion of Kent, C.); Clark v. Wood, 34 N. H. 447 (citing early cases in support of the

proposition that it is the accompanying possession alone which establishes the authenticity of an ancient deed).

³ White v. Farris, 124 Ala. 461, 27 South. 259; Reuter v. Stuckart, 181 Ill. 529, 54 N. E. 1014; Whitman v. Heneberry, 73 Ill. 109; Harlan v. Howard, 79 Ky. 373; Burgin v. Chenault, 9 B. Mon. (Ky.) 285; Cunningham v. Davis, 175 Mass. 213, 56 N. E. 2; Long v. McDow, 87 Mo. 197; Havens v. Seashore Land Co., 47 N. J. Eq. 365, 20 Atl. 497; Enders v. Sternbergh, 2 Abb. Dec. (N. Y.) 31, 1 Keyes, 264, 33 How. Pr. 464; Clark v. Owens, 18 N. Y. 434; Sanger v. Merritt, 120 N. Y. 109, 24 N. E. 386; Barr v. Gratz, 4 Wheat. (U. S.) 213, 4 L. Ed. 553; Walker v. Walker, 67 Pa. 185; Thompson v.

the entire ground,⁴ calls for more than passing notice. In that case, a paper dated in 1815 purporting to be a deed, but not legally recorded, was offered and received in evidence. There was no law in force at the era of its date which allowed of its being recorded on the force of an acknowledgment before the chief justice of the supreme court of Pennsylvania. The ground on which the paper was admitted was that of its being an ancient deed. It was contended that the admission was error in that the judge had misconceived the rule regulating the admission of ancient deeds without proof of execution, and that in no case could proof of the execution be properly dispensed with, until it was first shown that thirty years' quiet and continued possession of the land had been held under the deed. Daniel, J., in upholding the admission of the deed, said that the question was one on which there was some conflict of decision, rendering it necessary to review the opposing authorities. Inasmuch as his review is of educational interest, we feel called upon to reproduce it, dealing first with the authorities opposed to the admission and later with those supporting it.

Gilbert, after dealing generally with the rules for the admission of deeds in evidence,^{4a} says: "But to this rule there are several exceptions. First. If the deed be forty years old, that deed may be given in evidence without any proof of the execution of it; for the witnesses cannot be supposed to live above forty years; and forty years is proof sufficient of a presumption; for the age of a man is no more than sixty years, and a man is supposed to be twenty years before he is of age sufficient to understand the nature of right and wrong, and the general forms of contracting; so that [after] forty years the witness must be supposed to be dead;

Brannon, 14 S. C. 542; West v. Houston Oil Co., 56 Tex. Civ. App. 341, 120 S. W. 228; Nowlin v. Burwell, 75 Va. 551; Caruthers v. Eldridge, 12 Gratt. (Va.) 670; Apple-

gate v. Lexington etc. County Min. Co., 117 U. S. 255, 29 L. Ed. 892, 6 Sup. Ct. Rep. 742.

⁴ Caruthers v. Eldridge, *supra*.

^{4a} Gilbert's Evidence, pp. 88, 89.

and since no person living can be supposed to be coeval with such deeds, therefore they may be offered in evidence without proof. But [he proceeds] it had been ruled that if a deed be forty years old and possession hath not gone along with the deed, they ought to give some account of the deed; because the presumption fails that was established in behalf of such deeds, where there is no possession; for it is no more than old parchment if they give no account of its execution." The last paragraph, which is no doubt the one relied on as showing that, according to Gilbert, it is necessary there should be continual possession for thirty years, does not in terms assert such a proposition; and is not, said the learned judge, "susceptible of such a construction. It says, it is true, it had been ruled that possession should go along with the deed; but I do not understand him as saying that the ruling of the court to which he refers requires that it should have continued for the forty years." Again, at the commencement of the same chapter, after saying that the deed must be regularly proved by one witness at least, he (Gilbert) says: "This is now to be understood when the deed is of a late date, for if the deed be of thirty years' standing, which now makes an ancient deed, and the person to whom the deed was made, or those deriving under him, have been in possession under the deed, such ancient deed shall be read without proof, though the witness to it be alive; and this Baron Gilbert declared to be the rule of evidence at *nisi prius*; and if the person to whom the deed was made hath been in possession of the lands contained in the deed, such possession shall be presumed to be under the ancient deed unless the contrary be proved." The passage in Coke which was relied upon in support of the objection is as follows: "And many times juries, together with other matter, are much induced by presumptions; whereof there be three sorts, viz.: violent, probable, and light or temerary. *Violenta presumptio* is many times *plena probatio*: as if one be run through the body with a sword in a house, whereof he instantly dieth,

and a man is seen to come out of that house with a bloody sword, and no other man was at that time in the house. So it is in the case of a charter of feoffment, if all the witnesses to the deed be dead (as no man can keep his witnesses alive, and time weareth out all men), then violent presumption, which stands for proof, is continual and quiet possession." It will be seen, said the learned judge, that Coke is here treating of presumptions, and he cites the presumption founded on possession under an ancient deed as an instance of the *violenta presumptio* or full proof, as he does that also founded on a man's being seen to come from a house in which murder has been committed, with a drawn sword in his hand. He is not engaged in the task of pointing out all the cases in which a deed may be presumed to be genuine without proof of its execution; and it seems to me that it would be just as fair to conclude from this passage that he intended to give the only instance in which a murder might be presumed from circumstances, as that he intended to say that quiet and continual possession furnished the only evidence from which to infer the genuineness of an ancient deed. In Bacon's Abridgment^{4b} the only passage having immediate bearing on the rule under consideration is, "In case of a feoffment if all the witnesses to the deed are dead, then a continual and quiet possession for any length of time will make a strong or violent presumption which stands for proof." It is very obvious that this citation does not sustain the proposition that there must be possession under the deed for thirty years. An English case referred to is quoted in its entirety.^{4c} "Ejectment at last Norwich assizes for the residue of a term of one thousand years granted the 5 Eliz. The lessor of the plaintiff produced the original lease and proved possession in himself, and those under whom he claimed, ever since the 6th Anne, and also showed one mesne assignment in 16 Jac. 1. Sergeant Foster, who tried the case, then

^{4b} Bacon's Abridgment, "Evidence," H., 7th ed., p. 318.

^{4c} Earl v. Baxter, 2 W. Bl. 1228, 96 Eng. Reprint, 723.

thought it incumbent on the plaintiff to prove all the mesne assignments; for want of which, the plaintiff was nonsuited; but he since changed this opinion, and so reported it to the court. The court were clear that the sergeant's opinion was right, and that it should have been left to the jury, with a recommendation to presume all the mesne assignments: And in consequence nonsuit set aside without costs." There is nothing here, said the learned judge, to infer what would have been the fate of the case had there been a failure of proof as to the long continued possession which was shown in the lessor of the plaintiff, and those under whom he claimed. It was conceded by the learned judge that in a New York case⁴⁴ there was a direct ruling in favor of the proposition contended for. In that case possession was proved under the will of a testator from the time of his death, which had occurred some twenty-six years or twenty-seven years before the trial; and though the will bore date more than thirty years back, it was held that some proof of its execution was necessary; it being proved that one of the three subscribing witnesses was yet alive. Kent, Chief Justice, in delivering his opinion, said: "It is not proper to compute the will from its date, but only from the time that possession took place under it. It is the accompanying possession alone which establishes the presumption of authenticity in an ancient deed." And he proceeded to argue that when the possession fails, the presumption must fail also; that the length of the date would not help the deed, for if that were sufficient, a knave would have nothing to do but to forge an ancient deed. And he concluded that as the death of the testator had occurred only twenty-six or twenty-seven years before the commencement of the suit, the will in that case ought to be read in evidence, inasmuch as the time of possession under it fell short of the lowest period which, according to his view of the authorities, had been required to establish an ancient deed. The opinion of this learned judge on any question of

⁴⁴ Jackson v. Blanshan, 3 Johns. (N. Y.), 292, 3 Am. Dec. 485.

law is entitled to much respect; but it is to be observed that the decision in the case never had any force as authority even in New York, inasmuch as it was made by only two judges, a minority of the court. Van Ness, J., concurred with Kent, C. J.; Spencer dissented, and Thompson and Yates did not hear the argument in the cause, and gave no opinion. In another New York case⁴⁶ possession had been enjoyed for more than fifty years under a deed which purported to be made in pursuance of a power of attorney. The court said that an ancient deed, with possession corresponding with it, proved itself; and that a power of attorney, contained in such deed and necessary to give it validity and effect, ought equally to be embraced by the presumption. No intimation of opinion was given by the court that in the absence of such corresponding possession other circumstantial proofs might not be received, on which to predicate the presumption. The like remark will justly apply to a Pennsylvania case.⁴⁷ The possession had been enjoyed under a will for more than thirty years, and the case did not necessarily call for anything more than the application to an ancient will of the rule which had been announced, in the case just above cited, in respect to the ancient deeds. Tilghman, C. J., however, in delivering his opinion, took occasion to approve the doctrine held by Kent, C. J., in *Jackson v. Blanshan*, referred to, and said, that "although the antiquity of the writing affords some evidence in its favor, yet the main ingredient is possession. Both, however, are necessary to raise that presumption which will justify the court in departing from the usual rule which requires the production of the subscribing witnesses, or proof of their handwriting, after accounting for their absence." This opinion, said the learned judge may, perhaps, be fairly regarded as one in favor of the doctrine contended for; "but I do not regard the authority of the case as going further than to affirm that where there has

⁴⁶ *Doe v. Phelps*, 9 Johns. (N. Y.) 169.

⁴⁷ *Shaller v. Brand*, 6 Binn. (Pa.) 435.

been more than thirty years' possession under a paper set up as an ancient will, the genuineness of the paper may be presumed. The case of Carroll v. Norwood, 1 Har. & J. (Md.) 167, 174, may, I think, be fairly considered as deciding that an ancient deed is not evidence without proof of the execution, unless it is found that the possession has gone and been held according to the deed." The last of the cases cited in support of this side of the question are those of Deshazer v. Maitland, and Same v. Same, 12 Leigh, 524. In the first case, which was an action of *quare clausum fregit*, a paper purporting to convey the land in question was dated the 1st of September, 1789. It appears that it had been proven by one of four subscribing witnesses in the county court of Charlotte, in December after its date, and continued for further proof; and that it was found in a bundle of proved deeds in the clerk's office. Maitland proved that he had paid the taxes on the land from 1790 to 1815, both inclusive, and again from 1816 to 1827, both inclusive; but no proof was offered that Maitland or the grantees in the deed under whom he claimed, had ever been in actual possession under the deed. In the second case, which was an action of ejectment, the proofs in respect to the deed were very much the same, with the addition that Maitland, the plaintiff in the action below, proved that he had made diligent inquiry after the subscribing witnesses, and could get no account of them, except that they had all died many years ago, and that he could find no one acquainted with their handwriting. It further appears that neither Downman, the grantor, nor anyone claiming under him, ever set up any claim to the land in opposition to the deed; but it also appears that no one lived on, or was in actual possession of, the land until the defendant in the action Deshazer took possession thereof some four or five years before the commencement of the suit. The circuit court admitted the evidence in each case, and the appellate court reversed both judgments, holding that the deed had been improperly permitted to go to the jury. Judge Allen,

in delivering his opinion, which was concurred in by the other judges, relied mainly on the passages from Coke, Bacon and Gilbert, and the cases from 3 Johnson and 6 Binney, already referred to.

The learned judge then proceeded to examine the authorities maintaining the opposite doctrine. In the case of *The King v. Inhabitants of Farringdon*^{4g} it was held that an allowance of a certificate of a settlement, as having been duly executed, written in the margin of the certificate and signed by two justices, was alone sufficient proof of the certificate where such certificate was thirty years old; notwithstanding the certificate did not certify the affidavit of one of the witnesses to the due execution and attestation of the certificate according to the 3 George II, chapter 29. The certificate had been acted on for more than thirty years. Ashurst, J., said: "The certificate having been granted above thirty years, it is not necessary to substantiate it by the mode of proof prescribed by the act; for it having been recognized and acted under for so long a period, it was not necessary to have recourse to the act at all. Therefore, on the ground of the length of time which had elapsed since the certificate was granted, I think it is binding." Buller and Gross, JJ., however, made no reference to the fact that the certificate had been acted upon, but expressed the opinion, without any such qualification, that the certificate might be read under "the established rule which holds in the case of every deed, that if it be above thirty years' standing, it proves itself." In the case of *The King v. Inhabitants of Ryton*^{4h} the same doctrine was held in respect to a certificate, more than thirty years old. So a will more than thirty years old was allowed to be read in evidence, although the testator had died within thirty years, and some of the subscribing witnesses were proved to be still living. And in another case a will more than thirty years old was

^{4g} *Rex v. Inhabitants of Farringdon*, 2 Term Rep. 466, 100 Eng. Reprint, 251.

^{4h} *Rex v. Inhabitants of Ryton*, 5 Term Rep. 259, 101 Eng. Reprint, 146.

received without any proof of possession under it.⁴ⁱ In 7 Comyn's Digest, 429, *Testmoignes*, b. 2, it is said that "an ancient deed dated forty years past shall be read without further proof." So Roscoe, in his Treatise on Evidence, 14, Presumptive Evidence, announces the doctrine "that a deed thirty years old or upwards is presumed to have been duly executed, provided some account be given of the deed, where found," etc. Best lays it down as an established rule "that deeds, wills and other attested documents, which are more than thirty years old, and are produced from an unsuspected repository, prove themselves, and the testimony of the subscribing witnesses may be dispensed with; although it is of course competent to the opposite party to call them to disprove the regularity of their execution."^{4j} Phillips, in stating the exceptions to the general rule in respect to proof of writings, says: "It is a rule that if an instrument is thirty years old, it may be admitted in evidence without any proof of its execution; such an instrument is said to prove itself. The danger arising from such a relaxation of general principles is, in some measure, diminished by the operation of the rule which requires documents to be produced from their proper place of custody; and in many instances the circumstances of the instruments having been acted upon, and of the enjoyment of property being consistent with and referable to it or otherwise, affords a criterion of its genuineness. The exception applies generally to deeds concerning lands, etc., and all other ancient writing; and the execution or writing of them need not be proved, provided they have been so acted upon, or brought from such a place as to afford a reasonable presumption that they were honestly and fairly obtained and preserved for use, and are free from suspicion of dishonesty."^{4k} Mathews says: "The general probability of the due execution of instruments which were meant to have a legal operation is by many degrees in-

⁴ⁱ Oldham v. Wolley, 15 Eng. Com. L. 150; Doe v. Passingham, 12 Eng. Com. L. 209.

^{4j} Best, Presumptions, 65.
^{4k} 2 Phill. Ev. 203.

creased by lapse of time; which, as it affords opportunity to those whose interest it was to dispute their efficiency, shows at once the acquiescence of such persons, and also a conviction on their part that all proper steps were taken to render the assurance in question valid. On this principle, supported by a consideration of the difficulty if not the impossibility of obtaining living testimony, deeds of thirty years' standing, by a very ancient rule of law, are admitted in evidence without proof of their execution. And when the witnesses are dead, deeds of even a less age, provided the enjoyment of the property to which they relate has corresponded with the limitations, are received as genuine and authentic."⁴¹ Starkie says: "Presumptions are frequently founded upon, or at least confirmed by, ancient deeds, muniments found in their proper, legitimate repositories, although, from lapse of time, no direct evidence can be given of their execution, or of their having been acted upon. It seems, however, that in order to the reception of such evidence, or at least to warrant a court in giving any weight to it, a foundation should be first laid for its admission, by proof of acts, possession or enjoyment, of which the document may be considered explanatory. So it has been said that in the case of a charter of feoffment, if all the witnesses to the deed are dead, then a continual and quiet possession for any length of time will make a strong or violent presumption, which stands for proof."^{4m}

Having thus reviewed the cases, including *Jackson v. Laroway*, which we discuss later, the learned judge lays down the modern rule: "When the deed is of recent date, the party who offers it in evidence is required to produce the witnesses to its execution, if any, or proof of their handwriting, in case they are dead; and if there be no subscribing witnesses, he must prove the handwriting of the maker. But when the deed is of an ancient date, the production of such proof is no longer in the power, or is supposed to be no longer in the power, of the party. A resort

⁴¹ Matthews, Pres. Ev. 270.

^{4m} 1 Starkie, Ev. 65.

to presumptive proof is then allowed. What is there in the nature of the inquiry which renders it proper to declare that a corresponding possession shall be the only sufficient evidence of the fact to be presumed, viz., the genuineness of the deed? A presumption may be the result of a single circumstance or of many circumstances. Why say that, in the case of an ancient deed, there must be a departure from the general rule in respect to presumptions, and that its authenticity may be presumed from the single circumstance of possession, but may not be presumed from other circumstances, the existence of which is equally inconsistent with any other hypothesis than that of the genuineness of the instrument? The direct evidences, the positive proofs by which the execution of the deed is established, being no longer attainable, and the rule, which requires their production, being dispensed with, it seems to me wholly at war with the spirit of the law, which, under such exigency, allows a resort to circumstantial or presumptive evidence, to hold that a corresponding possession shall be the only evidence from which the authenticity of the deed may be presumed. Such possession does, indeed, furnish a violent presumption, but if in its absence there are other evidences (not intrinsically objectionable) equally capable of producing the same degree of belief, I cannot see the good to be attained, or the evil to be avoided, by rejecting them.”⁵ In such cases the courts are less strict in admit-

⁵ The extract above quoted is preceded by the following useful references: “I have come to the conclusion that the authorities do not furnish satisfactory evidence of the existence here or in England of any well-established rule, which, in the absence of proof of execution, makes a continual possession for thirty years, under an ancient deed, the sole sufficient test of its authenticity. And when I look to the foundations on which the rule is supposed to rest, I must confess my in-

ability to discover that solid and substantial reasoning on which it might be expected that a rule, of such vast importance in its consequences, would be placed. On the other hand, a rule which would allow the paper to prove itself, or which, in other words, would declare the antiquity of its date alone a sufficient proof of its genuineness, is justly obnoxious to the objection of Judge Kent, that ‘then a knave would have nothing to do but to forge a deed with a very ancient

ting proofs of the handwriting of witnesses than in respect to instruments of recent date.⁶ It is not necessary to prove a corresponding possession of every portion of the premises claimed to be conveyed. A *possession of a part* under the deed affords evidence of its authenticity of as high a character as though that possession extended to the whole.⁷ It

date.' Such objection is, however, wholly without weight when urged against the adoption of the general rule announced in *Jackson v. Laroway*." The dissenting opinion of Kent, J., in that case contains the following valuable reference to the text: "No authority authorizes the admission of such a writing. There are several loose *dicta* to be found, that an *ancient* deed proves itself; and these *dicta* are silent as to the circumstances that possession must have accompanied it. But whenever we can discover the facts in the cause, in which these sayings arose, we perceive that possession was an ingredient in the case. There is no case which lays down the rule, in positive terms, that an ancient deed is admissible, without proof, and without possession having gone with it; but there are several cases which directly state the rule of evidence to be, that a deed is not admissible, as an ancient deed, without possession, and without proof of its execution." The learned judge then cites Gilbert, Peake, Fleta and other old authorities in support of his dissent. The rule as laid down in *Jackson v. Laroway* is that a deed appearing to be of the age of thirty years may be given in evidence, without proof of its execution, if the possession be shown to have accompanied it, if such account be given of the deed, as may be reasonably expected under all of the circumstances of the case, and will afford

the presumption that it is genuine. This rule is founded on the necessity of admitting other proof, as a substitute for the production of witnesses who cannot be supposed any longer to exist. A correspondent possession is always high evidence in support of such a deed; but where no such possession appears, other circumstances are admitted to account for it, and raise a legal presumption in its favor. This case has received the sanction of several subsequent adjudications, and has been both recognized and acted upon by the supreme court of the United States. See, also, note to *Jackson v. Laroway*, *supra*, and notes to 1 Phill. Ev., p. 1310 et seq., note 903.

⁶ *Coulson v. Walton*, 9 Pet. (U. S.) 62, 9 L. Ed. 51; *Edmondston v. Hughes*, Cheves (S. C.), 81; *Stump v. Hughes*, 5 Hayw. (Tenn.) 93.

⁷ *Jackson v. Davis*, 5 Cow. (N. Y.) 123, 15 Am. Dec. 451; *Jackson v. Luquere*, 5 Cow. (N. Y.) 221; *Townsend v. Downer*, 32 Vt. 183. So the payment of taxes is *prima facie* evidence of possession: *Williams v. Hillegas*, 5 Pa. 492; *White v. Farris*, 124 Ala. 461, 27 South. 259. It is difficult to lay down a general rule as to the character of proof necessary to be given; but where the deed comes from the proper custody, and the facts and circumstances are proven to the court, from which it may reasonably be inferred that the deed has had an existence for over thirty years, such ought to be suffi-

has generally been held that where possession is the only corroborative fact supporting the ancient deed, such possession must be shown for the *period of thirty years*.⁸ But Wharton holds that "proof of contemporaneous possession is unnecessary, though without such proof the deeds may be entitled to little or no weight."⁹ The presumptions in favor of an ancient deed are greatly weakened, if not rebutted, by proof that the grantor, soon after its date, conveyed the premises to another person.¹⁰ Another exception has been recognized in the case of *office bonds*. Like those of executors, guardians and similar persons, such bonds are generally deposited in a public office. They are for the benefit of various persons who may be interested, and are not generally delivered until they have the approval of some public officer. These facts have been deemed a sufficient guaranty of the authenticity of bonds of this character to dispense with the evidence of the subscribing witness.¹¹ It has also been held that where an instrument in writing is *collaterally or incidentally intro-*

cient, where it is entirely free from any just ground of suspicion. Indorsements or memoranda upon a deed or ancient paper have been considered as circumstances indicating that they are genuine, where such indorsements or memoranda are of such a character as to show to a cautious mind that they would not be there had the paper been a forgery. In addition to this, if it be established that the deed has been of record for over thirty years, such ought to be a strong fact in its favor, although it may not have been recorded in the place required by law: *Whitman v. Heneberry*, 73 Ill. 109; *Bucklen v. Hasterlik*, 51 Ill. App. 132.

⁸ *Jackson v. Luquere*, 5 Cow. (N. Y.) 221, *Jackson v. Blanshan*, 3 Johns. (N. Y.) 292, 3 Am. Dec. 485. But the possession may be that of

successive holders: *Waldron v. Tuttle*, 4 N. H. 371; *Williams v. Conger*, 125 U. S. 397, 31 L. Ed. 778, 8 Sup. Ct. Rep. 933. See, also, *Wagner v. Aiton, Rice* (S. C.), 100.

⁹ Whart. Ev., § 733. Where there was evidence of contemporaneous official acts which satisfied the court that the instruments were genuine, proof of possession was dispensed with, the court saying that proof of possession, which some of the authorities indicate should be required as a condition to the admission of ancient records and documents, without further proof, was required solely to fortify and give credit to the instruments when offered in evidence: *Hodge v. Palms*, 117 Fed. 396, 54 C. C. A. 570.

¹⁰ *Willson v. Betts*, 4 Denio (N. Y.), 201.

¹¹ *Greenl. Ev.*, § 573.

duced in proceedings between persons not parties to it, or when it is not offered as part of a chain of title, it is not necessary to call the subscribing witnesses.¹²

§ 533 (546). Best evidence after nonproduction of subscribing witnesses.—We have now to consider what evidence must be called for where the subscribing witnesses to a document cannot for good and sufficient reason be produced. We must first premise, however, that if there are several subscribing witnesses, it is sufficient to produce one who has the requisite knowledge.¹³ If there are several witnesses, the absence or nonproduction of all of them must be accounted for before secondary evidence of handwriting can be received.¹⁴ In a Massachusetts case, a writ of entry to foreclose a mortgage, the objection was

¹² Greenl. Ev., § 724; Steiner v. Trantum, 98 Ala. 315, 13 South. 365; Smith v. Soper, 12 Colo. App. 264, 55 Pac. 195; Prescott v. Fletcher, 133 Ga. 404, 65 S. E. 877; Brashear v. Burton, 4 Bibb (Ky.), 442; Ayers v. Hewett, 19 Me. 281; Skinner v. Brigham, 126 Mass. 132; Commonwealth v. Castles, 9 Gray (Mass.), 121, 69 Am. Dec. 278; Heege v. Fruin, 18 Mo. App. 139; Rand v. Dodge, 17 N. H. 343; Leaverling v. Smith, 115 N. C. 385, 20 S. E. 446; Kitchen v. Smith, 101 Pa. 452; Bilger v. Buchanan (Tex. Sup.), 6 S. W. 408; Curtis v. Belknap, 21 Vt. 433; Citizens' Bank v. Nantucket Steamboat Co., 5 Fed. Cas. No. 2730, 2 Story, 16. Some of the older New York cases do not adopt this modification, but insist on the rigidity of the rule even where the document is collaterally introduced: Jackson v. Christman, 4 Wend. (N. Y.) 277; Jackson v. Sackett, 7 Wend. (N. Y.) 94.

¹³ O'Sullivan v. Overton, 56 Conn. 102, 14 Atl. 300; Cooper v. O'Brien, 98 Ga. 773, 26 S. E. 470; Jackson v.

Sheldon, 22 Me. 569; Gelott v. Goodspeed, 8 Cush. (Mass.) 411; Burke v. Miller, 7 Cush. (Mass.) 547; Melcher v. Flanders, 40 N. H. 139; Jackson v. Le Grange, 19 Johns. (N. Y.) 386, 10 Am. Dec. 237; Jackson v. Gager, 5 Cow. (N. Y.) 383; Burnett v. Thompson, 13 Ired. (N. C.) 379; McAdams v. Stilwell, 13 Pa. 90; Allen v. Hoxey, 37 Tex. 320; Hempbill v. Dixon, Hempst. 235, Fed. Cas. No. 6346a; Andrew v. Motley, 12 Com. B., N. S., 526; Adam v. Kerr, 1 Bos. & P. 360, 126 Eng. Reprint, 952; Belbin v. Skeats, 1 Swab. & T. 148, 27 L. J. P. 56.

¹⁴ Jackson v. Gager, 5 Cow. (N. Y.) 383; Davison v. Bloomer, 1 Dall. (Pa.) 123; Jackson v. Cody, 9 Cow. (N. Y.) 140; Jackson v. Root, 18 Johns. (N. Y.) 60; Hantz v. Rough, 2 Serg. & R. (Pa.) 349; Whittemore v. Brooks, 1 Me. 57; Shepherd v. Goss, 1 Tenn. 487; McPherson v. Rathbone, 11 Wend. (N. Y.) 96; Jackson v. Waldron, 13 Wend. (N. Y.) 178; Howard v. Russell, 104 Ga. 230, 30 S. E. 802.

taken that the demandant was allowed to read his mortgage in evidence to the jury, after having proved its execution by one of the subscribing witnesses, without having called the other attesting witness or shown any cause for omitting so to do. "We do not understand," said Bigelow, J., "that there is any inflexible rule of law, which requires that both of the subscribing witnesses to an instrument should be called and examined, in order to make legal proof of its execution. Ordinarily, it is sufficient if one is called and testifies to the due execution of the paper. Undoubtedly, there may be cases where, on account of the failure of the recollection of one of the subscribing witnesses, or the appearance of fraud or forgery in the execution of the instrument, the court, in the exercise of its discretion, may hold the party to produce both the witnesses, or give satisfactory reasons for the absence of one of them; but whether this shall be done or not depends on the circumstances of each particular case, and must be decided by the judge at the trial, in the exercise of a sound discretion, to which no exception can be taken. But in the present case, there can be no ground for complaint by the tenant, on this point, because the other subscribing witness was called by the demandant during the trial for another purpose, and thus opportunity was given to the tenant to cross-examine him in regard to all the facts and circumstances bearing on the execution of the deed."¹⁵ As to what constitutes the best evidence after the nonproduction of subscribing witnesses has been accounted for, there has been considerable conflict of opinion. One of the views entertained may be thus expressed in the language of Judge Story: "Where the subscribing witness is dead or cannot be found, or is without the jurisdiction, or is otherwise incapable of being produced, the *next best secondary evidence* is the *proof of his handwriting*; and that, when proved, affords *prima facie* evidence of a due execution of the instrument, for it is presumed that he would not subscribe his name to a false

¹⁵ *Burke v. Miller, supra.*

attestation. If upon due search and inquiry no one can be found who can prove his handwriting, there is no doubt that resort may then be had to proof of the *handwriting of the party* who executed the instrument; indeed, such proof may always be produced as corroborative evidence of its due and valid execution, though it is not, except under the limitations above suggested, primary evidence."¹⁶ Another eminent judge thus expressed the same view: "The plaintiff did not propose to read the instrument as an ancient deed; but attempted to show it genuine by one of the usual modes of proving a deed. But there was a great departure from the proper order of proof. Evidence was given of the handwriting of the grantor, before any account whatever had been given of the subscribing witnesses. In proving deeds, the proper course is first to call the subscribing witness; if he cannot be had, you may then prove his handwriting as the next best evidence. When it appears that that cannot be done, and not before, proof may be given of the handwriting of the grantor."¹⁷ While lapse of time would authorize the presumption that the witnesses to the deed in the case referred to were dead, it may be doubted whether it would warrant the further presumption that their handwriting could not be proved. A fact of that kind may be proved many years after the writer is dead. In the case referred to a witness swore to the handwriting of a grantor who had neither seen the man nor his writing in more than sixty years, and the grantor had been dead nearly fifty years.

¹⁶ Clarke v. Courtney, 5 Pet. (U. S.) 319, 8 L. Ed. 140.

¹⁷ Bronson, C. J., in Willson v. Betts, 4 Denio (N. Y.), 201. See, also, Wilson v. Royston, 2 Ark. 315; Boyer v. Norris, 1 Harr. (Del.) 22; Bowser v. Warren, 4 Blackf. (Ind.) 522; Yocum v. Barnes, 8 B. Mon. (Ky.) 496; Jones v. Roberts, 65 Me. 273; Whittemore v. Brooks, 1 Me. 57; Homer v. Wallis, 11 Mass. 309, 6 Am. Dec. 169; Gould v. Kelley, 16

N. H. 551; Farnsworth v. Briggs, 6 N. H. 561; Jackson v. Waldron, 13 Wend. (N. Y.) 178; Pelletreau v. Jackson, 11 Wend. (N. Y.) 110; Jones v. Blount, 2 N. C. 238; Holloway v. Laurence, 1 Hawks (N. C.), 49; North Penn. Iron Co. v. International Lithoid Co., 217 Pa. 538, 66 Atl. 860; Raines v. Philips, 1 Leigh (Va.), 483; Stebbins v. Duncan, 108 U. S. 32, 27 L. Ed. 641, 2 Sup. Ct. Rep. 313.

§ 534 (547). Same—Variations in order of proof—**Rebuttal of suspicious circumstances.**—Sir James Stephen thus states the English rule: “If a document is attested, it may not be used as evidence (except in the cases mentioned or referred to in the next article) if there be an attesting witness alive, sane, and subject to the process of the court, until one attesting witness at least has been called for the purpose of proving its execution. If it be shown that no attesting witness is alive or can be found, it must be proved that the attestation of one attesting witness at least is in his handwriting, and that the signature of the person executing the document is in the handwriting of that person. The rule extends to cases in which the document has been burnt or canceled; the subscribing witness is blind; the person by whom the document was executed is prepared to testify to his own execution of it; the person seeking to prove the document is prepared to prove an admission of its execution by the person who executed it, even if he is a party to the cause, unless such admission be made for the purpose of, or has reference to the cause.”¹⁸ In a note to this section the learned author says that this is probably the most ancient, and is, as far as it extends, the most inflexible, of all the rules of evidence. The following characteristic observations by Lord Ellenborough are cited by him: “The rule, therefore, is universal that you must first call the subscribing witness, and it is not to be varied in each particular case by trying whether, in its application, it may not be productive of some inconvenience, for then there would be no such thing as a general rule. *A lawyer who is well stored with these rules would be no better than any other man that is without them*, if by mere force of speculative reasoning it might be shown that the application of such and such a rule would be productive of such and such an inconvenience, and therefore ought not to prevail; but if any general rule ought to prevail, this is certainly one that is as fixed, formal and universal as any that can be stated in a court of justice.”^{18a} In another

¹⁸ Steph. Ev., art. 66.

^{18a} Rex v. Harringworth, 4 M. & S. 350, 105 Eng. Reprint, 863.

case, Pollock, C. B., said: "The parties are supposed to have agreed *inter se* that the deed shall not be given in evidence without his [the attesting witness] being called to depose to the circumstances attending its execution."^{18b} "In very ancient times," concludes the note, "when the jury were witnesses as to matter of fact, the attesting witnesses to deeds (if a deed came in question) would seem to have been summoned with, and to have acted as a sort of assessors to, the jury."^{18c} But the rule prevails in some jurisdictions in the United States that the *secondary evidence* may consist of proof of the *handwriting of the party*; and that such evidence is of as high order as that of the handwriting of the witness.¹⁹ In one of the cases last cited the court expressed the view that evidence of the handwriting of the party is the more satisfactory.²⁰ But in most jurisdictions it is conceded that evidence of the handwriting of the witness is sufficient;²¹ and that where there were several witnesses, proof of the handwriting of one is sufficient.²² In some states statutes

^{18b} Whyman v. Garth, 8 Ex. 807.

^{18c} See as to this, Bracton, fol. 38a; Fortescue *de Laudibus*, c. 32, with Selden's note, and cases collected from the year books in Broke's Abridgment, tit. "*Testmoignes*." See, also, American case cited to the article and note in Reynolds' Steph. on Ev., p. 104.

¹⁹ Snider v. Burks, 84 Ala. 53, 4 South. 225; Cox v. Davis, 17 Ala. 714, 52 Am. Dec. 199; McMinn v. Whelan, 27 Cal. 300; Landers v. Bolton, 26 Cal. 393; Yocum v. Barnes, 8 B. Mon. (Ky.) 496; Jones v. Roberts, 65 Me. 273; Trustees of Smith Charities v. Connolly, 157 Mass. 272, 31 N. E. 1058; Homer v. Wallis, 11 Mass. 309, 6 Am. Dec. 169; McPherson v. Rathbone, 11 Wend. (N. Y.) 96; Valentine v. Piper, 22 Pick. (Mass.) 85, 33 Am. Dec. 715; Clark v. Boyd, 2 Ohio, 56; Clark v. Sanderson, 3 Binn. (Pa.) 192, 5 Am. Dec. 368; Brown v. Edgar, 4 McCord (S.

C.), 91; Chator v. Brunswick-Balke-Collender Co., 71 Tex. 588, 10 S. W. 250; Leonard v. Neale, 1 Cranch C. C. 493, Fed. Cas. No. 8259.

²⁰ Valentine v. Piper, 22 Pick. (Mass.) 85, 33 Am. Dec. 715.

²¹ Mobile etc. R. Co. v. Hawkins, 163 Ala. 565, 51 South. 37; Groover v. Coffee, 19 Fla. 61; State v. Bodly, 7 Blackf. (Ind.) 355; McMurtry v. Frank, 2 T. B. Mon. (Ky.) 113; Dorsey v. Smith, 7 Har. & J. (Md.) 345; Little v. Chauvin, 1 Mo. 626; Glover v. Armstrong, 15 N. J. L. 186; Borst v. Empie, 5 N. Y. 33; Angier v. Howard, 94 N. C. 27; Kelly v. Dunlap, 3 Penr. & W. (Pa.) 136; Merck v. Merck, 89 S. C. 347, Ann. Cas. 1913A, 937, 71 S. E. 969; Garrison v. Owens, 1 Pinn. (Wis.) 544; Boswell v. First Nat. Bank, 16 Wyo. 161, 92 Pac. 624, 93 Pac. 661.

²² Fitzhugh v. Croghan, 2 J. J. Marsh. (Ky.) 429, 19 Am. Dec. 139;

regulate this subject not only as to wills but other documents. If there are any *suspicious circumstances* attending the instrument, it may be necessary to take the precaution to rebut them by proving in addition the identity of the person executing the instrument or his handwriting.²³ But ordinarily the identity of the maker will be assumed from the identity of name.²⁴ Proof of the handwriting of the party in addition to that of the witness is, of course, admissible in corroboration, and this is necessary if the handwriting of the witness is not fully proved, or where he has signed by the use of a mark.²⁵ In New York, where it is held that the handwriting of the absent witness must be shown in preference to that of the party, if possible, it was held that "the same diligence should be exacted in endeavoring to prove the handwriting, that is required in the endeavor to find and procure the personal attendance of the witness, at least, before the third degree of evidence is admitted, to wit: the handwriting of the party."²⁶ The following forms an excellent epitome of the various propositions dealt with. Where there is no witness to the deed, or if there is, and he denies having any knowledge of the execution; or the name of a subscribing witness is fictitious; or the witness is interested, or of an infamous character; or if dead, or out of the jurisdiction of the court, and after diligent inquiry, no proof of his handwriting can be made; or if, upon like inquiry, nothing can be heard of the subscribing witness, so that he can neither be produced, nor his handwriting proved,—in all these cases the execution of the deed may be proved by proving the handwriting of the party, or by his admission that he executed it. And

Gelott v. Goodspeed, 8 Cush. (Mass.) 411; Davis v. Higgins, 91 N. C. 382; Mapes v. Leal, 27 Tex. 345; Stebbins v. Duncan, 108 U. S. 32, 27 L. Ed. 641, 2 Sup. Ct. Rep. 313.

²³ Brown v. Kimball, 25 Wend. (N. Y.) 259, and cases cited.

²⁴ Atchison v. McCulloch, 5 Watts (Pa.), 13; Jackson v. Goes, 13 Johns. (N. Y.) 518, 7 Am. Dec. 399; Jack-

son v. Cody, 9 Cow. (N. Y.) 140; Jackson v. King, 5 Cow. (N. Y.) 237, 15 Am. Dec. 468. See § 100, *ante*.

²⁵ Nelius v. Brickell, 1 Hayw. (N. C.) 19; Gilham v. Perkinson, 4 Rand. (Va.) 325.

²⁶ Pelletreau v. Jackson, 11 Wend. (N. Y.) 110; McPherson v. Rathbone, 11 Wend. (N. Y.) 96.

all these qualifications of the general principle as to the proof of the execution of instruments with subscribing witnesses are in strict observance of another rule of evidence, namely, that the best of which the nature and state of the case will admit must be produced.²⁷ "There was in this case," said the court in the case last cited, "sufficient diligence shown in the inquiry after the subscribing witness to let in the secondary evidence, that is, proof of her handwriting; but it fell short of what the court should have required, in order to justify an entire disregard of the fact that there was a subscribing witness to the instrument, in the proof of the execution of it. The same diligence should be exacted in endeavoring to prove the handwriting that is required in the endeavor to find and procure the personal attendance of the witness, at least before the third degree of evidence is admitted, to wit, the handwriting of the party. In both these cases it should be satisfactorily proved that a reasonable, honest and diligent inquiry has been made, without any evasion or design to overlook the witness, or the means of proving his handwriting. . . . The rule is already sufficiently relaxed, and it is within the power of parties strictly and faithfully to comply with it in all cases. If there are more subscribing witnesses to a deed than one, the court may sometimes indulge in a latitude of discretion in relation to one, which they would not be justified in doing, if that one was the only witness."

§ 535 (548). Same—Substitutes for proof of handwriting—Presumption from proof of handwriting not conclusive.—There are still other ways of dealing with the difficulties of proof of attested documents. When the proper foundation has been laid, by proof that the subscribing witness cannot be produced or his handwriting shown, the execution of the instrument may be proved, not only by evidence of the handwriting of the maker, but by evidence of his express *admissions*,²⁸ or of his acknowledgment,

²⁷ Pelletreau v. Jackson, *supra*;
1 Phill. Ev. 363.

²⁸ Pelletreau v. Jackson, 11 Wend.
(N. Y.) 110; Conrad v. Farrow, 5

acquiescence or other *recognition of the validity* of the instrument.²⁹ The document is then on the plane of an unattested instrument, and the acknowledgment of the instrument as his own is, of course, a binding admission. This has been already treated in a previous section.³⁰ As we have shown, when the proper basis has been laid, the proof of the handwriting of the subscribing witness to an attested document is the next best evidence. In some of the cases this has been expressed that the proof of the *handwriting of a subscribing witness* is, in general, *prima facie* evidence of the execution of the instrument by the apparent maker, as it is presumed that the witness would not have attested the instrument, but for its due execution.³¹ The same is true when evidence is admissible as

Watts (Pa.), 536; *Holloway v. Lawrence*, 1 Hawks (N. C.), 49. See § 526, *ante*.

²⁹ *Hill v. Scales*, 7 Yerg. (Tenn.) 410. In this case there was a strong impression that the bond was not even signed by the person charged. The trial judge told the jury the "defendant may be proved to have executed this bond by implication." In this sentence the judge meant that, though there be no positive evidence that a party executed a bond, such as the evidence of subscribing witnesses, or proof of his handwriting, yet, as it is not essential that he should write his own name to a bond in order to make it his, if facts were proved amounting to an acknowledgment on the part of defendant that it was his bond, the jury might infer that it was executed by him. In the case put by the judge, at the conclusion of which he told the jury that such facts "would be evidence proper for their consideration that it is his bond," his meaning in the use of the expressions objected to is plainly developed. "We think," said the court, "the law was correctly stated,

and that the plaintiff in error spoke and acted in a way that amounted to an acknowledgment that it was his bond, and that it was fairly inferable that it was executed by him. Although he did not sign it, yet, if his name was put there by his direction, and he acknowledged it as his act and deed it would be his bond."

³⁰ § 526, *ante*. Where the witness to a lease, when she affixed her name to it, and also at the time of the trial, was incompetent to testify to its execution, proof of the party's handwriting was admissible, as if there had been no attesting witness: *Packard v. Dunsmore*, 11 Cush. (Mass.) 282; *Nelius v. Brickell*, 1 Hayw. (N. C.) 19.

³¹ *Sigfried v. Levan*, 6 Serg. & R. (Pa.) 308, 9 Am. Dec. 427; *Pelletreau v. Jackson*, 11 Wend. (N. Y.) 110; *Ingram v. Hall*, 1 Hayw. (N. C.) 193; *Jackson v. Waldron*, 13 Wend. (N. Y.) 178; *Carroll v. Norwood*, 1 Har. & J. (Md.) 167; *Ross v. Gould*, 5 Me. 204; *Farnsworth v. Briggs*, 6 N. H. 561; *Clarke v. Courtney*, 5 Pet. 319, 8 L. Ed. 144; *Winn v. Patterson*, 9 Pet. 674, 9 L. Ed. 266.

to the handwriting of the maker.³² Thus in a New Hampshire case,³³ where proof of the handwriting of a subscribing witness was held by Richardson, C. J., sufficient, Parker, J., in a concurring opinion said: "It is well known that, in point of fact, there is often no agreement of the parties who shall subscribe. Anyone present, or who is requested by either party, witnesses the instrument. Nor is he *called* as a witness to prove the circumstances which took place, or 'facts which are probably unknown to others' further than the fact of execution. He may be examined as to any such facts and circumstances by either party if he has knowledge of any, but he is called to prove the execution of the instrument. That is the matter to be proved, and if his testimony establishes this, it admits the instrument in evidence, if he has no knowledge of any other facts or circumstances. As he must or ought to have seen the party sign, or at least have heard him acknowledge his signature, and as he may have knowledge of attendant circumstances, his is the best evidence, and of course to be produced if to be had. If not to be had, the law allows a resort to the next best evidence. Next best evidence of what? Of course, of that matter to which the subscribing witness must have been called to testify, if his evidence could have been procured—that is the execution of the instrument by the party. The material evidence which the subscribing witness must have given, if examined, would have been, not merely that he signed as a witness, but that the party executed the instrument. The secondary evidence should be to the same point. The position that the signature of an attesting witness, when proved, is evidence of everything upon the face of the instrument is a fallacy, for instances have occurred where signatures have been put as signatures of subscribing witnesses, without such knowledge on the part of the individuals, so subscribing, as would establish the signature of the party. If the sub-

³² Sigfried v. Levan, 6 Serg. & R. (Pa.) 308, 9 Am. Dec. 427.

³³ Farnsworth v. Briggs, *supra*.

scribing witness 'denies the deed,' other witnesses may be called to prove it. If the witness, who attests, could not have given evidence at the time of attestation from ignorance of the facts, interest, infamy, or other cause, the proper course is to give evidence of the handwriting of the party, not of the witness. So if no person can be found to prove the handwriting of the witness, evidence of the signature of the party is admitted." The learned judge concluded this excellent collection of the rules in these words: "The proof of the handwriting of the witness is, at best, but indirect evidence of the signature of the party, and thus, it seems, that courts have refused to receive, in the first instance, direct evidence of the material fact, but take it on a failure to make out the indirect evidence. The expediency, however, of attempting to establish a rule differing from such numerous decisions may admit of doubt, and I therefore concur in the opinion that when the testimony of the subscribing witness cannot be had, evidence of his handwriting is next to be given; solely, however, upon the weight of authority, and with this qualification, that evidence of the handwriting of the witness alone can have no greater effect than that of mere formal proof, upon which to introduce the instrument in evidence, and that the slightest evidence against the genuineness of the signature of the witness, or party, must compel the party introducing the instrument to prove also the handwriting of the maker, or obligor." Delivery may also be presumed when proof is made of the signature of the subscribing witness.³⁴ But the presumption arising from proof of the handwriting of the witness or of the party is *not conclusive*;³⁵ it may be rebutted by the uncontradicted testimony of the witness.³⁶ If the *subscribing witness fails to establish the execution*, as where he does not remember the act, or denies the attestation, the party calling him to prove the instrument is, by

³⁴ Burling v. Paterson, 9 Car. & P. 570.

³⁶ Booker v. Bowles, 2 Blackf. (Ind.) 90.

³⁵ Bogle etc. Co. v. Sullivant, 1 Call (Va.), 561.

a positive rule of the law, not concluded by his testimony. He may establish the fact by other testimony.³⁷ In other words, the execution of the instrument, even though it be a will, may be established by competent evidence against the positive testimony of the subscribing witnesses.³⁸ The party who would establish a deed must lay his groundwork by the production of the subscribing witnesses, if their testimony can be obtained. If they fail to establish the execution of it, the party who thus calls them, by a positive rule of the law, is not to be concluded by their testimony; but will be permitted to establish the fact by other evidence.³⁹ It would be contrary to justice that the treachery of a witness should exclude a party from establishing the truth by the aid of other testimony.⁴⁰

§ 536 (549). Mode of proving execution by subscribing witnesses.—In the absence of statutory regulation, the party seeking to prove an instrument may examine his witness as to the acts of execution performed, the date, the place, the signature, sealing, if it is made under seal, and delivery by the maker, or his acknowledgment of it, as the case may be, the subscription by the witness or witnesses, and generally the compliance with the usual and formal requisites. It may happen that the subscribing witness cannot or will not testify to the complete execution. In such case the party seeking to prove the instrument may cross-examine the subscribing witness,⁴¹ or corroborate or add to his testimony by other evidence.⁴² But he *cannot impeach* the general reputation of such wit-

³⁷ Talbot v. Hodson, 7 Taunt. 251, 129 Eng. Reprint, 101; Whitaker v. Salisbury, 15 Pick. (Mass.) 534; Sigfried v. Levan, 6 Serg. & R. (Pa.) 308, 9 Am. Dec. 427; Hamsher v. Kline, 57 Pa. 397; Harrington v. Gable, 81 Pa. 406; Matter of Cottrell, 95 N. Y. 329; Patterson v. Tucker, 9 N. J. L. 322, 17 Am. Dec. 472; Thomas v. LeBaron, 8 Met.

(Mass.) 355; Tompson v. Fisher, 123 Mass. 559; Frost v. Deering, 21 Me. 156; Steph. Ev., art. 68.

³⁸ Matter of Cottrell, 95 N. Y. 329.

³⁹ Whitaker v. Salisbury, *supra*.

⁴⁰ 1 Stark. Ev. 147.

⁴¹ Bowman v. Bowman, 2, Moody & R. 501.

⁴² Whitaker v. Salisbury, *supra*.

ness for truth and veracity.⁴³ If a party, who calls a witness to prove a particular fact, be disappointed in the result of the testimony, it is competent for him to prove the fact by other testimony.⁴⁴ It may be that the party who calls the witness has been misinformed, and that the witness testified truly, although not according to the expectation of the party who called him, and therefore the testimony of another witness, establishing the fact which the party attempted to prove by the first witness, may be true and perfectly consistent with the veracity of the first witness. It does not necessarily follow that there was perjury committed by the first witness. The fact is to be established by competent evidence; and it would be evidently a rule that would operate with great injustice that a party calling a witness should be bound by the fact which was sworn to. No one would contend for a rule so inexpedient. When a party calls a witness whose general character for truth is bad, he is attempting to obtain his cause by testimony not worthy of credit. It is to some extent an imposition upon the court and jury. The law will not suppose that a party will do any such thing; but will rather hold the party calling the witness to have adopted and considered him as credible.⁴⁵ Declarations made by a deceased attesting witness, respecting the attested instrument, are not admissible, though they may be admissions of fraud or forgery, and though his handwriting has been proved as proof of the instrument.⁴⁶ It has been held in a few cases that, on cross-examination, there may be proved previous statements of the subscribing witness contradicting his testimony.⁴⁷ For example, where a subscribing witness to a will testified that

⁴³ Whitaker v. Salisbury, *supra*; Brown v. Bellows, 4 Pick. (Mass.) 179. See § 853, *post*.

⁴⁴ 3 Stark. Ev. 1692.

⁴⁵ Whitaker v. Salisbury, *supra*.

⁴⁶ Stobart v. Dryden, 1 Mees. & W. 615, 2 Gale, 146, 5 L. J. Ex. 218. See note on the "Admissibility of

Oral Declarations of Deceased Witness to Will on Issue of Genuineness Thereof," to Mobley v. Lyon, 19 Ann. Cas. 1009.

⁴⁷ Brown v. Bellows, *supra*; Cowden v. Reynolds, 12 Serg. & R. (Pa.) 281; Sigfried v. Levan, 6 Serg. & R. (Pa.) 308, 9 Am. Dec. 427.

the testator was drunk when he signed the will, it was permitted to show that on the application for probate he had sworn the testator was of sound mind when he put his signature to the document. Tilghman, C. J., said in that case:⁴⁸ "The argument which has been urged against admitting the probate in evidence is, that the party who calls a witness shall not be permitted to discredit him, on finding that his testimony is against him. To a certain extent this is true, but the rule admits of exceptions; the party who calls a witness shall not be permitted to impeach his general character, because that must have been supposed to be known before he was called; and it is very unfair to call a man of bad character with a view to avail yourself of his evidence, if it prove favorable, at the same time that you have the means of discrediting him, if it turns out unfavorable; such conduct is a fraud on the administration of justice, and therefore not to be tolerated. But did the plaintiffs attempt to act such a part? In the first place, it may be remarked that Joseph Rice (the attesting witness) could hardly be called the plaintiffs' witness; they did not call him voluntarily—but being one of the subscribing witnesses, the plaintiffs were forced to call him. But even if he had been strictly the plaintiffs' witness, there was no attempt to impeach his general character, but only to show that he had contradicted himself, and thereby to lessen the force of what he had sworn in court. There is no rule of law against this—and hard, indeed, would be the case of one who calls a witness, expecting that he would swear the truth, if, upon finding himself deceived, he may not show that the witness had told a different story at another time. This is not the case of calling a witness known to be of bad character; on the contrary, this witness was supposed to be of good character, but his testimony was a surprise on the plaintiffs; and even then the plaintiffs did not offer to prove him of general bad character, but only that he had contradicted

⁴⁸ Cowden v. Reynolds, *supra*.

himself. This, undoubtedly, they had a right to do, and therefore this probate ought to have been admitted in evidence." It is *not necessary*, in order to prove the execution, *that the subscribing witness should remember the transactions involved in the execution of the instrument.* Documents have often been submitted to the jury, as sufficiently proved, where the witness has recognized his signature, and from that fact stated his belief that the document was executed in his presence, without having any positive recollection as to the execution.⁴⁹ *Nor need the witness be present at the moment of the execution.* "If he is called in by the parties immediately afterward, and told that it is their deed or agreement, and requested to subscribe his name as a witness, that will be enough. The execution by the parties and the subscribing by the witness are then considered as parts of the same transaction."⁵⁰ But although the witness was present at the execution, if he did not subscribe the instrument at the time, but did it afterward without the request of the parties, he is not a good attesting witness. He may prove the instrument if there was no attesting witness, because he saw it executed, and there is no better evidence of the execution. But if there was a subscribing witness at the time, he must be called.⁵¹ These distinctions may be enforced by considering the reasons for requiring the subscribing witness, to the exclusion of all other modes of proving the instrument. He must be called, if within the reach of process, because he may be able to state the time of the execution, and other material

⁴⁹ *Maugham v. Hubbard*, 1 Man. & R. 7; *Russell v. Coffin*, 8 Pick. (Mass.) 143; *Merrill v. Ithaca etc.* R. Co., 16 Wend. (N. Y.) 586, 30 Am. Dec. 130; *Brown v. Anderson*, 1 T. B. Mon. (Ky.) 198.

⁵⁰ *Hollenback v. Fleming*, 6 Hill (N. Y.), 303. See § 527, *ante*. See, also, *Parke v. Mears*, 3 Esp. 171, 2 Bos. & P. 217, 126 Eng. Reprint, 1244; *Powell v. Blackett*, 1 Esp. 97;

Leshner v. Levan, 2 Dall. (Pa.) 96, 1 L. Ed. 305; *Grellier v. Neale*, *Peake's Cas.* 146, 3 R. R. 669; *Munns v. Dupont*, 2 Browne (Pa.), 42; and see, per Heath, *Lawrence and Chambre, JJ.*, in *Wright v. Wakeford*, 4 Taunt. 220, 128 Eng. Reprint, 310.

⁵¹ *Henry v. Bishop*, 2 Wend. (N. Y.) 575; *McCraw v. Gentry*, 3 Camp. 232.

facts attending the transaction, which may not be within the knowledge of any other witness; and for the further reason that he is the person selected and agreed on by the parties as the witness of their act in making the instrument, with the attending circumstances.⁵² Proof of the confession or acknowledgment of the party that he executed the instrument, will not be received as a substitute for the testimony of the subscribing witness.^{52a} Lord Kenyon refused to receive the acknowledgment of the person who executed the deed, though made in his presence, in court, and on the trial where the deed was to be used.^{52b} It has also been held that the execution of the deed cannot be proved by one of the parties to it. The subscribing witness must be called.^{52c} And he must be produced although the defendant has admitted the execution of the instrument in his answer to a bill of discovery.^{52d} The doctrine is asserted that no one is an attesting witness who did not subscribe his name as such at the time the instrument was executed. Doing so upon a subsequent confession or acknowledgment by the parties will not answer. He is not then a witness of the execution, but of a conversation about the execution. He cannot speak of the attending circumstances at the time the instrument was made; nor is he the person agreed on by the parties to witness the transaction.^{52e}

§ 537 (550). Statutes affecting proof of documents—Recording acts, etc.—Although considerable space has been necessarily given to the discussion of the common-law rules for the proof of attested documents, it should be observed that various statutes have been enacted in the

⁵² *Henry v. Bishop*, *supra*; 1 Phil. Ev. 464, 465, and notes by Cowen & Hill, 1261; 1 Stark. Ev., ed. 1842, 371; Greenl. Ev. 604; Hollenback v. Fleming, *supra*.

^{52a} *Fox v. Reil*, 3 Johns. (N. Y.) 47.

^{52b} *Johnson v. Mason*, 1 Esp. 89.

^{52c} *Willoughby v. Carleton*, 9 Johns. (N. Y.) 136.

^{52d} *Call v. Dunning*, 4 East, 53, 102 Eng. Reprint, 750.

^{52e} *Henry v. Bishop*, 2 Wend. (N. Y.) 575.

several states which greatly modify the old rule in certain classes of cases. It is, of course, beyond the scope of this work to enter into any general discussion of these statutes, or to do more than point out in the most general way their effect upon the common-law rules. Among the most important of the statutes referred to are those which provide for the *acknowledgment* or proof of *conveyances* and other instruments before public officers in such manner as to entitle them to be recorded under the registry laws; and that, when so acknowledged, they shall be received in evidence without further proof of execution, subject to rebuttal by competent testimony. Generally, when these statutes make the instrument *prima facie evidence of its execution* by reason of such acknowledgment, they also give like effect to the record and to certified copies of such record.⁵³ Where such statutes exist, the document, which has been proved or acknowledged pursuant to the statute, is admitted without calling the attesting witnesses or giving any proof of signature or other execution.⁵⁴ Of course, the instrument must be *acknowledged* in substantial *compliance with the statute*.⁵⁵ For example, if the statute requires the certificate to state that the party is known to the officer, this is essential.⁵⁶ So if the statute requires two witnesses as a condition of recording, and the instrument has only one, the execution must be proved.⁵⁷ But instruments so acknowledged may be admitted in evidence, al-

⁵³ See § 519, *ante*. See statutes of the jurisdiction.

⁵⁴ *Doe v. Johnson*, 3 Ill. 522; *Morris v. Wadsworth*, 17 Wend. (N. Y.) 103; *Thurman v. Cameron*, 24 Wend. (N. Y.) 87; *Keichline v. Keichline*, 54 Pa. 75; *Eaton v. Campbell*, 7 Pick. (Mass.) 10; *Hinchliff v. Hinman*, 18 Wis. 130; *Gragg v. Learned*, 109 Mass. 167; *Clark v. Troy*, 20 Cal. 219; *Simpson v. Mun-dee*, 3 Kan. 172; *Smith v. Gale*, 144 U. S. 509, 36 L. Ed. 521, 12 Sup. Ct.

Rep. 674 (acknowledged out of the state).

⁵⁵ *Lowry v. Harris*, 12 Minn. 255; *Winlock v. Hardy*, 4 Litt. (Ky.) 272; *Aubuchon v. Murphy*, 22 Mo. 115; *Andrews v. Marshall*, 26 Tex. 212; *Wood v. Weiant*, 1 N. Y. 77. See § 519, *ante*.

⁵⁶ *Morgan v. Curtenius*, 4 McLean (U. S.), 366, Fed. Cas. No. 9799; *Job v. Tebbetts*, 9 Ill. 143; *Bone v. Greenlee*, 1 Cold. (Tenn.) 29.

⁵⁷ *Eastland v. Jordan*, 3 Bibb (Ky.), 186.

though there are *errors* which appear from the face of the instrument to be the *result of inadvertence* or clerical mistake; for example, in respect to such matters as dates or names.⁵⁸ They are not excluded, although the acknowledgment has been made since the bringing of the suit.⁵⁹ Nor are they excluded by reason of slight clerical error or omission in the record. In a United States supreme court case,⁶⁰ while the deed itself was complete, the record disclosed no mark or symbol of the official seal of the notary. Objection was taken to the admission of the deed by reason of its not being legally recorded. Mr. Justice Brown took the broad and proper view. He said: "The record of the instrument is really but secondary evidence, although by statute it is made primary; and it would be sticking in the bark to hold that the original instrument, having the official seal of the notary to the acknowledgment, should be defeated by the fact that in recording such an instrument the seal was accidentally omitted. The record of such instrument might thereby become inadmissible as a substitute for the original, but so slight an omission as this in the record ought not to defeat the original instrument as evidence.⁶¹ It would be a singular perversion of the principles of natural justice if, with a perfect deed before the court and a record which lacked only a scrawl or other symbol of a seal, neither could be admitted in evidence by reason of the fact that they did not exactly correspond, or, to speak more accurately, were not exactly identical, especially when the record could be amended on the spot by adding the representation of a seal. The court should not permit such a plain defeat of justice, as this would be

⁵⁸ *Carpenter v. Dexter*, 8 Wall. (U. S.) 513, 19 L. Ed. 426; *Fisher v. Butcher*, 19 Ohio, 406, 53 Am. Dec. 436; *Mosier v. Momsen*, 13 Okl. 41, 74 Pac. 905; *Page v. Arnim*, 29 Tex. 53; *Jordan v. Mead*, 12 Ala. 247; *Emanuel v. Gates*, 53 Fed. 772, 3 C. C. A. 663; *Smith v. Gale*, 144 U.

S. 509, 36 L. Ed. 521, 12 Sup. Ct. Rep. 674.

⁵⁹ *Lanning v. Dolph*, 4 Wash. C. C. 624, Fed. Cas. No. 8073; *Sheldon v. Stryker*, 42 Barb. (N. Y.) 284.

⁶⁰ *Smith v. Gale*, 144 U. S. 509, 36 L. Ed. 521, 12 Sup. Ct. Rep. 674.

⁶¹ *Starkweather v. Martin*, 28 Mich. 471.

by an obstinate adherence to a statutory requirement." In some states, statutes have been enacted authorizing the acknowledgment of *other instruments* than those affecting real property; and making such acknowledgment *prima facie* evidence of execution, although promissory notes, bills of exchange and wills are generally excepted.⁶² Other statutes relating to the proof of documents are those which provide that either party may exhibit to the other, before the trial, any material document, and *request an admission of its genuineness*; and that on default of such admission, and on due proof at the trial, the one declining to make the admission be required to pay the expense of such proof. There is another class of statutes materially modifying the common-law rule with respect to *proof of signatures*. These statutes generally provide that written instruments, purporting to have been signed by a person, shall be proof of such signatures until the person by whom they purport to have been so signed shall specifically deny the signature by oath or affidavit, or by a pleading, duly verified. It has been held that the provisions of these statutes apply to instruments signed by strangers, as well as to those signed by parties to the action.⁶³ Under such a statute, it has been held that the affidavit denying the signature may, in the discretion of the court, be filed at the trial.⁶⁴ In general, the various states have statutes providing that instruments are deemed to be recorded when, being duly acknowledged or proved or certified, they are deposited in the recorder's office, with the proper officer, for record. Such statutes provide before or by whom the acknowledgments are to be taken within and without the state and without the United States; they set out the requisites for acknowledgments in general, including those of married women and corporations; they provide for the

⁶² As to the provisions of the various statutes on this subject, the statutes of the jurisdiction should be consulted.

⁶³ *Parroski v. Goldberg*, 80 Wis. 339, 50 N. W. 191.

⁶⁴ *Parroski v. Goldberg*, 80 Wis. 339, 50 N. W. 191; *Wallis v. White*, 58 Wis. 26, 15 N. W. 767.

form of the certificate, and generally the formalities to be observed are carefully set forth to obviate the difficulties experienced under the common-law system.

§ 538 (551). Nonjudicial records—Proof of—Federal statutes—Foreign.—It is impracticable in this work to discuss the various statutes existing in the different states relating to the authentication of nonjudicial records. There are, however, certain federal statutes, operative in all jurisdictions, to which attention should be called. The constitution of the United States provides: "Full faith and credit shall be given in each state to the public acts, records and judicial proceedings of every other state, and the Congress may by general laws prescribe the manner in which such acts, records and proceedings shall be proved and the effect thereof." One of these statutes is as follows: "All records and exemplifications of books which may be kept in any public office of any state or territory, or of any country subject to the jurisdiction of the United States, not appertaining to a court, shall be proved or admitted in any court or office in any other state or territory, or in any such country, by the attestation of the keeper of the said records or books, and the seal of his office annexed, if there be a seal, together with a certificate of the presiding justice of the court of the county, parish or district in which such office may be kept, or of the governor or Secretary of State, the chancellor or keeper of the great seal of the state or territory or country, that the said attestation is in due form, and by the proper officers. If the said certificate is given by the presiding justice of a court, it shall be further authenticated by the clerk or prothonotary of the said court who shall certify under his hand and the seal of his office that the said presiding justice is duly commissioned and qualified, or, if given by such governor, secretary, chancellor or keeper of the great seal, it shall be under the great seal of the state, territory, or country aforesaid in which it is made; and the said records and exemplifications, so authenticated, shall have such faith

and credit given to them in every court and office within the United States, as they have by law or usage in the courts or offices of the state, territory or country, as aforesaid, from which they are taken."⁶⁵ In case they do form part of the judicial records, they should be authenticated as stated in another part of this work;^{65a} or according to local statutes. The record *must be relevant* to the issue,⁶⁶ and the authentication must be *as required by the statute*, and be correct in form.⁶⁷ It has been held in some cases that the copy of the record is not admissible in such cases, unless there is also *proof of the effect* of such copy under the laws of the state where recorded.⁶⁸ Where, however, such records would have been inadmissible under the laws of the state where the record was made,⁶⁹ or if no evidence is furnished

⁶⁵ U. S. Rev. Stats., § 906 (U. S. Comp. Stats. 1901, p. 677, 3 Fed. Stats. Ann. 39); Desty, Fed. Proc., 9th ed., § 906. This mode of authentication has been held applicable to *marriage certificates*: King v. Dale, 2 Ill. 513; *deeds*: Drummond v. Magruder, 9 Cranch (U. S.), 122, 3 L. Ed. 677; Johnson v. Fowler, 4 Bibb (Ky.), 521; Pennel v. Weyant, 2 Harr. (Del.) 501; Warren v. Wade, 7 Jones (N. C.), 494; Petermans v. Laws, 6 Leigh (Va.), 523; Kidd v. Manley, 28 Miss. 156; Brown v. Edson, 23 Vt. 435; King v. Mims, 7 Dana (Ky.), 267; *pardons*: United States v. Wilson, Bald. (U. S.) 78, Fed. Cas. No. 16,730; *surveys*: Smith v. Redden, 5 Harr. (Del.) 321; and to other documents, when they do not form part of the records of courts, such as wills: Ewing v. Savary, 4 Bibb (Ky.), 424; *patents*: Henthorn v. Doe, 1 Blackf. (Ind.) 157; and *guardian's bonds*: Carlisle v. Tuttle, 30 Ala. 613. Under this statute *copies* of records are also admissible: Wilcox v. Bergman, 96 Minn. 219, 5 L. R. A., N. S., 938, and full note, 938-984, 104 N. W. 955.

^{65a} § 624 et seq., *post*.

⁶⁶ Ordway v. Conroe, 4 Wis. 45.

⁶⁷ Drummond v. Magruder, 9 Cranch (U. S.), 122, 3 L. Ed. 677; Pennel v. Weyant, 2 Harr. (Del.) 501; Mott v. Ramsay, 92 N. C. 152; Graham v. Troth, 69 Kan. 861, 77 Pac. 92; Taylor v. McKee (Ga.), 45 S. E. 672.

⁶⁸ Dickson v. Grissom, 4 La. Ann. 538; Kidd v. Manley, 28 Miss. 156; Stevens v. Bomar, 9 Humph. (Tenn.) 546; Dunlap v. Daugherty, 20 Ill. 397; Powell v. Knox, 16 Ala. 364.

⁶⁹ Thus, where in the state of Mississippi the party sought to prove a deed of trust by introducing a copy from the records of the probate court in Alabama, where it had been recorded, but gave no evidence to account for the original, the United States supreme court said: "At the date of the copy there was no law in Alabama which authorized the use of copies in place of and without accounting for the original; and in relation to deeds of trust, the registry acts of the state merely required their registration for the purpose of giving notice, but did not assign

as to what those laws are,⁷⁰ they have been denied admission in evidence. Thus where a copy of a record of a deed from one state, affecting lands in another state, was tendered, duly certified, it was inadmissible. In the case referred to,⁷¹ a power of attorney was offered to affect the title to lands in New Jersey, and would have been lawful if the original paper had been produced and proved. It had been recorded in New York and the copy of that record was offered in evidence. The court said: "A copy of a record from a register's office in New York cannot be legal evidence to establish a title to lands in another state. Suppose it had been an absolute deed for the lands in question, and instead of being recorded in the clerk's office of the county of Bergen, where the lands are, it had been recorded in a register's office in Texas, could a copy of such record be read here in support of title? Such a principle might lead to enormous consequences. This record would not have been evidence in any court in New York for the purpose for which it was offered in this case. The first section of the fourth article of the constitution of the United States does not reach a case like the present." So, also, where the copy record containing a certificate by the secretary of a territory that he had thereunto set his hand and affixed his official seal was marked by the word "seal," but there was nothing to indicate that it was the great seal of the territory, the copy was held inadmissible. The court said: "This record does not bear the impression of the seal, or indicate what it is. The seal used may or may not have been the great seal of the territory. There is not any

any value to the record as evidence in courts, nor has any statute of Mississippi enlarged the operation of the statute of Alabama in that state: *Bradford v. Dawson*, 2 Ala. 203; *Raviesies v. Alston*, 5 Ala. 297. We think that this copy should not have been admitted": *Griffin v. Reynolds*, 17 How. (U. S.) 609, 15 L. Ed. 229.

⁷⁰ *Munkres v. McCaskill*, 64 Kan. 516, 68 Pac. 42, where it was sought to put in evidence a copy of plat certified only by a county surveyor in Missouri. See, also, *Russell v. Kearney*, 27 Ga. 96; *Clardy v. Richardson*, 24 Mo. 295, and cases cited under *deeds* in note 65, *supra*.

⁷¹ *State v. Eagle*, 21 N. J. L. 347.

presumption that it was such great seal,⁷² and since it is necessary that the fact be made to appear affirmatively that the statute has been complied with, there was a failure in this particular.”⁷³ In another New Jersey case⁷⁴ Lippincott, J., has given a most exhaustive and enlightening opinion upon this federal statute. He deals with the question of what private instruments are or can be “records,” under the provisions of the constitution, in order to be the subject of exemplification, and used in evidence in other states than those in which the writing is recorded.⁷⁵ In

⁷² *Sisk v. Woodruff*, 15 Ill. 15.

⁷³ *Milwaukee Gold Extraction Co. v. Gordon*, 37 Mont. 209, 95 Pac. 995. In an earlier Montana case (*Parchen v. Peck*, 2 Mont. 567), the insistence of the statutory requirement is made plain. The opinion says: “The refusal of the court to admit in evidence the articles of incorporation is assigned as error. The laws of Iowa, under which it is claimed that the Northwest Transportation Company was incorporated, provides that a corporation shall be organized by articles of incorporation, which shall be recorded in the offices of the recorder and Secretary of State: Iowa Code 1873, § 1060, p. 183. To entitle the records of these articles to be admitted in evidence in this territory, how should they be authenticated? There are no statutes of this territory providing in what manner a record of this character should be authenticated for this purpose. Then the laws of the United States upon this subject must be complied with. In addition to the attestation by the recorder of deeds of the county, where the corporation has its principal place of business, and the Secretary of State of Iowa, with the seal of said state, there should be to each attestation respectively ‘a certificate of the

presiding justice of the court of the county, parish, or district in which such office may be kept, or of the governor, Secretary of State, the chancellor or keeper of the great seal of the state, that the said attestation is in due form, and by the proper officers’: U. S. Rev. Stats., § 906. No certificate by any of said officers is attached to the certificate or attestation of the said recorder or secretary. The Secretary of State did not add any such certificate to his own attestation. The articles of incorporation were properly rejected.”

⁷⁴ *Chase v. Caryl*, 57 N. J. L. 545, 31 Atl. 1024.

⁷⁵ He also marks the twofold object of recording acts. He says: “One object is to give notice, but that is not the only object. It is not only to give notice, but to perpetuate the writing, and proof of execution. Had notice been the only object, then, under most of these recording acts, the proof of a common-law execution of a deed, mortgage, or other instrument would not have been dispensed with as it has been by these acts which provide that all exemplifications of a recorded deed shall be allowed in all courts to be as good evidence as the original. *Brotherton v. Livingston*,

that case, and we quote it as an excellent illustration of what is a record within article 4 of the constitution of the United States, it was held that under the statute of the state of New York, entitled "Of the proof and recording of conveyances, and the cancellation of mortgages,"⁷⁶ which expressly classes mortgages on real estate as "conveyances of real estate," and includes them within that term; and which provides, also, that when duly acknowledged and proved, they may be read in evidence without any further proof; and which also provides that the record thereof, when duly recorded, in accordance with the statutes of that state, in the office of the clerk or register of the county wherein the lands lie, or a transcript thereof, duly certified, may be read in evidence with like force and effect as the original,—the record of a mortgage on real estate is a record, within the scope and meaning of the term "records," as used in article 4, section 1, of the constitution of the United States; and it can be exemplified under the act of Congress of March 27, 1804, and read and used in evidence in the courts of New Jersey with the same faith and credit, and with such force and effect, as is given the record by the statute of the state of New York. On the hearing of the case, which was an action on a bond, the bond and the assignment thereof were produced by the plaintiff, and proved, and then the plaintiff rested. In order that the defendant should make out the defense claimed, it was deemed necessary, at the outset, to prove the existence of a mortgage which was claimed to have accompanied the bond. The defendant proved, without objection, the statute of the state of New York in relation to the recording of conveyances of real estate, and mortgages thereon; to which we have already referred. As a part of the evidence tending to prove the existence of the

3 Watts & S. (Pa.) 334. Statutes providing for recording in full differ very much from those relating to the mere registration of an abstract, of which, without the certificate of

acknowledgment, the effect is only to give notice": Chase v. Caryl, *supra*.

⁷⁶ 1 N. Y. Rev. Stats., c. 3, marg. p. 756.

mortgage, alleged to have accompanied the bond, and the contents of the same, the defendant offered in evidence an exemplified copy of the mortgage, as recorded, in full, with the proper legal acknowledgments of execution indorsed thereon, in the register's office of the county of New York. This exemplification was admitted by the trial court, against the objection of the plaintiff, as proof going to the establishment of the existence of the mortgage. The court said: "The question thus arises,—that is, whether this exemplified copy of this record was legal evidence in this state. This forms the only legal question worthy of serious discussion or adjudication in the cause, as to the admission of evidence. The record copy of the mortgage was exemplified in the manner prescribed by the statute, and no objection was taken to the form of the exemplification. This offer of the exemplified record copy of this mortgage was objected to on the ground that the constitutional provision cited and the act of 1804 do not apply to the 'record' of a mortgage, and, even if admissible as such record, it affords no proof of the existence of the mortgage; that the most it could show was that such a mortgage had been recorded in New York." The learned judge, after referring to the New York statute before mentioned, continued: "The question here presented is whether a copy of a mortgage duly executed and acknowledged or proved in accordance with the laws of the state of New York, and duly recorded in accordance with the statute thereof, and which copy of the record, when certified, can be read, without further proof, in evidence in that state, with like force as if the original was produced and proved, is a record which, when authenticated under the act of Congress referred to, can be evidence in another state, in accordance with the provisions of the constitution requiring 'full faith and credit' to be given in each state to the public records and judicial proceedings of every other state. This question cannot be intelligently determined without considering the object of statutes which required

records of certain instruments to be made in public offices of the state, or the counties thereof. It would appear that there was some other and more important object than that of mere notice. I think this is well expressed in a single sentence by Chief Justice Gibson, when he says,^{76a} 'The object of recording acts is not only to give notice, but to perpetuate the writing, and proof of its execution.' Had notice been the only object, the common-law evidence of execution would not have been dispensed with, as it has, by the act of 1715 (this being a statute of Pennsylvania similar to the statute of the state of New York), which provided that an exemplification of a recorded deed should be allowed in all courts to be as good evidence as the original.' At common law, if it became necessary to prove the contents of a mortgage, except in connection with the question of notice, it could only be done on a common-law principle,—first by proof of loss or destruction of the original, and then by evidence of its contents.^{76b} "The statute of the state of New Jersey," said the learned judge, "now provides for the recording of a mortgage in full, and that a transcript of such record, duly certified, shall be received in evidence in any court of this state in the same manner and to the same effect as a record, or the transcript of a record, of a deed is received. (Revision, p. 706, § 18.) A certified copy of a deed, under our statute, is received in evidence, and is as good, effectual, and available in law, as if the original deed or conveyance were produced and proved. (Revision, p. 158, § 29.) 'A certified copy of an abstract of mortgage shall be received as secondary evidence in any court of this state, in the same manner as the record of deeds is now received, and shall be proof of the facts therein stated.' (Supp. Revision, p. 489, § 1.) Entries in the book of a county treasurer of a county in Wisconsin were refused admission in this state upon an exem-

^{76a} Brotherton v. Livingston, 3 Watts & S. (Pa.) 334.

^{76b} Den v. Gustin, 12 N. J. L. 43; New Jersey etc. Transp. Co. v. Suydam, 17 N. J. L. 25.

plification, but sworn copies were admitted. The entries in this case were not such as, by the statute of Wisconsin, were made *prima facie* evidence of the facts therein stated, and the exemplifications were refused admission on the ground that there was no proof of any provision of the law of Wisconsin showing what the effect of these entries was when offered in evidence in Wisconsin.^{76c} The exemplification of a deed from another state was refused admission in the state of Virginia. The reason given was that the exemplification was not in due form.^{76d} A copy of a deed of trust from the records of the probate court of Alabama, where it had been recorded, was not admissible in evidence in a suit in Mississippi without accounting for the absence of the original, there being no statute in Alabama authorizing the use of copies. The registry acts of that state merely require the registration for the purpose of giving notice. Nor had any statute of the state of Mississippi enlarged the operation of the statute of Alabama in that state.^{76e} In a Georgia case^{76f} an exemplified copy of a deed or instrument of a marriage settlement from another state was refused admission in the courts of Georgia. It did not appear that there was any statute in either state making copies of the record evidence. In a New York case,^{76g} an exemplification of a registry of a mortgage in New Jersey was refused admission in the courts of New York because the statutes of New Jersey relative to the recording of mortgages contained no provision making the registry, or copy thereof, evidence. The mere registry was not sufficient. This was before the passage of the statute providing that a certified copy should be evidence. In the Georgia case referred to, the general rule was applied that the production of the original writing, which was a marriage settlement, must be required until an excuse

^{76c} *Condit v. Blackwell*, 19 N. J. Eq. 193.

^{76d} *Drummond v. Magruder*, 9 Cranch (U. S.), 122, 3 L. Ed. 677.

^{76e} *Griffin v. Reynolds*, 17 How. 609, 15 L. Ed. 229.

^{76f} *Russell v. Kearney*, 27 Ga. 96.
^{76g} *Quay v. Eagle Fire Ins. Co.*, Anth. (N. Y.) 237.

has been given for the nonproduction. The settlement was admitted to the jury by the trial court on the idea, probably, that the admission was sanctioned by the act of Congress of May 26, 1790, or by the act of March 27, 1804. But, upon review, it was held that neither of those acts extend to the case of the exemplification of the record of the private writing, such as a deed. Such a writing, after being recorded, leaves the office of record, and returns to the hands of the private owner. It is still as much an original as ever, and must therefore be better evidence of itself than the copy of the record can be. It does not appear that the statute of North Carolina provided that the record, or the certified copy thereof, should be received in evidence. It was merely held that the certificate of the officer in North Carolina was not sufficient to admit it in Georgia. The court did not appear to have considered the effect of a statute which provided for a record, and the objects thereof, and the admission of an exemplification of the same. A record of a marshal's deed in Alabama is not proof in the courts of the state of Georgia, so as to admit the deed in evidence without proof of execution.^{76h} This was an offer of the deed itself, it having been first recorded under the laws of Alabama; but the court held that the fact that it had been merely recorded in Alabama did not dispense with the proof of its execution." Most of the states make provision for the proof of other official foreign documents or foreign nonjudicial records either by the original or by a copy certified by the legal keeper thereof, together with a certificate under the great or principal seal of the country or sovereign thereof, that the document is a valid and subsisting document of such country, and that the copy is duly certified by the officer having the legal custody of the original.⁷⁶ⁱ

^{76h} Papot v. Southwestern R. Co., 74 Ga. 296. See to the same effect (when a mortgage was offered in evidence), Baskin v. Vernon, 74 Ga. 370.

⁷⁶ⁱ Subd. 8, § 755, B. & C. Ann.

Codes, Oregon. In State v. McDonald, 55 Or. 419, 103 Pac. 512, 104 Pac. 967, 106 Pac. 444, it was held that duly authenticated copies of entries relating to births and deaths,

§ 539 (552). **Same—Department records—Federal statutes.**—There are numerous other federal statutes which provide for the admission of copies of records of the governmental departments and bureaus. The scope of this work will only admit a reference to these statutes, and a brief statement of their general purport. It is provided that "copies of any books, records, papers or documents in any of the executive departments, authenticated under the seals of such departments respectively, shall be admitted in evidence equally with the originals thereof."⁷⁷ In an action brought for the delinquency of any person accountable for public money, a transcript from the *books or proceedings of the treasury department*, certified by the

kept as a public record under the laws of a foreign country, were admissible in evidence. The court said: "An inspection of the law of New Zealand relating to the registration of births and deaths in that dominion, due proof of which was made, discloses that the register in question was required to be kept as a public record, at all times to be open to inspection by the public; that all of the facts noted above were required to be entered therein by the registrar, who is a public official. . . . The facts recorded, while not within the knowledge of the officer, have been ascertained and entered by an authorized and accredited public agent appointed for the purpose, and for the benefit of the public. When the particular facts are inquired into and recorded for the benefit of the public, those who are empowered to act in making such investigations and memorials are in fact the agents of all the individuals who compose the state; and every member of the community may be supposed to be privy to the investigation, and for those reasons it is not necessary that they should be confirmed and

sanctioned by the ordinary tests of an oath to entitle them to be received as evidence." See, also, *Grace v. Brown*, 86 Fed. 155, 29 C. C. A. 621, and useful note on "Admissibility of Foreign Official Records in Evidence," to *Miller v. Northern Pac. R. Co.*, 19 Ann. Cas. 1219. See, also, the late cases: *In re Peterson's Estate*, 22 N. D. 480, 134 N. W. 751 (Norwegian parish records); *Royal Neighbors of America v. Hayes*, 150 Ky. 626, 150 S. W. 845 (Irish baptismal record); *Waltz v. Workmen's Sick etc. Fund*, 139 N. Y. Supp. 1016 (French baptismal record).

⁷⁷ U. S. Rev. Stats., § 882 (U. S. Comp. Stats. 1901, p. 669; 3 Fed. Stats. Ann. 26). As to copies of records and papers in the office of the solicitor of the treasury: U. S. Rev. Stats., § 883 (U. S. Comp. Stats. 1901, p. 669, 3 Fed. Stats. Ann. 27); controller of the currency: U. S. Rev. Stats., § 884 (U. S. Comp. Stats. 1901, p. 669, 3 Fed. Stats. Ann. 27); including certificate of the organization of national banks: U. S. Rev. Stats. 885 (U. S. Comp. Stats. 1901, p. 670, 3 Fed. Stats. Ann. 27).

secretary or assistant secretary and authenticated under the seal of the department, or, if the suit involves the accounts of the *war or navy departments*, certified by the auditors respectively charged with the examination of those accounts, and authenticated under the seal of the treasury department, afford evidence on which the court may grant judgment.⁷⁸ So *copies of bonds, contracts* or other papers relating to or connected with the settlement of any account between the United States and an individual, when certified by the secretary or assistant secretary or the auditor and authenticated under the seal of such department, may be annexed to such transcript and have equal effect with the original papers, except that, if the action is upon a bond or other sealed instrument, and the plea is *non est factum*, the court may require the production of the original.⁷⁹ By statute such transcripts are sufficient evidence to show a balance against the defendant in an indictment for embezzlement of public moneys,⁸⁰ and of false swearing to affidavits made by officers which are required to be returned to the department of the interior.⁸¹ So certified copies of records, books and papers belonging to the *general land office*⁸² or to the *patent office*,⁸³ are evidence in all cases wherein the original would be evidence.

⁷⁸ *Maurice v. Worden*, 54 Md. 233, 39 Am. Rep. 384. As to the weight to be given to the opinions of the heads of departments as to third parties, see *Greeley v. Thompson*, 10 How. (U. S.) 225, 13 L. Ed. 397. As to letters received by them officially, see *Bingham v. Cabbot*, 3 Dall. (U. S.) 19, 1 L. Ed. 491.

⁷⁹ *Murphy v. Cady*, 145 Mich. 33, 108 N. W. 493; U. S. Rev. Stats., § 886 (U. S. Comp. Stats. 1901, p. 670; 3 Fed. Stats. Ann. 27). See, also, *York etc. R. Co. v. Winans*, 17 How. (U. S.) 30, 15 L. Ed. 27; *Laffan v. United States*, 122 Fed. 333, 58 C. C. A. 495.

⁸⁰ U. S. Rev. Stats., § 887 (U. S.

Comp. Stats. 1901, p. 671, 3 Fed. Stats. Ann. 30).

⁸¹ U. S. Rev. Stats., § 888 (U. S. Comp. Stats. 1901, p. 671; 3 Fed. Stats. Ann. 31). As applied to copies of records of the postoffice department, U. S. Rev. Stats., § 889 (U. S. Comp. Stats. 1901, § 671; 3 Fed. Stats. Ann. 31); *United States v. McCoy*, 193 U. S. 593, 48 L. Ed. 805, 24 Sup. Ct. Rep. 528.

⁸² U. S. Rev. Stats., § 891 (U. S. Comp. Stats. 1901, p. 672; 3 Fed. Stats. Ann. 32).

⁸³ U. S. Rev. Stats., § 892 (U. S. Comp. Stats. 1901, p. 673; 3 Fed. Stats. Ann. 33). So copies of official papers or official entries in the rec-

§ 540 (553). **Proof of records of public departments—Copies.**—Some of the statutes referred to in the last section have long been on the statute books, and have been frequently applied in the federal courts in actions against officers and sureties on their bonds, and in other similar actions. It is a familiar rule that the *copy must be authenticated* in the mode provided by the statute; and the statute must, in this respect, be *strictly pursued*.⁸⁴ It has been held a sufficient authentication of copies of records from the executive departments, where the certificate was signed by the head of the department, as by the secretary of the treasury,⁸⁵ or of state,⁸⁶ and authenticated by the seal of

ords of the offices of *consuls, vice-consuls or commercial agents* of the United States, certified under their hand and seal, are also admitted in evidence in the courts of the United States: U. S. Rev. Stats., § 896 (U. S. Comp. Stats. 1901, p. 674; 3 Fed. Stats. Ann. 34). See the late cases: *Williams v. Lyon* (Ala.), 61 South. 299; *C. B. Ensign & Co. v. Coffelt* (Ark.), 145 S. W. 231; *Baker v. Gaskins*, 10 Ga. App. 679, 73 S. E. 1075; *Wyman v. Chicago*, 254 Ill. 202, 98 N. E. 266; *Butchers' etc. Assn. v. City of Boston* (Mass.), 101 N. E. 426; *Meyer v. Creighton*, 83 N. J. L. 749, 85 Atl. 344; *Hibbard v. Craycraft*, 32 Okl. 160, 121 Pac. 198; *Stephens v. Long*, 92 S. C. 65, 75 S. E. 530; *Southwestern Surety Ins. Co. v. Anderson* (Tex. Civ. App.), 152 S. W. 816.

⁸⁴ *Reid v. State*, 168 Ala. 118, 53 South. 254; *Key v. Vaughn*, 15 Ala. 497; *Hollister v. Armstrong*, 5 Houst. (Del.) 46; *Taylor v. McKee*, 118 Ga. 874, 45 S. E. 672; *Moore v. Ann*, 9 B. Mon. (Ky.) 36; *Waller v. Cralle*, 8 B. Mon. (Ky.) 11; *State v. Allen*, 113 La. 705, 37 South. 614; *Reynolds v. Rowley*, 3 Rob. (La.) 201, 38 Am. Dec. 233; *Johnson v. Rannels*, 6

Mart. (La.), N. S., 621; *Phillips v. Flint*, 3 La. 146; *Kidd v. Manley*, 28 Miss. 156; *Paca v. Dutton*, 4 Mo. 371; *West Jersey Traction Co. v. Board of Public Works*, 57 N. J. L. 313, 30 Atl. 581; *Morrell v. Kimball*, 4 Abb. Pr. (N. Y.) 352; *Richard v. Hicks*, 1 Overt. (Tenn.) 207; *Broek v. Burchett*, 2 Swan (Tenn.), 27; *Hackney v. Williams*, 6 Yerg. (Tenn.) 340; *Paul v. Chenault* (Tex. Civ. App.), 44 S. W. 682; *Petermans v. Laws*, 6 Leigh (Va.), 523; *State v. Kniffen*, 44 Wash. 485, 120 Am. St. Rep. 1009, 12 Ann. Cas. 113, 87 Pac. 837; *James v. James*, 35 Wash. 650, 77 Pac. 1080; *Smith v. United States*, 5 Pet. (U. S.) 292, 8 L. Ed. 130; *Block v. United States*, 7 Ct. of Cl. 406; *Desty*, Fed. Proc., 9th ed., § 406, and note.

⁸⁵ *United States v. Hunt*, 105 U. S. 183, 26 L. Ed. 1037; *Chadwick v. United States*, 3 Fed. 750; *White v. St. Guirons, Minor* (Ala.), 331, 12 Am. Dec. 56.

⁸⁶ *United States v. Benner*, Bald. (U. S.) 234, Fed. Cas. No. 14,568; *United States v. Liddle*, 2 Wash. C. C. 205, Fed. Cas. No. 15,598. In *Ballew v. United States*, 160 U. S. 187, 40 L. Ed. 388, 16 Sup. Ct. Rep.

the department; thus, a copy of a collector's bond, so authenticated, is admissible,⁸⁷ but not if the execution of the bond is denied on oath.⁸⁸ If the document is in the immediate possession of a subordinate officer, it is sufficient if he makes the certificate, and his official character is certified to by the head of the department under its seal.⁸⁹ But where the transcript is offered under section 886 of the Revised Statutes, referred to in the last section, the certificate should be by the auditor and authenticated by the seal of the department, both having been held necessary.⁹⁰

263, the ground of objection relied upon as to the record from the pension office was that the copy was improperly authenticated, because the certificate signed by the acting Secretary of the Interior, and under the seal of the department, referred only to the official character of the commissioner of pensions, and the faith and credit to which his attestations were entitled, and U. S. Rev. Stats., § 882, was cited in support of the contention. That section reads as follows: "Copies of any books, records, papers, or documents in any of the executive departments, authenticated under the seals of such departments, respectively, shall be admitted in evidence equally with the originals thereof." Mr. Justice White said: "By reference to the transcript in question in the record, we find that the certificate of the acting Secretary of the Interior was preceded by a certificate signed 'Wm. Lochren, Commissioner of Pensions,' certifying that 'the accompanying page, numbered 1, is truly copied from the original in the office of the Commissioner of Pensions.' The records of the pension office constitute part of the records of the Department of the Interior, of which executive department the pension office is but a constituent. We think

that the certificates in question, taken together, were a substantial compliance with the statute."

⁸⁷ *Chadwick v. United States*, 3 Fed. 750.

⁸⁸ *United States v. Humason*, 8 Fed. 71, 7 Saw. 252.

⁸⁹ *Thompson v. Smith*, 2 Bond (U. S.), 320, Fed. Cas. No. 13,976; *Stephens v. Westwood*, 25 Ala. 716.

⁹⁰ *Smith v. United States*, 5 Pet. (U. S.) 292, 8 L. Ed. 130. Thus copies of papers and records have been received as evidence of the fact that officials were indebted to the government: *United States v. Hunt*, 105 U. S. 183, 26 L. Ed. 1037; of the official character of an accredited minister and of the date of his recognition: *United States v. Benner*, Bold. 234, Fed. Cas. No. 14,568; *United States v. Liddle*, 2 Wash. C. C. 205, Fed. Cas. No. 15,598; that an officer or other person received the money charged to him on the accounts certified: *Bruce v. United States*, 17 How. 437, 15 L. Ed. 129; *United States v. Lee*, 2 Cranch C. C. 462, Fed. Cas. No. 15,585. In like manner certified copies have been received of a vessel's register: *Catlett v. Pacific Ins. Co.*, 1 Paine (U. S.), 594, Fed. Cas. No. 2517; of official bonds: *Chadwick v. United States*, 3 Fed. 750; *United States v.*

In that case the auditor certified that the transcripts offered in evidence were "true copies of the originals on file" in his office, and, in that form, the certificate narrowly escaped condemnation. The majority of the court, evidently with some hesitation, held the transcripts admissible in evidence upon the ground that the bill of exceptions stated that the documents, offered as evidence and excluded, purported to be transcripts "from the books and proceedings of the Treasury Department." Upon that point three of the judges dissented. The grounds of the dissent are stated in the opinion of the court. The minority held that the certificate could be regarded as referring only to papers the originals of which were on file; that the *books* of the department could not be said to be *on file*, nor were copies from them copies from originals within the meaning of the statute; that it was a copy from the books and proceedings in the treasury department which was made evidence, and not mere copies of papers, though on the files, on which the rough draft of settlement may have been entered.

Lent, 1 Paine (U. S.), 117, Fed. Cas. No. 15,593; of accounts and returns rendered by officers: United States v. Gaussen, 19 Wall. (U. S.) 198, 22 L. Ed. 41; United States v. Vanzandt, 2 Cranch C. C. 338, Fed. Cas. No. 16,611; of certificates of organization of national banks: U. S. Rev. Stats., § 885 (U. S. Comp. Stats. 1901, p. 670; 3 Fed. Stats. Ann. 27); First Nat. Bank v. Kidd, 20 Minn. 234; Washington County Nat. Bank v. Lee, 112 Mass. 521; copies of patents: Hines v. Greenlee, 3 Ala. 73; Stephenson v. Doe, 8 Blackf. (Ind.) 508, 46 Am. Dec. 489; Lane v. Bommelmänn, 17 Ill. 95; Lacey v. Davis, 4 Mich. 140, 66 Am. Dec. 524; Barton v. Murrain, 27 Mo. 235, 72 Am. Dec. 259; Avery v. Adams, 69 Mo. 603; plats and descriptions in

the general land office: Lee v. Getty, 26 Ill. 76; Davis v. Freeland, 32 Miss. 645; LeBleu v. North Am. Land Co., 46 La. Ann. 1465, 16 South. 501; and certificates of receivers: McDonald v. Edmonds, 44 Cal. 328. The certificate of a consul, under his seal of office, is admissible as evidence that a master of a vessel refused to receive a destitute seaman in a foreign port, when the essential facts are stated: Mathews v. Offley, 3 Sum. (U. S.) 115, Fed. Cas. No. 9290; that ship's papers were lodged with him: United States v. Mitchell, 2 Wash. C. C. 478, Fed. Cas. No. 15,791; and that a seaman was discharged in a foreign port with his own consent: Lamb v. Briard, Abb. Adm. (U. S.) 367, Fed. Cas. No. 8010.

The account of a delinquent revenue officer or other person accountable for public money, as *finally adjusted* by the proper officers of the treasury department, to be admissible *as evidence* under section 886 of the Revised Statutes, should be certified and authenticated to be a transcript from *the books and proceedings of the department*. It is not sufficient that the certificate states the account or accounts offered as evidence to be *copies of originals on file*. The latter is the form of certificate used in reference to mere copies of bonds, contracts or other papers connected with the final adjustment, and which, duly certified and authenticated, have the same effect as the originals would have if produced in court.⁹¹ "The statute," said Mr. Justice Harlan, "is founded in justice as well as in the necessities of the government when compelled to institute suits against delinquent public officers. Its provisions are easily understood, and it is not at all difficult to meet the manifest object Congress had in enacting them. When the government desires, in suits against a delinquent officer accountable for public money, to use the final adjustment of his accounts as evidence, the certificate of the officer should show, not, necessarily, in the very words of the statute, but plainly and not by mere inference that the transcript offered is from the books and proceedings of the department; in other words, that such transcript presents the account of the delinquent as finally adjusted by the proper officers of the government, and spread upon the records of the department."

⁹¹ United States v. Morris (*subnom.* United States v. Pinson), 102 U. S. 548, 26 L. Ed. 226. In his opinion in this case Mr. Justice Harlan refers to Smith v. U. S., *supra*, and points out that though in that case the auditor certified that the transcripts offered in evidence were "true copies of the originals on file," the certificate narrowly escaped con-

demnation. It was saved only because the bill of exceptions stated that the documents purported to be transcripts "from the books and proceedings of the Treasury Department." See the dissenting opinion in Smith v. United States, *supra*. See, also, useful discussion in Ewing v. United States, 3 App. Cas. (D. C.) 353.

§ 541 (554). **Same—Effect of these statutes.**—It will be observed that, by provisions of some of the statutes referred to in a former section, the copies of the statements of account appearing upon the books of the departments, properly certified and authenticated, are admissible in evidence, and that they afford sufficient basis for the entry of judgment.⁹² Such transcripts are admissible, not only against the *principals*, but also *against their sureties*;⁹³ and it is no objection to their introduction as evidence that the party against whom they are offered had no notice of the adjustment of the accounts.⁹⁴ But although such transcripts are admissible as evidence, they are only *prima facie* evidence of the facts recited; and it is open to *proof that they are erroneous*.⁹⁵ Accounts which do not arise in the ordinary course of business in the departments are not proven by transcripts. Under these statutes, statements can only establish items for moneys disbursed through the ordinary channels of the department, where the transactions are shown by its books.⁹⁶ Items which become known to the department only through hearsay do not become evidence under these statutes.⁹⁷ The words “papers and documents” relate to such as are made in the discharge of official duty, which it is the duty of the officers to file.⁹⁸ They are *not evidence of unofficial acts*; for ex-

⁹² U. S. Rev. Stats., §§ 886–889 (U. S. Comp. Stats. 1901, pp. 670, 671; 3 Fed. Stats. Ann. 27). See § 539, *ante*.

⁹³ *United States v. Gaussen*, 19 Wall. (U. S.) 198, 22 L. Ed. 41; *United States v. Vanzandt*, 2 Cranch C. C. 338, Fed. Cas. No. 16,611.

⁹⁴ *Watkins v. United States*, 9 Wall. (U. S.) 759, 19 L. Ed. 820.

⁹⁵ *United States v. Irving*, 1 How. (U. S.) 250, 11 L. Ed. 120; *United States v. Gaussen*, 19 Wall. (U. S.) 198, 22 L. Ed. 41; *Soule v. United States*, 100 U. S. 8, 25 L. Ed. 536; *United States v. Hunt*, 105 U. S. 183,

26 L. Ed. 1037; *United States v. Ralston*, 17 Fed. 895.

⁹⁶ U. S. Rev. Stats., § 886 (U. S. Comp. Stats. 1901, p. 670; 3 Fed. Stats. Ann. 27); *United States v. Buford*, 3 Pet. (U. S.) 12, 7 L. Ed. 585; *United States v. Jones*, 8 Pet. (U. S.) 375, 8 L. Ed. 979.

⁹⁷ *United States v. Forsythe*, 6 McLean (U. S.), 584, Fed. Cas. No. 15,133.

⁹⁸ U. S. Rev. Stats., § 882 (U. S. Comp. Stats. 1901, p. 669; 3 Fed. Stats. Ann. 26); *Block v. United States*, 7 Ct. of Cl. 406.

ample, the certificate of a consul as to foreign laws,⁹⁹ or as to the arrival of a vessel,¹⁰⁰ and the facts as to the imprisonment of a seaman.¹ The statement of the account *should contain the items* of the account, the debits and credits as acted upon by the accounting officers, and not a statement of the balance in gross.² But it has been held in several cases that statements of accounts with postmasters are competent, although not containing the credits claimed that it is sufficient in such cases, if the balances on the quarterly returns are stated.³ In a suit upon a postmaster's bond, when treasury transcripts are offered in evidence, it is not necessary that they should contain the statements of credits claimed by the postmaster, and disallowed, in whole or in part, by the officers of the government. Nor is it a reason for rejecting the transcripts as evidence that the items charged in the accounts, as balances of quarterly returns,

⁹⁹ Church v. Hubbard, 2 Cranch (U. S.), 187, 2 L. Ed. 249. "In this case," said Marshall, C. J., "the edicts produced are not verified by oath. The consul has not sworn; he has only certified that they are truly copied from the originals. To give to this certificate the force of testimony, it will be necessary to show that this is one of those consular functions to which, to use its own language, the laws of this country attach full faith and credit. Consuls, it is said, are officers known to the law of nations, and are intrusted with high powers. This is very true, but they do not appear to be intrusted with the power of authenticating the laws of foreign nations. They are not the keepers of those laws. They can grant no official copies of them. There appears no reason for assigning to their certificate respecting a foreign law any higher or different degree of credit, than would be assigned to their certificates of any other fact."

¹⁰⁰ Levy v. Burley, 2 Sum. (U. S.) 355, Fed. Cas. No. 8300.

¹ Johnson v. Cariolanus, Crabbe (U. S.), 239, Fed. Cas. No. 7380.

² United States v. Jones, 8 Pet. (U. S.) 375, 8 L. Ed. 979; United States v. Kuhn, 4 Cranch C. C. 401, Fed. Cas. No. 15,545; United States v. Edwards, 1 McLean (U. S.), 467, Fed. Cas. No. 15,026. In United States v. Jones, *supra*, the court said that in every treasury account on which suit is brought, the law requires the credits to be stated as well as the debits. These credits the officers of the government cannot properly either suppress or withhold. They are made evidence in the case, and were designed by the law for the benefit of the defendant.

³ United States v. Harrill, 1 McAll. (U. S.) 243, Fed. Cas. No. 15,310; United States v. Hodge, 13 How. (U. S.) 478, 14 L. Ed. 231; Lawrence v. United States, 2 McLean (U. S.), 581, Fed. Cas. No. 8145.

did not purport, on the face of said accounts, to be balances acknowledged by the postmaster, nor were supported by proper vouchers; but merely purported to be the balances of said quarterly returns, as audited and adjusted by the officers of the government. The objection applied, if at all, to the accuracy of the accounts, and not to their admission as evidence. The basis of an action against a postmaster is his bond and its breaches; and not the transcripts nor the quarterly returns, which are made evidence by the statute.⁴ The statute says that a transcript from the books shall be admitted as evidence. A transcript or a transcribing is substantially a copy. A copy from the books, and not of the books, shall be admissible in evidence. An extract from the books, a portion of the books, when authenticated to be a copy, may be given in evidence. While a garbled statement is not evidence, or a mutilated statement wherein the debits shall be presented and the credits suppressed, or perhaps a statement of results only, it still seems to be clear that it is not necessary that every account with an individual, and all of every account, shall be transcribed as a condition of the admissibility of any one account. The statement presented should be complete in itself, perfect for what it purports to represent, and give both sides of the account as the same stands upon the books. So the accounts rendered by a revenue officer are admissible as entries made against the interest of the party making them. They are admissible also against the sureties where they are complete, and not partial or fragmentary, in that they are statements made by him to the government in the performance of his official duty. They are

⁴ This is the excellent syllabus to *United States v. Hodge*, *supra*. Mr. Justice Daniel points out in the case that the mere fact of the transcript not containing items claimed but not allowed by the government did not render the documents any the less transcripts duly certified, nor destroy their competency as evidence

under the statute. By the disallowance of particular items, the officer is put in the position and notified to sustain, if he could, his claim by legal proof. His failure could furnish no reason why the other and admitted items of indebtedment should be withheld.

also admissible against third persons in privity with him. The authorities place the rule upon the grounds: 1. That the entries made are against the interest of the party making them; and 2. That a surety is bound by the acts and declarations of his principal, being within the scope of the business as a part of the *res gestae*.⁵ So a transcript of documents in the patent office may be received, though it is not a transcript of all the proceedings, or of anything in the nature of a record, but only of certain documents in that office relevant to the issue.⁶

§ 542 (555). **Same—Certificates.**—From what has already been said on the subject of authentication of copies there is little to add as to the actual certification of the fact that a given document is a copy or transcript of the original document of which it purports to be a copy. At the same time too much importance cannot be attached to the certificate, as many an unfortunate litigant knows when a case has failed for want of attention to an apparently trifling matter too often styled technicality.⁷ According to the dictionary, a certificate is a documentary declaration usually proceeding from the public authority as an attestation of facts contained in a public record. Its signification in law being a writing so signed and authenticated as to be legal evidence.⁸ In the true legal acceptance of the term, however, it conveys more than this. It conveys not only the fact that the document to which it is appended is what it purports to be, but also that the certifier is the proper and authorized person under the law to make the certificate.⁹

⁵ *Gartiot v. United States*, 15 Pet. (U. S.) 336, 370, 10 L. Ed. 759; *Hoyt v. United States*, 10 How. (U. S.) 109, 132, 13 L. Ed. 348; *United States v. Irving* (Eckford), 1 How. (U. S.) 250, 11 L. Ed. 120; *United States v. Gaussen*, 19 Wall. (U. S.) 198, 22 L. Ed. 41.

⁶ *Toohy v. Harding*, 1 Fed. 174, 4 Hughes, 253.

⁷ Holmes, in "*Elsie Venner*," is responsible for, "Certificates are, for the most part, like ostrich eggs—the giver never knows what is hatched out of them."

⁸ *Standard Dictionary*.

⁹ Under § 905, U. S. Rev. Stats. (U. S. Comp. Stats. 1901, p. 677; 3 Fed. Stats. Ann. 37), the fact that the clerk authenticating the record

Hence it follows that the office of the certificate is limited to the extent of authenticating that which the law calls for, and with the few exceptions noted hereafter¹⁰ it may not be otherwise used. Certified copies of official records are essentially secondary in character, and the right to introduce such written copies as primary evidence exists only by virtue of statute, and, to authorize their admission, they must be certified in the manner required by the statute. Under the laws of North Dakota,¹¹ it is provided that "the certificate must state in substance that the copy is a correct copy of the original or a specified part thereof, as the case may be." Under this section the authority of the certifying officer is limited to certifying that the copy is a correct copy of an original record, or a specified part of it; and the section does not authorize him to certify that any fact does or does not appear of record, or give him authority to substitute his judgment for that of the court, and certify what the record pertains to.¹² Although copies, properly certified and authenticated, in pursuance of a statute may be used as evidence, instead of the originals, yet officials cannot certify as a fact that certain acts were performed at a given time, for example, that a patent was issued.¹³ When certificates are admissible under the statutes referred to, they are *prima facie* evidence of the genuineness of the originals.¹⁴ This was at one time extended to cases not authorized by statute, particularly with regard to assignments of patents.¹⁵

had charge of the record will be presumed. The fact need not be certified: *Ritchie v. Carpenter*, 2 Wash. 512, 26 Am. St. Rep. 877, 28 Pac. 380.

¹⁰ § 544, *post*.

¹¹ § 5700, Rev. Codes 1899.

¹² *Sykes v. Beck*, 12 N. D. 242, 96 N. W. 844.

¹³ *Davis v. Gray*, 17 Ohio St. 330.

¹⁴ As to certificates generally, see note to *Wilcox v. Bergman*, 5 L. R. A., N. S., 954, 973, which abounds with valuable illustrations.

¹⁵ *Lee v. Blandy*, 1 Bond (U. S.), 361, Fed. Cas. No. 8182. This case has, however, been disapproved in *Paine v. Trask*, 56 Fed. 233, 5 C. C. A. 497, and in *Mayor etc. of New York v. American Cable R. Co.*, 60 Fed. 1016, 9 C. C. A. 336. In *Paine v. Trask*, *supra*, the court said: "Rev. Stats., § 892, which provides for certified copies from the patent office, relates only to records, books, papers, or drawings 'belonging to' that office, and letters patent. If

§ 543 (556). **Mere certificates not evidence.**—The certifying officer is as much the creature of the statute as his certificate. It must comply with the requirement, and he must certify that it does, and there his authority and power end. Under the familiar rule that it is the province of the court to determine the effect of written instruments, and that the best evidence must be produced, it is clear that the certifying officer should attach his certificate to the copy of the instrument to be proven. Both under federal statutes we have discussed and under the statutes of the states, it is the rule that the *mere certificate of the clerk* or other custodian of a paper, *as to its substance, contents or legal effect*, or that the paper attached is an abstract or summary of the original, is no evidence whatever. Such certificates are pure hearsay.¹⁶ The authority of an officer authorized to certify to copies of records and documents is limited to establish *prima facie* that the paper which he certifies is a true copy of another writing. When so certified, if the record or document be one which under the statute may be proved by copy, it is admissible in evidence under the statute but not otherwise. He is not clothed with authority

the law required the original assignments to remain on file, and that certified copies should be given of them, a different principle would be involved; but the only thing in this case 'belonging to' the patent office is the record, which is itself only secondary evidence. No provision is made for authentication of the genuineness of the instrument to be recorded, as frequent in laws providing for registry, but a forged assignment may be recorded equally with a genuine one. Neither is there any method given by the law, by which any person prejudiced by the registry in the patent office of a spurious instrument can purge the records. Neither does this registry have the moral protection presumably given to local county and town-

ship records through local publicity and notoriety."

¹⁶ Griffiths v. Tunckhouser, Pet. C. C. 418, Fed. Cas. No. 5823; McGuire v. Sayward, 22 Me. 230; Cox v. Cox, 26 Pa. 375, 67 Am. Dec. 432; Drake v. Merrill, 2 Jones (N. C.), 368; Foute v. McDonald, 27 Miss. 610; Tessman v. Supreme Commandry, 103 Mich. 185, 61 N. W. 261; Brill v. Christy, 7 Ariz. 217, 63 Pac. 757; United States v. Lew Poy Dew, 119 Fed. 786; Francis v. City of Newark, 58 N. J. L. 522, 33 Atl. 853; State v. Champion, 116 N. C. 987, 21 S. E. 700; Sykes v. Beck, 12 N. D. 242, 96 N. W. 844. See, also, Wickersham v. Johnson, 104 Cal. 407, 43 Am. St. Rep. 118, 38 Pac. 89. See § 525, *ante*.

to determine what the record or document relates or pertains to, or to pass judgment upon it in any way. The authorities are unanimous upon this point.¹⁷ Clerks and other recording officers may make and verify copies of their records; and in doing so they act under the obligation of their oath of office. Their certificate may be evidence of the correctness of such copies, but it is *no part of their duty to certify to other facts* than that the copy is correct.¹⁸ The courts will not assume that the conclusions drawn by such officers from the inspection of the records are correct.¹⁹ Many illustrations might be given of the general

¹⁷ *Sykes v. Beck*, 12 N. D. 242, 96 N. W. 844. In *McGuire v. Sayward*, 22 Me. 230, the court, in rejecting the certification of an official record as incompetent upon the ground that it was merely the statement of the certifying officer of what appeared in the record, said: "The law does not permit a recording or certifying officer to make his own statement of what he pleases to say appears by the record. What the record itself does declare is to be made known to the court by a duly authenticated copy of it; and upon it, and not upon what the officer may say that it declares, does the law authorize a court of justice to rely. The certificate in this case states the existence of a record; and yet, instead of a duly authenticated copy, there is only a statement of what the officer says will appear by an inspection of it. The law requires that the court before which it is produced should inspect and decide what it contains and proves, and not intrust that duty to a certifying officer." Similar language was said in *Doe ex dem. Foute v. McDonald*, 27 Miss. 610.

¹⁸ *Oakes v. Hill*, 14 Pick. (Mass.) 442.

¹⁹ *Hanson v. South Scituate*, 115 Mass. 336. This rule has been applied to the certificate of a *justice* as to what was claimed on a trial before him: *Wolfe v. Washburn*, 6 Cow. (N. Y.) 261; the certificate of the *clerk* of a court as to the events of a trial: *Barry v. Rhea*, 1 Overt. (Tenn.) 345; *Wilcox v. Ray*, 1 Hayw. (N. C.) 410; or the loss of a paper: *Robinson v. Clifford*, 2 Wash. C. C. 1, Fed. Cas. No. 11,948; *Wilcox v. Ray*, 1 Hayw. (N. C.) 410. In Pennsylvania, however, negative certificates are accepted to permit secondary evidence: *See Ruggles v. Gaily*, 2 Rawle (Pa.), 232; the certificate of the chairman of *county commissioners* to prove that work on a highway has been accepted: *Reed v. Scituate*, 7 Allen (Mass.), 141; the *surveyor's return* on a warrant for the collection of highway taxes: *Davis v. Clements*, 2 N. H. 390; the certificate of the *Secretary of State* that a certificate of a certain character has not been filed in his office: *Cross v. Pinckneyville Mill Co.*, 17 Ill. 54; and that a certain grant has not been recorded in his office: *Ayres v. Stewart*, 1 Overt. (Tenn.) 221; the certificate of the *commissioner of patents* that a patent of the kind

rule that the certificate of a public officer and, for stronger reasons, that of a private individual, is not competent evidence of facts in issue. Unless the certificate accompanies

designated has been issued: *Stoner v. Ellis*, 6 Ind. 152; *Reed v. Chicago, M. & St. P. Ry. Co.*, 71 Wis. 399, 37 N. W. 225; the certificate of the register that certain lands have been listed to a state: *Murphy v. Sumner*, 74 Cal. 316, 16 Pac. 3; the certificate of a judge of probate to show who are the heirs of a deceased person: *Greenwood v. Spiller*, 3 Ill. 502; or that a person is public administrator: *Littleton v. Christy*, 11 Mo. 390; or other facts known to him by inspection of his office records: *Armstrong v. Boylan*, 4 N. J. L. 76; the certificate of a register of deeds that there is no plat on record of a certain kind: *Bemis v. Becker*, 1 Kan. 226; the certificate of the register of the land office that a map is a correct representation of part of a township: *Doe v. King*, 4 Miss. 125. The one certifying cannot show the absence of a particular fact from his records by a certificate to that effect. He must be sworn as any other witness: *Martin v. Anderson*, 21 Ga. 301; *Dillon v. Mattox*, 21 Ga. 113; *Lamar v. Pearre*, 90 Ga. 377, 381, 17 S. E. 92; *Walker v. Logan*, 75 Ga. 759; *Miller v. Reinhart*, 18 Ga. 239; *Hines v. Johnston*, 95 Ga. 629, 23 S. E. 470; *Greer v. Fergerson*, 104 Ga. 552, 30 S. E. 943. In *English v. Sprague*, 33 Me. 440, the court said: "A magistrate, in order to say what a record contains, is not merely to certify what his construction of the record is. He must have a copy of it, that the court may judge of its import. His certificate that it contains any particular fact is never receivable as proof." In *Jay v. East Livermore*, 56 Me. 107, a paper

certified to be a "true extract from the record" was rejected. A similar certificate of a deputy controller was condemned in *Wood v. Knapp*, 100 N. Y. 109, 2 N. E. 632. The court said: "It is not the province of the deputy controller to determine what is or is not material to a question pending in a legal tribunal. He has power to certify to the correctness of copies of papers in the controller's office so as to make them evidence, but beyond this his certificate has no more effect than the opinion of any other person." In *Hanson v. South Scituate*, 115 Mass. 336, a certified copy of records was rejected on the ground that it "was simply a statement of what the certifying officer under whose hand it was, deemed to be shown by them." The following authorities will be found to fully sustain the rule as stated in the cases already cited: *Robbins v. Townsend*, 20 Pick. (Mass.) 345; *Jackson v. Miller*, 6 Cow. (N. Y.) 751; *Childress v. Cutter*, 16 Mo. 24; *Byers v. Wallace*, 87 Tex. 503, 28 S. W. 1056, 29 S. W. 760; *Drake v. Merrill*, 47 N. C. 368; *Goodrich v. Conrad*, 24 Iowa, 254; *Davis v. Gray*, 17 Ohio St. 330; *Adams v. Wright*, 14 Wis. 408; *Tessman v. United Friends*, 103 Mich. 185, 61 N. W. 261; *Owen v. Boyle*, 15 Me. 147, 32 Am. Dec. 143; *Cooper v. Armstrong*, 4 Kan. 30; *Billingsley v. Hiles*, 6 S. D. 445, 61 N. W. 687. See, also, the late cases of *Painton v. Cavanaugh*, 135 N. Y. Supp. 418, 151 App. Div. 372; 1 Wharton's Law of Ev., §§ 80, 120, 121; 1 Greenl. on Ev., 16th ed., § 498.

a copy of the record, it has no probative force. The courts do not admit as evidence the certificate that no *document* or record of a given character *exists* in his office, or that it *cannot be found* after diligent search. Such a fact must be proven by the deposition or testimony of the proper officers taken in open court.²⁰ But frequently statutes admit certificates that documents cannot be found or have not been filed. The reason for the rule which prohibits the custodian of public records from including in certified copies only such portions of the record as, in his opinion, are pertinent to a particular official act or fact, is, of course, that the relevancy of the parts of the record is for the court to determine. To hold otherwise would be to substitute the judgment of the certifying officer for that of the judicial tribunal in which the fact in controversy is to be determined. The danger of any other rule is well illustrated in the North Dakota case already referred to.^{20a} In that case the plaintiff brought suit in the district court of Stutsman county to determine adverse claims to certain real estate owned by him and situate in that county. The defendant purchased all of said lands at the 1898 tax sale for the taxes of 1897, and again at the 1899 sale for the taxes of 1898, and also paid the subsequent taxes thereon for the years of 1899 and 1900. The plaintiff alleged "that in said years the said lands were not legally assessed for taxation, and no taxes were legally levied or charged against the same, and that by reason thereof all of said taxes and tax sales are wholly void," and prays "that all of said taxes and tax sales be adjudged void and canceled." The trial court held that there was no valid assessment of any of such lands for taxes for any of the years in question, and further held that the state and county taxes levied for each of said years were invalid, and entered judgment declaring all of said taxes and tax certificates void. On the

²⁰ Bullock v. Wallingford, 55 N. H. 619; Stoner v. Ellis, 6 Ind. 152; Daniel v. Braswell, 113 Ga. 372, 38 S. E. 829.

^{20a} Sykes v. Beck, 12 N. D. 242, 96 N. W. 844.

appeal, Young, C. J., pointed out that the trial court found that in 1897 there was a county levy in fact. It further found that the levy for that year was not based upon an itemized statement of county expenses for the ensuing year, or a statement of the outstanding indebtedness of the county, and was therefore void. The only evidence offered to show that a statement of expenses and a statement of indebtedness was not made as required by law was the fact that no such statements appeared in the certified copy offered in evidence, coupled with the auditor's certificate that the copy contained all that pertained to the county tax levy for 1897. "It is only fair to assume," said the learned chief justice, "that the absence of the statements from the certified copy controlled the trial court in its finding that the levy, which is complete in itself, was not based upon a statement of expenses and indebtedness. Accepting the copies as properly certified, the trial judge necessarily concluded that if statements had been made, they would be in the copy, inasmuch as the certifying officer certified that it contained all that pertained to the county tax levy. In making the certificate the auditor merely expressed his opinion as to what pertains to a county tax levy. The fact is the county tax levy was complete in itself, as will appear by reference to the finding. If the levy is invalid, it is not because of the form in which it was made, but simply because of the failure of the board to perform an anterior act, namely, the preparation of the statements. But the statements are no part of the levy. This was made clear by Bartholomew, J.,^{20b} who said: 'While the levy must be based upon the itemized statement, such statement is no part of the levy. The two things are entirely distinct. They need not be made at the same sitting, or at the same session. The only part of the commissioners' record here introduced pertains to one sitting, and to the levy proper. I find nothing to negative the idea that a complete and technical itemized statement of county ex-

^{20b} *Shuttuck v. Smith*, 6 N. D. 71, 69 N. W. 5.

penses for the ensuing fiscal year may not be found elsewhere in their records.' Possibly the county auditor, in making these copies, was also of opinion that a copy of the record of the county tax levy would not properly include copies of the statements, and therefore did not include them. At any rate, the copy is no more than the opinion of the certifying officer. It hardly need be said that the judgment of the county auditor cannot be substituted for that of the court. The copies were not certified as required by law. The exhibits must be rejected and the testimony disregarded. There is, then, no proof whatever tending to show the invalidity of the county tax levies for the several years in question. It is proper to say that in case the certificates showed that the copies were true copies of a specified part of the commissioners' record, or all of it, properly identifying the part of the original record copied, the exhibits would be admissible, and would not be rejected merely because the certifying officer had, after making a proper certificate, expressed his opinion as to what the record related to, and as to what facts did or did not appear in the record. As, for example, had the auditor certified that the copy was a true copy of pages 27 and 28 of the record, book A of the county commissioners' record of Stutsman county for the year 1897, or by other suitable description, and then added a statement of his opinion as to the subject that the record related to, and that there was no other record or matter relating to that subject, in that event the extraneous recitals in the certificate would be suppressed, and the contents of the exhibit received as a true copy of the original record. But that is not this case. These certificates identify no part of the original record by book, page, or otherwise. The auditor merely certifies that the papers are true copies 'of all that pertains to' the county levies. If, however, it were conceded that these copies are so certified that they may be properly admitted in evidence as proof of any part of the commissioners' proceedings, yet their admission would not avail the plain-

tiff, for the reason that after rejecting the opinion of the auditor as to what they pertain to, and his opinion that they contain all that relates to the county tax levies, there is no competent evidence that the records of the board do not elsewhere show a literal compliance with the statute.”

§ 544 (557). **Exceptions to the rule that mere certificates are not evidence.**—Although the rule is very general that official certificates are not evidence, except as authentication of accompanying copies, yet occasionally cases are to be found in which such certificates have been received. Thus, the certificates of foreign dignitaries have been received as evidence in a few old cases where the certificate related to, or was part of an official act, or where it was probable that the official would not give a deposition.²¹ But they are only mentioned as illustrations of the exception. An examination of them, too, will disclose that they invariably hold some special warrant for a departure from the rule. Even a century since we find the court insisting on the deposition. In a case where it was sought to put in evidence a certificate of the collector at Havana,²² the court said: “All that we know respecting this certificate is, that the officer who gave it is authorized, and can alone grant such a one, according to the laws which prevail in the island of Cuba. But are we bound, on that account, to receive it as evidence? We admit that it is an authentic instrument; but still, it is only an *ex parte* certificate of a fact, which the officer who gave it was authorized to certify. But it is not the best evidence which the case admits of, because the deposition of the officer might have been taken; and it was important for the defendant to have had the privilege of cross-examination, particularly for the purpose of eliciting the true cause of the order of sale.” By a familiar rule of the law-merchant, the *certificate of a notary public*

²¹ United States v. Acosta, 1 How. (U. S.) 24, 11 L. Ed. 33; Bingham v. Cabbot, 3 Dall. 19, 1 L. Ed. 491; United States v. Mitchell, 3

Wash. C. C. 95, Fed. Cas. No. 15,792.

²² Wood v. Pleasants, 3 Wash. C. C. 201, Fed. Cas. No. 17,961.

that he made due demand and presentment of a foreign negotiable bill, and of its dishonor is proof of such demand and refusal to pay or accept.²³ "On the other hand, the *protest of inland bills*, however common, is not necessary by the law-merchant; and, when made, is extraofficial; and therefore a certificate or record of it is not evidence, either of presentment, demand or dishonor, or of notice to any party."²⁴ *Statutes* have, however, frequently been enacted in this country making such certificates evidence in the case of the protest of inland bills and promissory notes.²⁵ In such cases, the statute must be strictly complied with before the certificate will be admitted;²⁶ neither is the notary thereby authorized to act beyond his territorial limits.²⁷ The certificate of protest is only evidence of such facts as it properly states. It is *not evidence of collateral facts*; for example, as to the statements or conduct of the parties.²⁸ The presumption is that acts alleged to be done were regularly performed in all cases.²⁹ This mode of proof is exclusive as to foreign bills of exchange,³⁰ but the statutes relating to the protest of inland bills of

²³ 2 Dan. Neg. Inst., 5th ed., § 959; 2 Pars. Notes & B. 499.

²⁴ 2 Pars. Notes & B. 498; Young v. Bryan, 6 Wheat. (U. S.) 146, 5 L. Ed. 228; Union Bank v. Hyde, 6 Wheat. (U. S.) 572, 5 L. Ed. 333; Nicholls v. Webb, 8 Wheat. (U. S.) 326, 5 L. Ed. 628; Bank of United States v. Leathers, 10 Mon. (Ky.) 64; Bond v. Bragg, 17 Ill. 69; Carter v. Burley, 9 N. H. 558; Sumner v. Bowen, 2 Wis. 524.

²⁵ Dan. Neg. Inst., 5th ed., § 926. See the statutes of the jurisdiction.

²⁶ Rogers v. Jackson, 19 Wend. (N. Y.) 383.

²⁷ Dutchess Co. Bank v. Ibbotson, 5 Denio (N. Y.), 110; Kirtland v. Wanzer, 2 Duer (N. Y.), 278; Dan. Neg. Inst., 5th ed., § 959.

²⁸ Bradshaw v. Hedge, 10 Iowa, 402; Sprague v. Tyson, 44 Ala. 338;

Turner v. Rogers, 8 Ind. 139; Sullivan v. Deadman, 19 Ark. 484; Stiles v. Inman, 55 Miss. 469; Dan. Neg. Inst., 5th ed., § 966.

²⁹ Bank of United States v. Smith, 11 Wheat. (U. S.) 171, 6 L. Ed. 443; Pattee v. McCrillis, 53 Me. 40; Simpson v. White, 40 N. H. 540; Union Bank v. Middlebrook, 33 Conn. 95; Bank of Commonwealth v. Mudgett, 44 N. Y. 514; Coleman v. Smith, 26 Pa. 255; Stainback v. Bank of Virginia, 11 Gratt. (Va.) 260; Elliott v. White, 6 Jones (N. C.), 98; Whaley v. Houston, 12 La. Ann. 585; Wamsley v. Rivers, 34 Iowa, 463; McFarland v. Pico, 8 Cal. 626.

³⁰ Union Bank v. Hyde, 6 Wheat. (U. S.) 572, 5 L. Ed. 333; Carter v. Union Bank, 7 Humph. (Tenn.) 548, 46 Am. Dec. 89.

exchange *do not exclude other modes of proof*,³¹ such as the admission of the party, or the oral testimony of the notary.³² But in general the certificates of notaries, unless relating to bills of exchange or protests of ships, are, like other official certificates, not evidence of any controverted fact.³³ Cases of this character do not at all modify the general rule that mere certificates are not evidence. On a principle elsewhere discussed, the entries or certificates of *persons, since deceased*, made in the regular course of business may be admissible.³⁴ In many cases, some of which are set out in the notes, it will be found that while the exception nominally relates to a "certificate," the word has been used in its sense of being a statement in writing by a person having a public or official status, concerning some matter within his knowledge or authority,³⁵ rather than something certified to in the sense in which that term is applied as authenticating a copy of an original docu-

³¹ Bailey v. Dozier, 6 How. (U. S.) 23, 12 L. Ed. 228; Wanzer v. Tupper, 8 How. (U. S.) 234, 12 L. Ed. 1060.

³² Derickson v. Whitney, 6 Gray (Mass.), 248; Long v. Crawford, 18 Md. 220; Terbell v. Jones, 15 Wis. 253.

³³ Talcott v. Delaware Ins. Co., 2 Wash. C. C. 449, Fed. Cas. No. 13,734; Moore v. Worthington, 2 Duv. (Ky.) 307. Certificates have been received as evidence when they have been issued *as part of the act* to be proven, and were made contemporaneously therewith, such as receipts of public officers for money: Newport v. Cooper, 10 La. 155; Goddard v. Gloninger, 5 Watts (Pa.), 209; Fager v. Campbell, 5 Watts (Pa.), 287; Lewisburg v. Augusta, 2 Watts & S. (Pa.) 65; Johnson v. Thompson, 4 Bibb (Ky.), 294; the certificate of a *marine inspector*: Perkins v. Augusta Ins. etc. Co., 10 Gray (Mass.), 312, 71 Am. Dec. 654;

the certificates of officers in service *of process*: Knowlton v. Ray, 4 Wis. 288; or on sale of property on legal process: Knowlton v. Ray, 4 Wis. 288. See, also, Miller v. Larmon, 38 How. Pr. (N. Y.) 417 (the *return* of a constable styled a certificate); McVey v. McVey, 51 Mo. 406 (certificate of *appraisement*); Dalton v. Fenn, 40 Mo. 109 (certificate of *tax sale*); United States v. Ambrose, 2 Fed. 556 (*declarations* by clerks of courts); People v. Nordheim, 99 Ill. 553 (when word used disjunctively with *statement*); Books v. State, 83 Ala. 122, 6 South. 902 (when used in connection with *license, diploma*, or certificate of qualifications); Splahn v. Gillespie, 48 Ind. 397 (where it was held that a certificate of *purchase*, made by a sheriff, is in substance an agreement conveying property).

³⁴ See § 319, *ante*.

³⁵ Rapalje & Lawrence Law Dict.

ment. Hence many cases which might be included in a list of exceptions will be found under their appropriate headings of admissions or declarations, valuable according as they are part of the *res gestae*, owe their existence to statute, or are mere hearsay.

§ 545 (558). **Proof of handwriting—Writer need not be called.**—The term “handwriting” includes generally whatever a party has written with his hand and not merely his common and usual style of chirography.³⁶ When it is necessary to prove handwriting, probably no mode would ordinarily seem so satisfactory to the jury as to call the alleged writer himself as a witness; this has sometimes been called the strongest proof of such a fact.³⁷ But while this may be generally true, it is not necessarily so in all cases. The rule of evidence requiring the production of the best evidence obtainable is not violated by permitting the genuineness of a signature to be proved by a witness who is familiar with the handwriting of the person by whom it purports to have been made, without introducing the testimony of such person, although he may be easily accessible at the time such proof is offered.³⁸ It might fre-

³⁶ Commonwealth v. Webster, 5 Cush. (Mass.) 295, 52 Am. Dec. 711.

³⁷ Eagleton v. Kingston, 8 Ves. 474, 32 Eng. Reprint, 425. In Brewster v. Countryman, 12 Wend. (N. Y.) 446, it was held that where a copy was taken of an agreement, and the party, instead of producing the copyist or accounting for his absence, proved his handwriting, it was held that the evidence was insufficient to authorize the admission of the copy. Savage, C. J., said: “As to the paper purporting to be a copy of the agreement, the best evidence was not produced. The plaintiff had requested Joseph Hunt to make a copy, and the paper produced purported to be a copy and was in Hunt’s hand-

writing; and the witness who had seen the original, said it was substantially the same. This was pretty strong testimony, yet Joseph Hunt’s testimony would be stronger. Joseph Hunt was not produced, nor was his absence accounted for. The evidence produced showed that there was better evidence in the power of the defendant not produced. That is the very case in which secondary evidence should not be received as sufficient.”

³⁸ McCray v. State, 134 Ga. 416, 20 Ann. Cas. 108, 68 S. E. 62, and note on “Proof of Handwriting by Third Person Where Writer is Accessible as Witness.” See, also, Reg. v. Hurley, 2 M. & R. (Eng.) 473; McCaskle v. Amarine, 12 Ala. 17;

quently happen that an ignorant person could form a less accurate judgment as to his own handwriting after a considerable lapse of time than could be formed by a third person acquainted with his handwriting and accustomed to pass judgment upon such questions. It is well settled, therefore, that *the alleged writer need not be called as a witness in the first instance*. His testimony is not the *best evidence* within the meaning of the rule that the best evidence must be produced. Upon the trial in a Tennessee case,^{38a} the original warrant upon which the arrest was alleged to have been made was offered in evidence by the defendants, upon proof by a third person of the handwriting of the justice by whom it was issued, and also of the justice who committed the defendant. This was objected to by the plaintiff upon the ground that both of said justices were witnesses in the case, in attendance upon the trial, and had been sworn and placed under charge of an officer as witnesses for the defendants. "It is insisted," said the court, "that said justices should have been called

Royce v. Gazan, 76 Ga. 79; Smith v. Prescott, 17 Me. 277; Smith v. Valentine, 19 Minn. 452; Lefferts v. State, 49 N. J. L. 26, 6 Atl. 521; Ainsworth v. Greenlee, 8 N. C. 190; Washington v. State, 143 Ala. 62, 39 South. 388; Abat v. Rion, 9 Mart. O. S. (La.), 465, 13 Am. Dec. 313; Burgess v. Burgess, 44 Neb. 16, 62 N. W. 242; Osborne v. State, 9 Yerg. (Tenn.) 488; Foulkes v. Commonwealth, 2 Rob. (Va.) 836. In McCaskle v. Amarine, *supra*, the plaintiff was permitted to prove the handwriting of a justice of the peace by a constable who was well acquainted with it. On appeal the court said: "We would remark, that if such proof was essential, we can discover no objection to the competency of the constable. This witness affirms that he was well acquainted with the handwriting of

the justice; and if it was more convenient to obtain his testimony, or the plaintiff preferred relying on it, to calling on the justice to prove or admit his writing, we cannot conceive that any rule of law would be violated. The evidence of the justice might, perhaps, be more satisfactory and convincing, but it would not be of a higher grade, and could not consequently be rejected under the influence of the rule which requires the best evidence attainable to be adduced." The case of Cheritree v. Roggen, 67 Barb. (N. Y.) 124, is not in conflict and is easily distinguishable. In Haun v. State, 13 Tex. App. 383, 44 Am. Rep. 706, there was no evidence of familiarity with the handwriting by the witness.

^{38a} McCully v. Malcolm, 9 Humph. (Tenn.) 187.

to prove the issuance of the warrant and judgment thereon, and that it was error, under the circumstances, to admit proof of their handwriting. We do not think so. The rule requiring the best evidence of which the case is susceptible to be produced is not infringed in this case. This was not the substitution of an inferior for a higher grade of evidence. The fact to be established was the genuineness of the warrant and judgment; and this might as well be done by the testimony of one acquainted with their handwriting and signatures as by the parties themselves. The evidence is of precisely the same grade. It may, as argued, excite suspicion that the refusal to call the justices was because they might, upon cross-examination, have proved other facts adverse to the defendants; but it is a sufficient answer to this objection to say that they might have been called as witnesses by the plaintiff. The fact that the justices were within call at the time of the trial, and witnesses in the case, does not vary the principle. A letter may be proved to be genuine without calling the writer, though he be present." "There is not such a distinction between one man's knowledge of his own handwriting, and the knowledge of another on the same subject as constitutes the former evidence of a superior degree to the latter."³⁹ If there were, there would be required, in proving a promissory note or other unattested writing, the production of the maker of the instrument, to the exclusion of all other evidence as primary proof.⁴⁰ The same rule prevails in both *civil and criminal cases*.⁴¹ The general rule which admits proof of the handwriting of a party by others who are acquainted with such writing rests on the ground that in every person's handwriting there is a peculiar prevailing

³⁹ Stark. Ev., 6th Am. ed., 339; Reg. v. Benson, 2 Camp. 508; Ainsworth v. Greenlee, 8 N. C. 190; Lefferts v. State, 49 N. J. L. 26, 6 Atl. 521; Hess v. State, 5 Ohio, 5, 22 Am. Dec. 767. See, also, Williams v. Deen, 5 Tex. Civ. App. 575,

24 S. W. 536; Burgess v. Burgess, 44 Neb. 16, 62 N. W. 242.

⁴⁰ Lefferts v. State, *supra*.

⁴¹ De la Motte, 21 How. St. Tr. 810; Hammond's Case, 2 Greenl. (Me.) 33, 11 Am. Dec. 39.

character which distinguishes it from the handwriting of every other person, and, therefore, that one who knows the handwriting of the party is competent to testify to it. This kind of evidence, admits of every degree, from the lowest presumption to the highest moral certainty.⁴² The degree of weight to be attached to it depends not only upon the character of the witness, but also upon the opportunity he has had of acquiring a knowledge of the party's handwriting.⁴³

§ 546 (559). **One who has seen another write or what is admitted by the writer to be his writing is competent to testify as to his handwriting.**—Having discussed the absence of necessity to prove writing, in the first place, by the writer himself, it must be considered by what other means the authenticity of a document should be established. A witness is deemed competent to testify to the handwriting of another if *he has seen that person write*. This rule is recognized in all the cases that will be cited on the subject. Other means of acquiring the same knowledge were later, by successive enlargements of the rule, recognized as proper; but for the preference for this original necessary source of knowledge there was an important reason; it disposed of any doubt as to the authenticity of the writing which afforded the witness his mental standard for comparison with the disputed writing. It has also been suggested that quite as important a reason for the choice of the rule is the fact that this method of proof established that the person in question was capable of writing, which was not a usual accomplishment in early times.⁴⁴ A witness is qualified to testify to the genuineness of a controverted signature if he has the proper knowledge of the party's handwriting. The difficulty has been in determining what is proper knowledge, and how it shall be acquired. It is settled everywhere that if a person has seen another

⁴² 1 Phill. Ev. 484.

⁴³ Strong v. Brewer, 17 Ala. 706.

⁴⁴ From the excellent note to

Ratliff v. Ratliff, 63 L. R. A. 963,
on "Competency of Witnesses to
Handwriting."

write his name but once, he can testify, and that he is equally competent if he has personally communicated with him by letter, although he has never seen him write at all. But is the witness incompetent unless he has obtained his knowledge in one or the other of these modes? Clearly not; for in the varied affairs of life there are many modes in which one person can become acquainted with the handwriting of another besides having seen him write or correspond with him. There is no good reason for excluding any of these modes of getting information, and if the court, on the preliminary examination of the witness, can see that he has that degree of knowledge of the party's handwriting which will enable him to judge of its genuineness, he should be permitted to give to the jury his opinion on the subject.⁴⁵ Discussion and differences of opinion have arisen, not as to the general rule just stated, but with respect to the *degree of weight* to be given to testimony of this character. This kind of testimony may be so weak as to be unsafe to act upon, or so strong as, in the mind of every reasonable man, to produce conviction. But whatever degree of weight his testimony may deserve, which is a question exclusively for the jury, it is an established rule that, if one has seen the person write, he will be competent to speak as to such handwriting; and this is true *although the impression* on the mind of the witness may be *faint* and inaccurate.⁴⁶ The witness practically states the inference he draws from the writing before him and his knowledge of the handwriting of the person, by comparison or otherwise, to whose handwriting he has been called upon to testify.⁴⁷ Thus, the testimony has been admitted, although

⁴⁵ Rogers v. Ritter, 12 Wall. (U. S.) 317, 20 L. Ed. 417.

⁴⁶ Hopper v. Ashley, 15 Ala. 457; Hammond's Case, 2 Greenl. (Me.) 33, 11 Am. Dec. 39, and note; Stoddard v. Hill, 38 S. C. 385, 17 S. E. 138; Riggs v. Powell, 142 Ill. 453, 32 N. E. 482; State v. Farrington, 90 Iowa, 673, 57 N. W. 606; State v.

Hall, 16 S. D. 6, 65 L. R. A. 151, 91 N. W. 325; as to proof of handwriting by witnesses, see article, 16 Am. L. Rev. 569. See, also, Southern R. Co. v. Cortner, 3 Ala. App. 400, 58 South. 84.

⁴⁷ Salazar v. Taylor, 18 Colo. 538, 33 Pac. 369; Riggs v. Powell, 142 Ill. 453, 32 N. E. 482; Hopkins v.

the witness has not seen the person write for many years before the trial,⁴⁸ and although he has only seen the person write on a single occasion,⁴⁹ and even though he only saw the person write his name,⁵⁰ or even his surname,⁵¹ or although he never saw the person write before the date of the disputed paper;⁵² and it is not necessary that the witness should be an *expert*.⁵³ These are matters affecting, not the admissibility, but the *weight* of such testimony;⁵⁴ and it is within the discretion of the court to determine them in the first instance.⁵⁵ If a witness has seen the per-

Megquire, 35 Me. 78; Berg v. Peterson, 49 Minn. 420, 52 N. W. 37; Burnham v. Ayer, 36 N. H. 182; Hammond v. Varian, 54 N. Y. 398; Hess v. State, 5 Ohio, 5, 22 Am. Dec. 767; Smyth v. Caswell, 67 Tex. 567, 4 S. W. 848; Pepper v. Barnett, 22 Gratt. (Va.) 405; Rinker v. United States, 151 Fed. 755, 81 C. C. A. 379.

⁴⁸ Horne Tooke's Case, 25 How. St. Tr. 71 (nineteen years); Warren v. Anderson, 8 Scott, 384 (ten years); Smith v. Walton, 8 Gill (Md.), 77 (six years); Edelen v. Gough, 8 Gill (Md.), 87 (three years); Commonwealth v. Nefus, 135 Mass. 533; Wilson v. Van Leer, 127 Pa. 371, 14 Am. St. Rep. 854, and note, 17 Atl. 1097; Renshaw v. First Nat. Bank (Tenn.), 63 S. W. 194; Diggins' Estate, 68 Vt. 198, 34 Atl. 696.

⁴⁹ Hammond v. Varian, 54 N. Y. 398; Commonwealth v. Nefus, 135 Mass. 533; McNair v. Commonwealth, 26 Pa. 388; Rideout v. Newton, 17 N. H. 71; Pepper v. Barnett, 22 Gratt. (Va.) 405; Horne Tooke's Case, 25 How. St. Tr. 71; Willman v. Worrall, 8 Car. & P. 380; Diggins' Estate, 68 Vt. 198, 34 Atl. 696; State v. Goodwin, 37 La. Ann. 713. See, also, Egan v. Murray, 80 Iowa, 180, 45 N. W. 563; Bess v. Commonwealth, 118 Ky. 858,

82 S. W. 576; State v. Freshwater, 30 Utah, 442, 116 Am. St. Rep. 853, 8 App. Cas. 1030, 7 L. R. A., N. S., 557, 85 Pac. 447, in which the dicta of leading text-writers is collected.

⁵⁰ Woodford v. McClenahan, 9 Ill. 85; State v. Burns, 27 Nev. 289, 74 Pac. 983; Burnham v. Ayer, 36 N. H. 182; Rideout v. Newton, 17 N. H. 71; Hammond v. Varian, 54 N. Y. 398; In re Diggins, 68 Vt. 198, 34 Atl. 696; Pepper v. Barnett, 22 Gratt. (Va.) 405; Rogers v. Ritter, 12 Wall. (U. S.) 317, 20 L. Ed. 417; Willman v. Worrall, 8 Car. & P. 380; Warren v. Anderson, 8 Scott, 384.

⁵¹ Smith v. Walton, 8 Gill (Md.), 77.

⁵² Keith v. Lothrop, 10 Cush. (Mass.) 453; Ratliff v. Ratliff, 131 N. C. 425, 63 L. R. A. 963, 42 S. E. 887; Tucker v. Hyatt, 144 Ind. 635, 41 N. E. 1047, 43 N. E. 872.

⁵³ Moon v. Crowder, 72 Ala. 79; Williams v. Deen, 5 Tex. Civ. App. 575, 24 S. W. 536.

⁵⁴ Hammond v. Varian, 54 N. Y. 398; Commonwealth v. Nefus, 135 Mass. 533; McNair v. Commonwealth, 26 Pa. 388; Miles v. Loomis, 75 N. Y. 288, 31 Am. Rep. 470.

⁵⁵ Wilson v. Van Leer, 127 Pa. 371, 14 Am. St. Rep. 854, 17 Atl.

son write to whose signature he swears, the fact that he and that person were upon opposite sides of the same table when the writing was done does not render him incompetent.⁵⁶ The evidence of a witness who admitted, on cross-examination, that the only times he had seen the person in question write he had not read his writing, and was not very near him when writing, was, although not of the most satisfactory kind, competent to go to the jury, and sufficient to admit the writings testified to. The court said in this case: "The evidence may be slight, but, if he is able to state that in his belief the handwriting is that of the person in question, it is competent to be considered in the first instance, and is sufficient until some rebutting evidence is offered."⁵⁷ That the rule admitting witnesses who had

1097. The following cases illustrate the ruling of the court as to the admission of such testimony—*admitted*: In re Marchall's Estate, 126 Cal. 95, 58 Pac. 449; Salazer v. Taylor, 18 Colo. 538, 33 Pac. 369; Kendall's Exr. v. Collier, 97 Ky. 446, 30 S. W. 1002; Commonwealth v. Hall, 164 Mass. 152, 41 N. E. 133; State v. Hall, 16 S. D. 6, 65 L. R. A. 151, 91 N. W. 325; Poncin v. Furth, 15 Wash. 201, 46 Pac. 241; State v. Harvey, 131 Mo. 339, 32 S. W. 1110; *excluded*: Gibson v. Trowbridge, 96 Ala. 357, 1 South. 365.

⁵⁶ People v. Petmecky, 2 N. Y. Cr. Rep. 450; affirming 99 N. Y. 415, 2 N. E. 145. And a curious authority for this proposition is found in the trial of the Seven Bishops, 12 How. St. Tr. 183, 288, where a witness, who offered to prove the handwriting of one of the bishops from the fact of having seen a letter which the bishop had acknowledged in his presence to be in his handwriting, was rejected, but a witness who had seen the bishop write, but had "never stood by him so near as

to see him make his letters," was permitted to express his opinion.

⁵⁷ Hoitt v. Moulton, 21 N. H. 586. But where the witness testified to standing at a shop door and seeing the signatory seated in a carriage on the road, where he appeared to be writing while resting papers upon his hat which was in his hands, and that the witness was not near enough to see what he wrote, the evidence was properly rejected: Brigham v. Peters, 1 Gray (Mass.), 139. For a case where the only testimony was that of a witness who said he saw the writer once sign her name with a gloved hand, see McConnell v. Playa de Oro Min. Co., 43 App. Div. 616, 59 N. Y. Supp. 368. The testimony of a witness thirty years of age, blind since she was twenty-two, who had seen an intestate write in an autographic album when she was twelve years old, and a letter written by him when she was thirteen years old and not since, was thus commented upon by the court: "The circumstances of having seen

once seen the person in question write has been considered practically inflexible, without regard to the length of time since that occurrence, appears from several extraordinary cases.⁵⁸ It must be conceded, however, that in the nature of things it is scarcely possible to fix any arbitrary limit of time within which the witness must have seen the writ-

him write but once, and that so long ago, while not authorizing the rejection of her testimony arbitrarily, greatly impairs its value. Doubtless it is possible that the single instance created such an impression on the mind that it has continued all the years intervening with such distinctness as to enable her to recall its resemblance with a signature to a letter which also is but a memory of long ago, and say both are in the same handwriting, but it is so out of the ordinary and improbable, that the court rightly declined to base its judgment thereon": *Murphy v. Murphy*, 146 Iowa, 255, 125 N. W. 191.

⁵⁸ From the note to *Ratliff v. Ratliff*, 63 L. R. A. 963, *supra*, we take the following illustrations: In *Tooke's Case*, 25 How. St. Tr. 1, 71, which has been thought unreasonable, a witness who had seen the prisoner write but once, and that nineteen years before, but had in the meantime received letters which he supposed to be from him, was allowed to give his opinion of the genuineness of an incriminating writing. It was held in *Renshaw v. First Nat. Bank* (1900; Tenn. Ch. App.), 63 S. W. 194, that sufficient foundation was laid for the opinion of a witness by his testimony that he was acquainted with the handwriting of the person in question some forty years before, that he did not know his handwriting very well even then, but had seen him

write and sign his name, and still had some recollection of it, and had papers with his signatures upon them which he saw him write. The court said: "We think that this shows that he was acquainted with the handwriting sufficiently to make his testimony competent although its probative force may be weak." Some discretion, however, is to be allowed the trial court in this matter, it seems—at least in Pennsylvania. The decision of a trial judge, holding that a witness who had seen an alleged testator write twice thirty-two years before, when the witness was ten years old, and once nineteen years before the trial, was competent to give his opinion as to the genuineness of the signature of the will, was within the authorities, although such evidence ought to be regarded with great caution: *Wilson v. Van Leer*, 127 Pa. 371, 14 Am. St. Rep. 854, 17 Atl. 1097. But in *Wilson v. Betts* (1847), 4 Denio (N. Y.), 201, is met what seems the climax of absurdity. There a witness, an ignorant man, was allowed to testify to his belief in the genuineness of a signature purporting to be that of a person whom he had seen write sixty-three years before, although he had not seen him or his handwriting since, and had not had his attention called to that handwriting until the instrument in question was shown to him.

ing done. That must depend on his intelligence, his habit of observation of such matters, and the apparent strength and confidence of his memory, which must be passed upon in the first instance by the trial judge.⁵⁹ The same is true when the witness is unable to read and write, but testifies to handwriting with which he says he is familiar,⁶⁰ or when a witness testifies that he is familiar with the mark of another, used as a signature.⁶¹ It may be more difficult to acquire a knowledge of a simple mark, by which an illiterate man executes a deed, than the knowledge of the handwriting of one who can write his name in full. "In some instances the peculiarity may be as strong as that which marks the characters of one who can write, and in other instances not perhaps so great; yet in all, we apprehend, would be found something distinct and peculiar, which would enable one, who had frequently seen the party make his mark, to know it. We can, therefore, see no reason why one who has frequently seen a party make his mark to deeds or other writings, and who can testify that he believes that he knows it, may not be permitted to prove the execution of a deed thus described."⁶² But where there is nothing distinctive about a signature by mark, the genuineness of it is not subject to proof by the opinion of a witness.⁶³ One may be competent to testify as to the *signa-*

⁵⁹ *Wilson v. Van Leer, supra.*

⁶⁰ *Foye v. Patch*, 132 Mass. 105.

⁶¹ *Strong v. Brewer*, 17 Ala. 706; *Fogg v. Dennis*, 3 Humph. (Tenn.) 47; *Jackson v. Van Dusen*, 5 Johns. (N. Y.) 144, 4 Am. Dec. 330; *Thompson v. Davitte*, 59 Ga. 472; *Pearcy v. Dicker*, 13 Jur. 997; *George v. Surrey, Moody & M.* 516, 31 R. R. 755.

⁶² *Strong v. Brewer*, 17 Ala. 706. There are very few cases on the point. There appears to be one English one (*George v. Surrey*, 1 M. & M. 516, 31 R. R. 755), referred to in Cowen & Hill's Notes to 3 Phill.

Ev., 1323, in which it was held that a witness who had seen the party, whose signature he was called to prove, make the mark, might be permitted to testify to the execution of the instrument.

⁶³ *Jones v. Hough*, 77 Ala. 437; *Ex parte Miller*, 49 Ark. 18, 4 Am. St. Rep. 17, 3 S. W. 883; *Delony v. Delony*, 24 Ark. 7; *Watts v. Kilburn*, 7 Ga. 356; *Travers v. Snyder*, 38 Ill. App. 379; *Phoenix Nat. Bank v. Taylor*, 113 Ky. 61, 67 S. W. 27; *Allen v. Moss*, 27 Mo. 354; *Jackson v. Van Dusen*, 5 Johns. (N. Y.) 144, 4 Am. Dec. 330; *Carrier v. Hampton*,

ture of another, if acquainted with it, although he is not acquainted with his general handwriting.⁶⁴ So he may testify as to the signature of a firm, although he is not acquainted with the handwriting of either member of the firm.⁶⁵ As to when a person is deemed to be acquainted with the handwriting of another, Stephen⁶⁶ says it is "when he has at any time seen that person write, or when he has received documents purporting to be written by that person in answer to documents written by himself or under his authority and addressed to that person, or when, in the ordinary course of business, documents purporting to be written by that person have been habitually submitted to him." In a New York case⁶⁷ it is laid down that before a witness should be permitted to testify to the handwriting of another, he should be acquainted and somewhat familiar with the handwriting of the person whose writing is sought to be proved. He should have an intelligent acquaintance with the handwriting of the party, so that he can determine with a reasonable degree of certainty whether the writing offered is his genuine handwriting.⁶⁸ It has also been held that a witness is competent to testify as to the

33 N. C. 307; *State v. Byrd*, 93 N. C. 624; *State v. Tice*, 30 Or. 457, 48 Pac. 367; *Engles v. Bruington*, 4 Yeates (Pa.), 345, 2 Am. Dec. 411; *Shinkle v. Crock*, 17 Pa. 159; *Gilliam v. Perkinson*, 4 Rand. (Va.) 325. See, also, *Gregory v. Baugh*, 4 Rand. (Va.) 611. The above cases contain such comment on the subject as, "To attempt to prove a mark to a will would be idle and ridiculous"; "He makes a cross-mark, perhaps the first and last he ever made in his life. To attempt to prove such signature as this would be a mockery of justice"; "Although in some very extraordinary instances the mark of an illiterate person may become so well known as to be susceptible of proof, like handwriting, yet gen-

erally a mark, a mere cross, cannot be identified." These illustrations are taken from a useful note on proof of mark by comparison or opinion evidence, appended to *Ausmus v. People*, 19 Ann. Cas. 504. See, also, § 527, *ante*.

⁶⁴ *McKonkey v. Gaylord*, 1 Jones (N. C.), 94; *In re Marchall's Estate*, 126 Cal. 95, 58 Pac. 449.

⁶⁵ *Gordon v. Price*, 10 Ired. (N. C.) 385.

⁶⁶ Reynolds' Steph. Dig., art. 51.

⁶⁷ *People v. Corey*, 148 N. Y. 476, 42 N. E. 1066.

⁶⁸ In that case the witness was practically unable to read writing, to write, or to distinguish words written; he had never seen the person, whose handwriting was in question,

handwriting of another, although he has not actually seen him write, if the witness *has seen writing which such person has acknowledged or admitted* to be his.⁶⁹ Such acknowledgment may not only be in express terms, as where a person has formally acknowledged the signature or other writing to have been executed by him,⁷⁰ but may be inferred, as will be seen from other facts and circumstances or from the course of business.⁷¹ But when a witness has testified that he has neither seen a certain person write nor any writing which he knew to be the writing of the person, his opinion as to the genuineness of such writing is not admissible.⁷² It must appear that the witness has the *requisite knowledge* of the handwriting.⁷³

§ 547 (560). Knowledge of handwriting may be gained by correspondence.—As we have said, the genuineness of a disputed handwriting may be proved by the testimony of two classes of witnesses: *First*, those who are personally acquainted with the handwriting of the person supposed to have written it; *second*, those who, although wholly unacquainted with the party's handwriting, are competent to testify, by a comparison by juxtaposition, of a writing proved or admitted to be the party's handwriting, with the writing disputed. Of course, all evidence of handwriting, except where the witness saw the disputed document written, is, in a sense, in its nature comparison. It is the belief which a witness entertains upon comparing the writing in question with an exemplar in his mind derived from

write his name and had only seen him "print" it in a will. His testimony as to whether a letter introduced was written by the testator was rejected.

⁶⁹ *Hammond v. Varian*, 54 N. Y. 398; *Cabarga v. Seeger*, 17 Pa. 514; *Berg v. Peterson*, 49 Minn. 420, 52 N. W. 37; *Pierce v. De Long*, 45 Ill. App. 462.

⁷⁰ *Cabarga v. Seeger*, 17 Pa. 514.

⁷¹ *Riggs v. Powell*, 142 Ill. 453,

32 N. E. 482; *Tucker v. Kellogg*, 8 Utah, 11, 28 Pac. 870.

⁷² *Spottiswood v. Weir*, 80 Cal. 448, 22 Pac. 289; *Gibson v. Trowbridge F. Co.*, 96 Ala. 357, 11 South. 365; *Arthur v. Arthur*, 38 Kan. 691, 17 Pac. 187; *Talbott v. Hedge*, 5 Ind. App. 555, 32 N. E. 788.

⁷³ *Richardson v. Stringfellow*, 100 Ala. 416, 14 South. 283; *Riggs v. Powell*, 142 Ill. 453, 32 N. E. 482.

some previous knowledge.⁷⁴ There are two modes of acquiring personal knowledge of the handwriting of another, either of which is sufficient to enable a witness to testify to its genuineness. One is from having seen him write. The other is from having seen letters or other documents "purporting to be the handwriting of the party, and having afterward personally communicated with him respecting them, or acted upon them as his, the party having known or acquiesced in such acts, founded upon their supposed genuineness, or by such adoption of them into the ordinary business transactions of life as induces a reasonable presumption of their being his own writings."⁷⁵ One is deemed competent to testify to the handwriting of another person when he has received letters or documents purporting to be written by that person in answer to those written by himself, or under his authority, and addressed to that person. In such case there is a presumption that the letter or document is genuine.⁷⁶ It has sometimes been held that the receipt of *letters*, purporting

⁷⁴ Doe v. Suckermore, 5 Ad. & E. 703-730, 111 Eng. Reprint, 1331.

⁷⁵ 1 Greenl. Ev., § 577; Mitchell, J., Berg v. Peterson, 49 Minn. 420, 52 N. W. 37.

⁷⁶ Venable v. Venable, 165 Ala. 621, 51 South. 833; Campbell v. Woodstock Iron Co., 83 Ala. 351, 3 South. 369; Atlantic Ins. Co. v. Manning, 3 Colo. 224; State v. Barrett, 5 Penne. (Del.) 147, 59 Atl. 45; Rumph v. State, 91 Ga. 20, 16 S. E. 104; Pearson v. McDaniel, 62 Ga. 100; Stitzel v. Miller, 250 Ill. 72, Ann. Cas. 1912B, 412, 34 L. R. A., N. S., 1004, 95 N. E. 53; Clark v. Wyatt, 15 Ind. 271, 77 Am. Dec. 90; Bullis v. Easton, 96 Iowa, 513, 65 N. W. 395; Morvant's Succession, 45 La. Ann. 207, 12 South. 349; Page v. Homans, 14 Me. 478; Smith v. Walton, 8 Gill (Md.), 77; Keith v. Lothrop, 10 Cush. (Mass.) 453;

Southern Exp. Co. v. Thornton, 41 Miss. 216; Monumental Bronze Co. v. Doty, 99 Mo. App. 195, 73 S. W. 234, 78 S. W. 850; Violet v. Rose, 39 Neb. 660, 58 N. W. 216; Titford v. Knott, 2 Johns. Cas. 211; Chaffee v. Taylor, 3 Allen (Mass.), 598; Cunningham v. Hudson River Bank, 21 Wend. (N. Y.) 557; Clark v. Freeman, 25 Pa. 133; Redding v. Redding's Estate, 69 Vt. 500, 38 Atl. 230; Parker v. Amazon Ins. Co., 34 Wis. 363; Alexander v. Vye, 16 Can. S. Ct. 501; In re Stanbro, 1 Manitoba, 263; Steph. Ev., art. 51. See § 546, *ante*. But this is sometimes held to be insufficient authentication: McKeone v. Barnes, 108 Mass. 344. On the "Necessity of Proof of Genuineness of Reply Letter," see note to Lancaster v. Ames, 17 L. R. A., N. S., 229.

to come from another, which have been *acted upon* as such will render the testimony of the person so receiving them competent to prove the handwriting.⁷⁷ But the decisions generally establish the proposition that the rule is not changed by the mere fact that the one receiving the letters has acted upon them, although such acts may be part of a chain of evidence from which the acknowledgment or approval of the supposed author may be inferred. In order to bind the alleged writer he must have recognized or ratified such instrument or letter.⁷⁸ But it is well settled that the mere receipt of letters or papers, standing alone, is not evidence that they were written by the person whose name they bear.⁷⁹ Nor is the official stationery of the alleged sender. Where there is no direct knowledge of handwriting, there must be something which assures the recipient of letters, in a responsible way, of their genuineness, before he can swear to their writer or use them as comparisons of handwriting.⁸⁰ It needs no authority beyond that stated that where both parties have acted on the correspondence, there is little room for challenging the testimony.⁸¹ The witness need not necessarily be the sendee of the letters or even the custodian of the documents. *Any* witness may be called who has, by sufficient means, acquired a knowledge of the general character of the handwriting of the party whose signature is in question. This may have been acquired in any of the modes indicated and which thus form the sources of that previous knowledge which may qualify the witness to state his belief whether the handwriting is genuine or not. He testifies from a

⁷⁷ Thorpe v. Gisburne, 2 Car. & P. 21.

⁷⁸ Doe v. Suckermore, 5 Ad. & E. 703, 111 Eng. Reprint, 1331; Cunningham v. Hudson River Bank, 21 Wend. (N. Y.) 557; Nunes v. Perry, 113 Mass. 274; Murray v. Walker, 83 Iowa, 202, 48 N. W. 1075. See § 583, *post*.

⁷⁹ White S. M. Co. v. Gordon, 124

Ind. 495, 19 Am. St. Rep. 109, 24 N. E. 1053; Pinkham v. Cockell, 77 Mich. 265, 43 N. W. 921; Hightower v. Ogletree, 114 Ala. 94, 21 South. 934; State v. Hall, 14 S. D. 161, 84 N. W. 766; Flowers v. Fletcher, 40 W. Va. 103, 20 S. E. 870.

⁸⁰ Pinkham v. Cockell, *supra*.

⁸¹ As to presumption of genuineness of reply letters, see § 52, *ante*.

standard of comparison, existing in his mind, the sources of which are not usually in court for production.⁸²

§ 548 (561). Such knowledge may be gained in the course of business—Official and otherwise.—A person is deemed to be acquainted with the handwriting of another when, in the ordinary course of business, documents purporting to be written by that person have been habitually submitted to him.⁸³ It has sometimes been held that in order to prove the signatures of *bank officers* on *bank bills* to be genuine, or forged, the officers themselves should be called, or at least other witnesses who have seen such offi-

⁸² Page v. Homans, 14 Me. 478. See, also, Riggs v. Powell, 142 Ill. 453, 32 N. E. 482.

⁸³ Doe v. Suckermore, 5 Ad. & E. 703, 111 Eng. Reprint, 1331; Titford v. Knott, 2 John. Cas. (N. Y.) 211; Commonwealth v. Smith, 6 Serg. & R. (Pa.) 568; Commonwealth v. Webster, 5 Cush. (Mass.) 295, 52 Am. Dec. 711, and note; Jones v. Huggins, 1 Dev. (N. C.) 223, 17 Am. Dec. 567, and note; Murray v. Walker, 83 Iowa, 202, 48 N. W. 1075. This rule has been applied where an *agent* or *clerk* takes the letters of his principal to the post: Doe v. Suckermore, 5 Ad. & E. 703, 111 Eng. Reprint, 1331; where *public officers* have seen many official documents of importance filed in their office which purported to bear the signature of another officer: Rogers v. Ritter, 12 Wall. (U. S.) 317, 20 L. Ed. 417; Yates v. Yates, 76 N. C. 142; Goddard v. Gloninger, 5 Watts (Pa.), 209; Amherst Bank v. Root, 2 Met. (Mass.) 522; where the writing or signature of the person whose handwriting is in question has come before such officer in other ways: Sill v. Reese, 47 Cal. 294; where one has received and *paid notes* bearing the name of the party whose handwriting

is in question: Johnson v. Daverne, 19 Johns. (N. Y.) 134, 10 Am. Dec. 198; Hess v. State, 5 Ohio, 5, 22 Am. Dec. 767, and note; where the officers of a bank, who are called on to testify, have been in the habit of *paying checks* of a customer: State v. Candler, 3 Hawks (N. C.), 393; Hess v. State, 5 Ohio, 5, 22 Am. Dec. 767; Allen v. State, 3 Humph. (Tenn.) 867; Johnson v. State, 35 Ala. 370; or have *seen his signature to papers* known to have been signed by him: Ennor v. Hodson, 28 Ill. App. 445; where the witness has in the course of business seen orders: Cody v. Conly, 27 Gratt. (Va.) 313; receipts or other papers, which the party, whose handwriting is in question has *acknowledged* by payment or other mode of approval: Armstrong v. Fargo, 8 Hun (N. Y.), 175. See, also, Hess v. State, 5 Ohio, 5, 22 Am. Dec. 767, and note; *surveyor* as to signature on maps with which he is familiar: Hamilton v. Smith, 74 Conn. 374, 50 Atl. 884; clerk: United States v. Ortiz, 176 U. S. 422, 44 L. Ed. 529, 20 Sup. Ct. Rep. 466; *administrator* as to signature of deceased from seeing it on checks: Tucker v. Kellogg, 3 Utah, 11, 28 Pac. 870.

cers write or have received letters from them in correspondence.⁸⁴ But the weight of authority holds that, since the bills are known to the public, persons who have been in the habit of receiving such bills and who are skilled in the detection of counterfeits may testify in such cases.⁸⁵ The business need not necessarily be commercial. Thus, the evidence of a successor of a county surveyor who made and recorded a survey that an interlineation therein was in the handwriting of his predecessor is admissible and proper, where it is shown that the successor, as county surveyor, had charge of the official documents of the office, and had frequently examined numerous documents therein purporting to be in the handwriting of his predecessor, and which the latter had testified were in his handwriting.⁸⁶ A witness whose only knowledge of another's signature has been derived from an examination of official documents in official custody, purporting to be signed by such other, may give his opinion as a witness as to the genuineness of such person's signature to a paper offered in evidence. Thus, the genuineness of the signatures to the official documents of officers of Mexico, which are now in the custody of the surveyor general of the United States, will be presumed in a case where such signatures are used for a collateral purpose, such as to enable a witness who has examined such documents to testify as to the genuineness of the signature to a paper offered in evidence, from having seen such signature on such documents.⁸⁷ A proper foundation in the

⁸⁴ *State v. Allen*, 1 Hawks (N. C.), 6, 9 Am. Dec. 616.

⁸⁵ *Commonwealth v. Carey*, 2 Pick. (Mass.) 47; *State v. Lawrence*, Brayt. (Vt.) 78; *State v. Anderson*, 2 Bail. (S. C.) 565; *State v. Carr*, 5 N. H. 367.

⁸⁶ *Burdell v. Taylor*, 89 Cal. 613, 26 Pac. 1094.

⁸⁷ *Sill v. Reese*, 47 Cal. 294. In *Amherst Bank v. Root*, 2 Met. (Mass.) 522, it was held that a clerk of a court who in the ordinary work

of his office frequently saw the official signature of a justice of the peace, and had certified to it, was a competent witness to prove the handwriting, although he had never actually seen him sign his name. See, also, *Venable v. Venable*, 165 Ala. 621, 51 South. 833; *Salazar v. Taylor*, 18 Colo. 538, 33 Pac. 369; *State v. Spence*, 2 Harr. (Del.) 348; *Shaw v. Chiles*, 9 Ga. App. 460, 71 S. E. 745; *Nagle v. Schnadt*, 136 Ill. App. 417; *Kelly v. Fallon*, 108 Ill.

nature of the witness' knowledge of the handwriting must, of course, be laid, for if his judgment is founded on false premises, such as the want of genuineness in that writing which he makes the base of his inference, his evidence would be worthless.⁸⁸

§ 549 (562). Value of the testimony—How affected by the means of knowledge.—When a witness states that he is acquainted with the handwriting in question, but is not asked his means of knowledge, his testimony is *prima facie* competent. But his means of knowledge or the fact that he has not sufficient data for knowledge may be drawn out by the adverse party; and if it appear to the court that he is not sufficiently acquainted with the writing, the testimony will not be admitted.⁸⁹ “Knowledge of handwriting, *acquired for the purpose of testifying*, will qualify only where it is clear that there was no motive either in the writer or the witness to manufacture testimony.”⁹⁰ The

App. 108; Tarnofker v. Grissler, 108 N. Y. Supp. 696; Bank of Commonwealth v. Mudgett, 44 N. Y. 514; Tuttle v. Rainey, 98 N. C. 513, 4 S. E. 475; Berkley v. Maurer, 34 Pa. Sup. Ct. 363; Powers v. McKenzie, 90 Tenn. 167, 16 S. W. 559; Tucker v. Kellogg, 8 Utah, 11, 23 Pac. 870; Neall v. United States, 118 Fed. 699, 56 C. C. A. 31; Crawford Peerage Case, 2 H. L. Cas. 534, 9 Eng. Reprint, 1196.

⁸⁸ See Jarvis v. Vandeford, 116 N. C. 147, 21 S. E. 302. In State v. Hooper, 2 Bail. (S. C.) 37, the court said that proof of handwriting is always a matter of opinion founded on recollection. The witness called compares the paper presented to him with the image left on his mind by his previous acquaintance with the handwriting, to prove which he is called, and if he thinks they are

identical, he proves it; if not identical, he disproves it.

⁸⁹ Goodhue v. Bartlett, 5 McLean (U. S.), 186, 1 Fed. Cas. No. 5538; Henderson v. Bank at Montgomery, 11 Ala. 855; Smith v. Walton, 8 Gill (Md.), 77; Whittier v. Gould, 8 Watts (Pa.), 485; Arthur v. Arthur, 38 Kan. 691, 17 Pac. 187; Talbott v. Hedge, 5 Ind. App. 555, 32 N. E. 788. But see Carrier v. Hampton, 11 Ired. (N. C.) 307.

⁹⁰ Lawson, Exp. Ev., rule 54; Reese v. Reese, 90 Pa. 89, 35 Am. Rep. 634, and note; Sanderson v. Osgood, 52 Vt. 309; Reid v. State, 20 Ga. 681; Board of Trustees v. Misenheimer, 78 Ill. 22; Keith v. Lothrop, 10 Cush. (Mass.) 453; Stranger v. Searle, 1 Esp. 15; Rex v. Crouch, 4 Cox C. C. 163; Greaves v. Hunter, 2 Car. & P. 477; Territory v. O'Hare, 1 N. D. 30, 44 N. W. 1003.

value or weight to be given to the opinion of a witness as to the authorship of handwriting is to be determined by the opportunity and circumstances under which he has acquired his knowledge. Whether or not a paper is in the handwriting of a person, if none of the witnesses actually saw him write it, is a matter of opinion; and the witnesses can speak as to their opinion. In such cases the jury pass upon two questions. The first is as to the credibility of the witness; the second is as to the value to be given to his opinion. This last question depends upon his opportunity and capacity of acquiring the knowledge of the handwriting. Has he seen it under such circumstances as to satisfy the jury that he knows it? In other words, it is not the expression of the opinion which is to satisfy the jury. They must conclude from the facts stated by the witness, the times, places, opportunity and circumstances under which he acquired his knowledge, whether he really knows it or not. In this connection the jury should consider the capacity and experience of the witness. If he is an illiterate man, or one whose business seldom brings him into contact with writing, his opinion is entitled to much less weight than if he were an educated man accustomed to correspondence and to seeing people write.⁹¹ If a witness has become familiar with the handwriting of a person, he may testify as to the genuineness of the alleged handwriting of that person, although it appears to be *simulated and dis-*

⁹¹ United States v. Gleason, 37 Fed. 331. In Green v. Terwilliger, 56 Fed. 384, District Judge Hawley draws excellently the distinction between this class of testimony and that of experts. He says that the weight and value of this character of testimony depends in some degree upon the frequency with which the witnesses have had occasion to notice and carefully observe the handwriting, and how recent their opportunities for noticing the handwriting have been. The fact as to whether

or not the witnesses have any interest in establishing the genuineness of the signature is always to be considered, in determining the weight and value of the testimony. The value of expert testimony depends, to a certain extent, upon the general knowledge and experience of the witnesses; their competency, character, and reputation. It depends more or less upon the facts stated by them, which form the basis of their judgment, and the reasons given for their opinion.

guised.⁹² It will be seen from the cases already cited that the witness must be familiar with the handwriting concerning which he testifies. When he shows such an acquaintance, he may give his opinion or belief; and it is *not necessary that he should know* or be certain that the specimen is the handwriting of the person who, it is claimed, wrote it.⁹³ But the witness should be able to state that he *has an opinion*.⁹⁴ A nonexpert witness may point out or state the grounds of his opinion when testifying to the genuineness of a signature, when the reasons given constitute facts and do not savor of argument or conclusion. "If for instance, the witness could truthfully state that the party whose signature was under investigation made the capital 'H,' the first letter of his Christian name, in a certain form invariably, and that the capital 'H,' in the signature under investigation was made in an entirely different form, we are of the opinion that there would be no error in allowing the witness to state such fact."⁹⁵ Greenleaf, referring to evidence based on the comparison of handwriting, says, "All evidence of handwriting, except where the witness saw the document written, is, in its nature, comparison. It is

⁹² Commonwealth v. Webster, 5 Cush. (Mass.) 295, 52 Am. Dec. 711.

⁹³ Garrels v. Alexander, 4 Esp. 37; Eagleton v. Kingston, 8 Ves. 474, 32 Eng. Reprint, 425; Talbott v. Hedge, 5 Ind. App. 555, 32 N. E. 788; Beverly v. Williams, 4 Dev. & B. L. (N. C.) 378; Magee v. Osborn, 32 N. Y. 669; Bell v. Brewster, 44 Ohio St. 690, 10 N. E. 679; Taylor v. Sutherland, 24 Pa. 333; Salmon v. Feinour, 6 Gill & J. (Md.) 60; Wiggin v. Plumer, 31 N. H. 251; State v. Minton, 116 Mo. 605, 22 S. W. 808; Salazar v. Taylor, 18 Colo. 538, 33 Pac. 369; Egan v. Murray, 80 Iowa, 180, 45 N. W. 563; State v. Harvey, 131 Mo. 339, 32 S. W. 1110; Commonwealth v. Andrews, 143 Mass. 23, 8 N. E. 643; People v.

Bidleman, 104 Cal. 608, 38 Pac. 502; Mosher v. Farmers & Merchants' Nat. Bank, 51 Neb. 55, 70 N. W. 540. In Holmes v. Goldsmith, 147 U. S. 150, 37 L. Ed. 118, 13 Sup. Ct. Rep. 288, the witness was allowed to state that he would act on the signature in question.

⁹⁴ Wiggin v. Plumer, 31 N. H. 251; Burnham v. Ayer, 36 N. H. 182; Fash v. Blake, 38 Ill. 363; People v. Spooner, 1 Denio (N. Y.), 343, 43 Am. Dec. 672, and note; Succession of Morvant, 45 La. Ann. 207, 12 South. 349. Only an expert, however, can state an opinion derived from comparison: Spottiswood v. Weir, 80 Cal. 448, 22 Pac. 289.

⁹⁵ Nagle v. Schnadt, 136 Ill. App. 417.

the belief which a witness entertains, upon comparing the writing in question with its exemplar in his mind, derived from some previous knowledge. The admissibility of some evidence of this kind is now too well established to be shaken. It is agreed that if the witness has the proper knowledge of the party's handwriting, he may declare his belief in regard to the genuineness of the writing in question. He may also be interrogated as to the circumstances on which he founds his belief. The point upon which learned judges have differed in opinion is, upon the source from which this knowledge is derived, rather than as to the degree or extent of it."⁹⁶ It is almost unnecessary to add that the weight of the evidence is for the jury.⁹⁷

§ 550 (563). Use of writing written for comparison at the trial.—The use of handwriting for the purpose of comparison at the trial is, by the great weight of authority, confined to that *written before the trial*. Most of the courts hold that a person is not entitled to offer a specimen of his handwriting written during the trial. This rule is based on the ground that the party might be influenced by the interests, then at stake, to disguise his handwriting, if, by so doing, he could promote his cause.⁹⁸ As original evidence, a signature made for the occasion *post litem motam* and for use at the trial ought not to be taken as a standard for genuineness.⁹⁹ It would open too wide a door for fraud if a witness was allowed to corroborate his own testimony by a preparation of specimens of his writing for the purpose of comparison.¹⁰⁰ "There is an obvious distinction between comparison by juxtaposition of an admitted or established writing and the disputed writing,

⁹⁶ 1 Greenl. Ev., par. 576.

⁹⁷ 1 Greenl. Ev., § 577.

⁹⁸ King v. Donahue, 110 Mass. 155, 14 Am. Rep. 589; Commonwealth v. Allen, 128 Mass. 46, 35 Am. Rep. 356; Gulzoni v. Tyler, 64 Cal. 334, 30 Pac. 981; McGlasson v. State, 37 Tex. Cr. 620, 66 Am. St.

Rep. 842, 40 S. W. 503; Whittle v. State, 43 Tex. Cr. 468, 66 S. W. 771; Hickory v. United States, 151 U. S. 303, 38 L. Ed. 170, 14 Sup. Ct. Rep. 334.

⁹⁹ King v. Donahue, *supra*.

¹⁰⁰ Williams v. State, 61 Ala. 33.

and comparison of the latter with an image in the mind's eye, but in either instance papers prepared for the purpose of having the comparison made are objectionable."¹ It is only when the paper is written, not by design but unconstrainedly and in the natural manner, so as to bear the impress of the general character of the party's writing, as the involuntary and unconscious result of constitution, habit, or other permanent cause, and therefore of itself permanent, that it furnishes, if otherwise admissible, any satisfactory test of genuineness.² But if the writing is done at the request of the adverse party on cross-examination, such writing is admissible.³ So it was held error not to allow an expert on cross-examination to show before the jury the effect that the use of a blotter has on the color of ink.⁴ In England there is a statute by which a person whose handwriting is in dispute may be called upon by the court to write his name *in the presence of the jury*.⁵ In this country, there is high authority for the rule that, in the absence of a statute, the court may, in the exercise of a sound discretion, require a party in a civil action to write his signature in the presence of the jury as a basis of comparison.⁶ This part of the subject has been already dis-

¹ Hickory v. United States, *supra*.

² Coleridge, J., Doe v. Suckermore, 5 Ad. & E. 703, 705, 111 Eng. Reprint, 1331. In Stranger v. Searle, 1 Esp. 14, Lord Kenyon refused to admit the testimony of a witness whose familiarity was derived from seeing him write for the express purpose of qualifying the witness, "as the party might write differently from his common mode of writing through design."

³ Bronner v. Loomis, 14 Hun (N. Y.), 341; Bridgman v. Corey's Estate, 62 Vt. 1, 20 Atl. 273; Huff v. Nims, 11 Neb. 363, 9 N. W. 548; Chandler v. LeBarron, 45 Me. 534; Bradford v. People, 22 Colo. 157, 43

Pac. 1013; Smith v. King, 62 Conn. 515, 26 Atl. 1059.

⁴ Farmers' etc. Bank v. Young, 36 Iowa, 44.

⁵ Cobbett v. Kilminster, 4 Fost. & F. 490; Reg. v. Taylor, 6 Cox C. C. 58.

⁶ Smith v. King, 62 Conn. 515, 26 Atl. 1059; Williams v. Riches, 77 Wis. 569, 46 N. W. 817; King v. Donahue, 110 Mass. 155, 14 Am. Rep. 589; Hickory v. United States, 151 U. S. 303, 38 L. Ed. 170, 14 Sup. Ct. Rep. 334. In First Nat. Bank v. Robert, 41 Mich. 709, 3 N. W. 199, the refusal of the trial court to permit the signature for such purpose was upheld.

cussed under the heading of experiments and tests in the presence of the jury.⁷

§ 551 (564). **Comparison of handwriting—English rule.** It has been the subject of much discussion in the courts whether handwriting can be proved in court by a direct comparison of hands, that is, by a collation of the two papers in juxtaposition for the purpose of ascertaining by inspection whether they were written by the same person. Cases have arisen many times in England in which it was contended, and in some of which it was held, that handwriting might be proved by the immediate comparison by a witness of the paper in dispute with some other specimen proved to have been written by the supposed writer of the first. But the *English rule* finally became settled that such comparison could not be made.⁸ The grounds on which this rule rests are thus stated by Mr. Best: "First, that the writings offered for the purpose of comparison with the document in question might be spurious, and consequently that, before any comparison between them and it could be instituted, a collateral issue must be tried to determine their genuineness. Nor is this all,—if it were competent to prove the genuineness of the main document by comparison with others, it must be equally so to prove that of the latter by comparison with fresh ones; and so the inquiry might go on *ad infinitum*, to the great distraction of the attention of the jury and delay in the administration of justice.⁹ Secondly, that the specimens might not be fairly selected.¹⁰ Thirdly, that the persons composing the jury might be unable to read, and consequently be unable to institute such comparison."¹¹ Although the rule

⁷ § 403, *ante*.

⁸ Doe v. Suckermore, 5 Ad. & E. 703, 111 Eng. Reprint, 1331; Hickory v. United States, 151 U. S. 303, 38 L. Ed. 170, 14 Sup. Ct. Rep. 334. See note on "Comparison of Handwriting," to University of Illinois v. Spalding, 62 L. R. A. 818.

⁹ Doe v. Suckermore, 5 Ad. & E. 706, 111 Eng. Reprint, 1331.

¹⁰ Burr v. Harper, Holt N. P. 420.

¹¹ Best, Ev., 10th ed., § 238; Eagleton v. Kingston, 8 Ves. 475, 32 Eng. Reprint, 425; Peck v. Callaghan, 95 N. Y. 73.

as above stated has become well settled after long discussion in the courts of England and has become known as the English rule, yet *a statute* was finally enacted to the effect that "comparison of a disputed handwriting with any writing, proved to the satisfaction of the judge to be genuine, is permitted to be made by witnesses; and such writings, and the evidence of witnesses respecting the same, may be submitted to the court and jury as evidence of the genuineness or otherwise of the writing in dispute."¹² Under these statutes it has been decided that any writings, of the genuineness of which the judge is satisfied upon the proof, may be used for the purposes of comparison, although they may not be admissible for any other purpose in the cause;¹³ and that the comparison may be made either by witnesses or without the intervention of any witnesses at all, by the jury themselves.¹⁴

§ 552 (565). Same—Conflicting views in United States.

It would be difficult to frame any general rule which could be applied in this country on the subject, for the reason that the differences between the states have been of so long standing, and are mainly attributable to the variegated adoption and adaptation of the English law—common and statute—with all its concomitant divergence of authority. In addition in some states the rulings are still inconsistent. The most the lawyer can do is to apply himself strictly to the state of the law in the particular jurisdiction in which the matter of the moment lies. It has been thought expedient, however, to draw brief attention to the principal streams of decisions which have flowed from the different sources referred to. The federal courts and the courts of many states had adopted the old English rule stated in the last section,¹⁵ but Congress has

¹² Steph. Ev., art. 52; 17 & 18 Vict., c. 125, § 27; 28 Vict., c. 18, § 8.

¹³ Birch v. Ridgway, 1 Fost. & F. 270; Cresswell v. Jackson, 2 Fost. & F. 24.

¹⁴ Cobbett v. Kilminster, 4 Fost. & F. 490; 1 Whart. Ev. 712.

¹⁵ The cases cited in this and the following note are reproduced from the last edition for use where refer-

now made competent as a basis for comparison any admitted or proved handwriting of the person the genuineness of whose handwriting is involved.^{15a} In other states

ence may be required to decisions on the old English rule. As mentioned in the text, however, there is a decided tendency toward a uniformity of legislation which will to a certain extent efface many of the old differences of decision attributable to the causes mentioned in the section, and a reference to the more recent enactments will disclose an intention to relax the apparent rigidity of the old English rule on the subject: *Moon v. Crowder*, 72 Ala. 79; *Snider v. Burks*, 84 Ala. 53, 4 South. 225; *Miller v. Jones*, 32 Ark. 337; Cal. Code, § 1944, notes (comparison made by expert: *Marshall v. Hancock*, 80 Cal. 82, 22 Pac. 61); *Wilber v. Eicholtz*, 5 Colo. 240; *Bradford v. People*, 22 Colo. 157, 43 Pac. 1013; *Putnam v. Wadley*, 40 Ill. 346; *Gitchell v. Ryan*, 24 Ill. App. 372 (in *Northfield Farmers' Mut. Fire Ins. Co. v. Sweet*, 46 Ill. App. 598; *Frank v. Taubman*, 31 Ill. App. 592, the writing used for comparison was already evidence in the case); *McDonald v. McDonald*, 142 Ind. 55, 41 N. E. 336; *Hawkins v. Grimes*, 13 B. Mon. (Ky.) 257; see, also, *Fee v. Taylor*, 83 Ky. 259; *Herrick v. Swomley*, 56 Md. 439 (the fact that there is a genuine and a disputed signature on same page does not render proper a comparison of them by the jury: *Williams v. Drexel*, 14 Md. 566); *Foster's Will*, 34 Mich. 21; *People v. Parker*, 67 Mich. 222, 11 Am. St. Rep. 578, 34 N. W. 720 (in *Dietz v. Fourth Nat. Bank*, 69 Mich. 287, 37 N. W. 220, the writings used for comparison were already evidence in the case, and the witness having denied his signature was cross-examined upon them); *Rose v. First Nat.*

Bank, 91 Mo. 399, 60 Am. Rep. 258, 3 S. W. 876; *State v. Thompson*, 132 Mo. 301, 34 S. W. 31; *People v. Spooner*, 1 Denio (N. Y.), 343, 43 Am. Dec. 672; *Miles v. Loomis*, 75 N. Y. 288, 31 Am. Rep. 470; *Peck v. Callaghan*, 95 N. Y. 73; *Fuller v. Fox*, 101 N. C. 119, 9 Am. St. Rep. 27, 7 S. E. 589; *Pope v. Askew*, 1 Ired. (N. C.) 16, 35 Am. Dec. 729 (*State v. De Graff*, 113 N. C. 688, 18 S. E. 507, is typical of the later decisions); *Territory v. O'Hare*, 1 N. D. 30, 44 N. W. 1003; *Kinney v. Flynn*, 2 R. I. 319; *Clark v. Rhodes*, 2 Heisk. (Tenn.) 206; *Wright v. Hessey*, 3 Baxt. (Tenn.) 42; *Powers v. McKenzie*, 90 Tenn. 167, was decided on the Acts of 1889, c. 22; *Hanley v. Gandy*, 28 Tex. 211, 91 Am. Dec. 315; *Cannon v. Sweet* (Tex. Civ. App.), 28 S. W. 718; *Burress v. Commonwealth*, 27 Gratt. (Va.) 934 (*Hanriot v. Sherwood*, 82 Va. 1, is typical of the later decisions); *Clay v. Alderson*, 10 W. Va. 49; *Hazleton v. Union Bank*, 32 Wis. 34; *Hickory v. United States*, 151 U. S. 303, 38 L. Ed. 170, 14 Sup. Ct. Rep. 334; *Stokes v. United States*, 157 U. S. 187, 39 L. Ed. 187, 15 Sup. Ct. Rep. 617; *Withaup v. United States*, 127 Fed. 530, 62 C. C. A. 328. For the various American rules, see note to *University of Illinois v. Spalding*, 62 L. R. A. 818, 832.

^{15a} By the act of Congress approved February 26, 1913, it was provided that in any proceeding before a court or judicial officer of the United States where the genuineness of the handwriting of any person may be involved, any admitted or proved handwriting of such person shall be competent evidence as a

the English rule was never followed, and the reasons which led to its adoption in England were held no longer applicable.¹⁶ But the strong *tendency* in the United States has been toward the adoption of *the more liberal rule*. In several states the earlier rulings adopting the old English rule were modified by later decisions and before the adoption of statutes. At present, in nearly all the states *statutes exist* having more or less resemblance to the English statute quoted in the last section. In some jurisdictions the statutes prescribe that the comparison may be made by *experts* or the jury.¹⁷ But without any such provision in the statute the testimony based on a comparison of hands should obviously be limited to those having some special skill, since it is in the nature of opinion evidence calling for more than ordinary knowledge.¹⁸ The fact that in most states the subject is now governed by

basis for comparison by witnesses, or by the jury, court, or officer conducting such proceeding, to prove or disprove such genuineness.

16 Tyler v. Todd, 36 Conn. 218; Wimbish v. State, 89 Ga. 294, 15 S. E. 325; Riordan v. Guggerty, 74 Iowa, 688, 39 N. W. 107; State v. Farrington, 90 Iowa, 673, 57 N. W. 606; State v. Zimmermann, 47 Kan. 242, 27 Pac. 999; State v. Stegman, 62 Kan. 476, 63 Pac. 746; State v. Thompson, 80 Me. 194, 6 Am. St. Rep. 172, 13 Atl. 892; Homer v. Wallis, 11 Mass. 309, 6 Am. Dec. 169, and note; Costelo v. Crowell, 139 Mass. 588, 2 N. E. 698; Morrison v. Porter, 35 Minn. 425, 59 Am. Rep. 331, 29 N. W. 54; Wilson v. Beauchamp, 50 Miss. 24; University of Ill. v. Spaulding, 71 N. H. 163, 62 L. R. A. 817, 51 Atl. 731; Grand Island Banking Co. v. Shoemaker, 31 Neb. 124, 47 N. W. 696; Koons v. State, 36 Ohio St. 195; Weaver v. Whilden, 33 S. C. 190, 11 S. E. 686; In re Rockey's Estate, 155 Pa. 453,

26 Atl. 656; State v. Hopkins, 50 Vt. 316; Tucker v. Kellogg, 8 Utah, 11, 28 Pac. 870; Moore v. Palmer, 14 Wash. 134, 44 Pac. 142.

17 Consult the statute of the jurisdiction.

18 Birmingham Nat. Bank v. Bradley, 108 Ala. 205, 19 South. 791; Spottiswood v. Weir, 80 Cal. 448, 22 Pac. 289; Bradford v. People, 22 Colo. 157, 43 Pac. 1013; Mixer v. Bennett, 70 Iowa, 329, 30 N. W. 587; State v. David, 131 Mo. 380, 33 S. W. 28; Heffernan v. O'Neill, 1 Neb. (Unof.) 363, 96 N. W. 244; Gordon's Case, 50 N. J. Eq. 397, 26 Atl. 268; Wheeler & W. M. Co. v. Buckhout, 60 N. J. L. 102, 36 Atl. 772; People v. Collins, 57 App. Div. 257, 68 N. Y. Supp. 151, 15 N. Y. Cr. 305; Lowe v. Dorsett, 125 N. C. 301, 34 S. E. 442; Kornegay v. Kornegay, 117 N. C. 242, 23 S. E. 257; Powers v. McKenzie, 90 Tenn. 167, 16 S. W. 559; Bratt v. State, 38 Tex. Cr. 121, 41 S. W. 622.

statutes renders it unnecessary to discuss the many decisions based on common-law rules. Under some of these statutes any writing which is admitted to be or treated as genuine by the party against whom the evidence is offered may be used for the purpose of comparison with the writing or signature in question, although it may not be admissible in evidence for any other purpose.¹⁹ The evils apprehended from the introduction of such evidence have been stated to be, *first*: The selection of unfair specimens of the handwriting which is in dispute, by the party offering them in proof, and *second*: The embarrassments arising from the multiplication of issues over the genuineness of the various signatures which might be offered in evidence.²⁰ The New York act hereinafter referred to leaves the character, number and sufficiency of identification of the specimens offered in evidence for the purposes of comparison entirely to the discretion of the court, and thus attempts to obviate the objections formerly existing to this species of evidence.²¹ Under the statute of New York amending the original statute of 1880 it is enacted that comparison of a disputed writing with any writing proved to the satisfaction of the court to be the genuine handwriting of any person, claimed on the trial to have made or executed the disputed instrument, or writing, shall be permitted and submitted to the court and jury in like manner.²² The "disputed writing" referred to by the

¹⁹ Holmes v. Goldsmith, 147 U. S. 150, 37 L. Ed. 118, 13 Sup. Ct. Rep. 228; Peck v. Callaghan, 95 N. Y. 73; Baker v. Mygatt, 14 Iowa, 131.

²⁰ Miles v. Loomis, 75 N. Y. 288, 31 Am. Rep. 470.

²¹ Peck v. Callaghan, *supra*. See, also, Marshall v. Hancock, 80 Cal. 82, 22 Pac. 61; Kelly v. Keese, 102 Ga. 700, 29 S. E. 591; Munkers v. Farmers' Ins. Co., 30 Or. 211, 46 Pac. 850; Powers v. McKenzie, 90 Tenn. 167, 16 S. W. 559.

²² People v. Molineux, 168 N. Y.

264, 62 L. R. A. 193, 61 N. E. 286.

In the course of the valuable opinion of the court, the amending statute is thus referred to: "The act of 1888 does not repeal or supersede the act of 1880, but enlarges the operation of the latter by admitting evidence of the kind which it was thought had been decided in Peck v. Callaghan, *supra*, to be inadmissible under the statute of 1880. In other words, it authorized evidence which would establish forgery of the disputed writing by a particular person."

statutes is any writing which one party upon a trial seeks to prove as the genuine handwriting of any person, and which is not admitted to be such, provided that the writing is not inadmissible under other rules of evidence. In the later New York decision referred to it is said: "The statutes were clearly intended to remove the restriction which at common law limited the comparison of a disputed writing either with other writings put in evidence for other purposes than comparison, or with standards existing in the minds of witnesses familiar with the handwriting of the person sought to be charged with the disputed writing. The class of disputed writings which may be proved upon the trial of an issue has neither been enlarged nor restricted. The admissibility of such disputed writings depends upon other rules than either the common-law or the statutory rules respecting comparison of handwriting. If a disputed handwriting is itself either a fact in issue, or a fact relevant to the issue, it may be proved by the means pointed out by the statutes. If it is neither in issue nor relevant to the issue, it must be excluded, not because the statutes of 1880 and 1888 have anything to do with the question, but because, according to fundamental rules, it can have no bearing upon the controversy."²³ The later cases mark the gradual extension of the more liberal rule referred to.

§ 553 (566). Comparison of simulated signatures — Proof of identity.—It is axiomatic that absolute and characteristic similarity are divided by a plain line of demarcation. Hence a comparison to establish a type of handwriting differs from a comparison to reach a conclusion as to whether two signatures are identical. The two methods of comparison are clearly distinguishable. In seeking to prove that signatures are identical in every respect, the object of the comparison is precisely the opposite of that usually sought. On the one hand, in the ordinary case of

²³ *People v. Molineux, supra.*

comparison, it is sought, from the similarity or dissimilarity of the disputed writing, compared with the genuine one, to show whether the disputed writing is genuine or a forgery; while, on the other hand, it is sought to prove the forgery of a signature by establishing the fact that the disputed signature is so nearly identical with other signatures that it must be a forgery,—that is, that the disputed signature was traced by some process.²⁴ The authorities generally agree that no two signatures of an individual written in a natural way will be the same in all respects. The fact that two signatures are exactly alike is accepted as strong evidence that one was traced or otherwise reproduced from the other, or that both were made from still another signature.²⁵ The rules guiding examination as to authenticity of signatures vary just as they do with regard to handwriting generally, and while it is impracticable, therefore, to lay down a general formula, the following illustrations will be found to be of service. It has been held that on the issue as to the genuineness of a signature, it is not competent, on cross-examination, to submit to the witness *simulated* signatures and to require his opinion as to their genuineness.²⁶ In South Carolina, the rule was adopted that comparison of handwriting might be competent when the evidence is conflicting; and it was held that in such a case the witness making the comparison need not be experts.²⁷ Under the statute of New York authorizing the comparison of a disputed writing with any writing proved, to the satisfaction of the court, to be

²⁴ Stitzel v. Miller, 250 Ill. 72, Ann. Cas. 1912B, 412; 34 L. R. A., N. S., 1004, 95 N. E. 53.

²⁵ Day v. Cole, 65 Mich. 129, 31 N. W. 823; Kemp v. Mackrill, Sayer, 130; Hanriot v. Sherwood, 82 Va. 1; Taylor Will Case, 10 Abb. Pr., N. S. (N. Y.), 300; McDonogh's Succession, 18 La. Ann. 419; 1 Moore, Facts, § 607.

²⁶ Rose v. First Nat. Bank, 91 Mo. 399, 60 Am. Rep. 258, and note, 3 S. W. 876; Massey v. Farmers' Nat. Bank, 104 Ill. 327. This would not apply to experts. See § 556, *post*. On the "Comparison of Handwriting to Show Copying of Signature," see note to Stitzel v. Miller, 34 L. R. A., N. S., 1004.

²⁷ Benedict v. Flanigan, 18 S. C. 506, 44 Am. Rep. 583.

genuine, it was held inadmissible to offer in evidence writings other than those of the person whose signature was in question, and that specimens of the *handwriting of a person, who, it was claimed, had forged the signature*, should be excluded.²⁸ But in a later and celebrated case the court held, as we have shown in the preceding section, that "if a disputed handwriting is itself either a fact in issue, or a fact relevant to the issue, it may be proved by the means pointed out by the statutes. If it is neither in issue nor relevant to the issue, it must be excluded."²⁹ It is the general rule that a signature, made for the occasion *post litem motam*, and *merely for use at the trial*, ought not to be taken as a standard. It is only when the paper is written, not by design, but unconstrainedly and in the natural manner, so as to bear the impress of the general character of the party's writing, as the involuntary and unconscious result of constitution, habit or other permanent cause, and therefore of itself permanent, that it furnishes, if otherwise admissible, any satisfactory test of genuineness.³⁰ It often happens, however, that signatures made on the trial are, by consent of parties, allowed to be compared by the jury. The writings used for comparison must, however, be shown to be genuine.³¹ Proved specimens of the signature of a party are admissible in evidence for the purpose of showing by a comparison, that an unsigned memorandum is in his handwriting.³² It is competent, in order to prove that a handwriting in question is genuine or fabri-

²⁸ Peck v. Callaghan, 95 N. Y. 73; Bruyn v. Russell, 52 Hun (N. Y.), 17 N. Y. Supp. 784. On the "Competency of Handwriting as a Standard for Comparison," see note to Gambrill v. Schooley, 63 L. R. A. 428.

²⁹ People v. Molineux, 168 N. Y. 264, 62 L. R. A. 193, 61 N. E. 286, 306. In a criminal case the genuineness of the paper to be compared must be proved beyond a reasonable doubt.

³⁰ King v. Donahue, 110 Mass. 155,

14 Am. Rep. 589; Chandler v. Le Barron, 45 Me. 534; Hickory v. United States, 151 U. S. 303, 38 L. Ed. 170, 14 Sup. Ct. Rep. 334; Doe v. Suckermore, 5 Ad. & E. 703; McGlasson v. State, 37 Tex. Cr. 620, 66 Am. St. Rep. 842, 40 S. W. 503; State v. Koontz, 31 W. Va. 127, 5 S. E. 328. See note to Gambrill v. Schooley, 63 L. R. A. 440.

³¹ See next section.

³² Richardson v. Newcomb, 21 Pick. (Mass.) 315, citing Homer v.

cated and forged, to give in evidence another signature of the same person, to a paper not otherwise competent evidence in the cause, to enable the court and jury, by an examination and comparison of the genuine specimen with the controverted one, to form an opinion whether the latter be or be not genuine.³³ A *comparison of hands* has frequently been resorted to *for the purpose of proving the identity* of a person. This was illustrated in a celebrated murder case.³⁴ Certain anonymous letters, which were claimed to have been written by the prisoner to the city marshal of Boston, calculated to divert suspicion to other quarters, were produced, and to prove that they were written by the defendant, the prosecution called a witness, who testified that he had known the defendant many years by sight, but had no personal acquaintance with him; that he had never seen him write, but had often seen what purported to be his writing, and had been familiar with his signature for twenty years, from seeing it affixed to diplomas of the medical college of which the defendant was professor, which the witness had been employed to fill out; and that he, the witness, had made a study of penmanship, and had practiced and taught it for fifty years. Upon the prosecution asking the witness his opinion as to whether or not the letters in question were written by the defendant, the defendant's counsel objected that, as the writing did not purport to be that of the defendant, and was not alleged to be in imitation of any other person, the testimony was inadmissible. Shaw, C. J., said: "The witness was asked whether he had a personal knowledge of the defendant's handwriting, and stated that he had. His experience qualifies him to say this. Papers have passed under his notice in a business or official capacity which have given him a long and familiar acquaintance with the defendant's handwriting. He seems, therefore, competent to give an

Wallis, 11 Mass. 312, and Moody v. Rowell, 17 Pick. (Mass.) 490, 28 Am. Dec. 317.

³³ Moody v. Rowell, *supra*.

³⁴ Commonwealth v. Webster, 5 Cush. (Mass.) 295, 52 Am. Dec. 711.

opinion in regard to it, independent of any skill of his own as a penman or as a judge of penmanship. In regard to the term 'handwriting,' we think that it should include, generally, whatever the party has written with his hand, and not merely his common and usual style of chirography. This question of proof of handwriting most commonly arises and is discussed in cases of forgery. But there are other cases in which the evidence of experts is applied to handwriting, as in prosecutions for threatening letters, or for arson. There the question is generally made that they are not genuine, on the part of the person purporting to send them, but simulated and disguised; and the proof shows that the writer did not seek to imitate a hand, but to depart, as far as possible, from his own. The evidence has always been considered admissible in these instances." In the one case the writer simulates the writing of others; in the other, he dissimulates his own. Evidence of this character was received in the celebrated Tichborne case; and such evidence has been received, as above shown, for the purpose of identifying parties in various other actions, such as those for sending threatening letters, for arson, and in suits for libel and the like.

§ 554 (567). Exceptions — Allowing comparison of hands.—Before the English statute was adopted, two exceptions to the general rule excluding a comparison of hands to prove handwriting were well established. One of these exceptions relating to *ancient documents* has been thus stated: "When a document is of such a date that it cannot reasonably be expected to find living persons acquainted with the handwriting of the supposed writer, either by having seen him write or by having held correspondence with him, the law, acting on the maxim, *lex non cogit impossibilia*, allows other ancient documents, which are proved to have been treated and regularly preserved as authentic, to be compared with the disputed one."³⁵

³⁵ Best, Ev., 10th ed., § 240; Doe Eng. Reprint, 1331; Strother v. Lucas, 5 Ad. & E. 703, 111 cas, 6 Pet. (U. S.) 763, 8 L. Ed. 573;

The other exception is that, when *different instruments are properly in evidence* in the case for other purposes, the handwriting of such instruments may be compared by the jury, and the genuineness or simulation of the handwriting in question be inferred from such comparison.³⁶ These exceptions are still recognized and well established in those jurisdictions where the common law, or so-called English rule, prevails. Concerning this subject Mr. Justice Brad-

Sweigart v. Richards, 8 Pa. 436; Jackson v. Brooks, 8 Wend. (N. Y.) 426; Wilson v. Betts, 4 Denio (N. Y.), 201; Turnipseed v. Hawkins, 1 McCord (S. C.), 272; West v. State, 22 N. J. L. 212; Clark v. Wyatt, 15 Ind. 271, 77 Am. Dec. 90. See note to Homer v. Wallis, 6 Am. Dec. 171. In Doe v. Suckerinore, *supra*, Coleridge, J., said: "But, in truth, as to ancient documents, the necessity of the case, and the difference of circumstances, have introduced a different rule of evidence. You cannot call a witness who has seen the party write, or correspond with him, nor is there much danger, in resorting to comparison, of an unfair selection of specimens. Further, it is obvious to remark that, in ancient documents, it does often become a pure question of skill, the character of the handwriting varying with the age, and the discrimination of it to be materially assisted by antiquarian studies. This may have naturally assisted in opening the way for the admission of this evidence, even in cases where skill of that particular kind is not necessary."

36 Griffin v. Working Women's Home Assn., 151 Ala. 597, 44 South. 605; Miller v. Jones, 32 Ark. 337; In re Thomas, 155 Cal. 488, 101 Pac. 798; Castor v. Bernstein, 2 Cal. App. 703, 84 Pac. 244; Bradford v. People, 22 Colo. 157, 43 Pac.

1013; Keyser v. Pickrell, 4 App. Cas. (D. C.) 198; Doe v. Roe, 16 Ga. 521; Rofers v. Tyley, 144 Ill. 652, 32 N. E. 393; Brobston v. Cahill, 64 Ill. 356; Swales v. Grubbs, 126 Ind. 106, 25 N. E. 877; Shorb v. Kinzie, 100 Ind. 429; Saunders v. Howard, 51 Iowa, 517, 1 N. W. 708; Joseph v. First Nat. Bank, 17 Kan. 256; Fee v. Taylor, 83 Ky. 259; Tome v. Parkersburg Branch R. Co., 39 Md. 36, 17 Am. Rep. 540; Commonwealth v. Andrews, 143 Mass. 23, 8 N. E. 643; People v. Hutchings, 137 Mich. 527, 100 N. W. 753; Springer v. Hall, 83 Mo. 693, 53 Am. Rep. 598; Davis v. Fredericka, 3 Mont. 262; Bowman v. Sanborn, 25 N. H. 87; People v. Molineux, 168 N. Y. 264, 62 L. R. A. 193, 61 N. E. 286; Van Wyck v. McIntosh, 14 N. Y. 439; State v. De Graff, 113 N. C. 688, 18 S. E. 507; Territory v. O'Hare, 1 N. D. 30, 44 N. W. 1003; Gable v. Rauch, 50 S. C. 95, 27 S. E. 555; Mississippi Lumber etc. Co. v. Kelly, 19 S. D. 577, 9 Ann. Cas. 449, 104 N. W. 265; Millington v. Millington (Tex. Civ. App.), 25 S. W. 320; Kennedy v. Upshaw, 64 Tex. 411; Hazleton v. Union Bank, 32 Wis. 34; Tower v. Whip, 53 W. Va. 158, 63 L. R. A. 937, 44 S. E. 179; Moore v. United States, 91 U. S. 270, 23 L. Ed. 346; Stokes v. United States, 157 U. S. 187, 39 L. Ed. 667, 15 Sup. Ct. Rep. 617.

ley used the following language: "But the general rule of the common law, disallowing a comparison of handwriting as proof of signature, has exceptions equally well settled as the rule itself. One of these exceptions is that, if a paper admitted to be in the handwriting of the party, or to have been subscribed by him, is in evidence for some other purpose in the cause, the signature or paper may be compared with it by the jury."³⁷ This last exception is founded on the necessity of the circumstance that the comparison is unavoidable. There being two documents in question in the cause, one of which is known to be in the handwriting of a party, the other alleged, but denied to be so, no human power can prevent the jury from comparing them with a view to the question of genuineness; and therefore it is best for the court to enter with the jury into that inquiry, and to do the best it can, under circumstances which cannot be helped.³⁸ A great many courts have interpreted the expression "properly in evidence" to include documents properly in the record forming portion of the case, or as they are called "papers in the case." In an Indiana case,³⁹ Howard, C. J., said: "We think there can be little doubt that in this state, after some fluctuation in our decisions, the rule is that any writings admitted to be genuine, or writings which are properly papers in the case for any purpose, may be used, by way of comparison, to prove or disprove the genuineness of the writing in dispute."⁴⁰ The

³⁷ *Moore v. United States*, 91 U. S. 270, 23 L. Ed. 346; *Hickory v. United States*, 151 U. S. 303, 38 L. Ed. 170, 14 Sup. Ct. Rep. 334; *Van Wyck v. McIntosh*, 14 N. Y. 439; *Randolph v. Loughlin*, 48 N. Y. 456; *Brobston v. Cahill*, 64 Ill. 356; *State v. Fritz*, 23 La. Ann. 55; *Hanley v. Gandy*, 28 Tex. 211, 91 Am. Dec. 315; *Johnston Co. v. Miller*, 72 Mich. 265, 16 Am. St. Rep. 536, 40 N. W. 429; *Swales v. Grubbs*, 126 Ind. 106, 25 N. E. 877; *State v. DeGraff*, 113 N. C. 688, 18 S. E. 507; *Green v.*

Terwilliger, 56 Fed. 384; *State v. Farrington*, 90 Iowa, 673, 57 N. W. 606; *Williams v. State*, 27 Tex. App. 466, 11 S. W. 481.

³⁸ *Doe v. Newton*, 5 Ad. & E. 514, 111 Eng. Reprint, 1260. In that case Lord Denman, C. J., said: "The best rule is, that comparison of writings by the jury shall not be allowed in any case where it can be avoided."

³⁹ *Tucker v. Hyatt*, 144 Ind. 635, 41 N. E. 1047, 43 N. E. 872.

⁴⁰ *White Sewing Mach. Co. v. Gordon*, 124 Ind. 495, 19 Am. St. Rep.

writings used for comparison in the case at bar, being the affidavit made by appellee for a change of venue and her verified reply, were both 'papers in the case'; and under the rule above stated it was not error to allow these papers to be used by the witness, on cross-examination, to compare the signatures of appellee thereto with the signature to the release."⁴¹ In others, again, there has been a refusal to allow the signatures of pleadings and affidavits in the cause to be used for such purposes.⁴² We think the better rule to be that which permits their use. The fact of their being documents in the case, whereto the signature is material, seems to furnish an unanswerable demand for their use in any aspect. Where the papers belong to the files in the cause, or have been previously received in evidence, and are admitted to be genuine, the objections urged against this class of testimony that the writings sought to be used for comparison may have been specially selected as a standard, or that their introduction may cause collateral issues to spring up as to their genuineness, do not obtain.⁴³

109, 24 N. E. 1053; McDonald v. McDonald, 142 Ind. 55, 41 N. E. 336, and cases cited.

⁴¹ See, also, Bradford v. People, 22 Colo. 157, 43 Pac. 1013; McCafferty v. Heritage, 5 Houst. (Del.) 220; Abbott v. Coleman, 22 Kan. 250, 31 Am. Rep. 186; Northern Bank v. Buford, 1 Duv. (Ky.) 335; Sauve v. Dawson, 2 Mart. (La.), O. S., 202; Brown v. Evans, 149 Mich. 429, 112 N. W. 1079; Vinton v. Peck, 14 Mich. 287; State v. David, 131 Mo. 380, 33 S. W. 28 (evidence taken at coroner's inquest); State v. Noe, 119 N. C. 849, 25 S. E. 812 (bail bond); Mississippi Lumber Co. v. Kelly, 19 S. D. 577, 9 Ann. Cas. 449, 104 N. W. 265; Hunt v. State, 33 Tex. Cr. 252, 26 S. W. 206 (application for attachment); Grooms v. State, 40 Tex.

Cr. 319, 50 S. W. 370 (bill of review); Williams v. State, 27 Tex. App. 466, 11 S. W. 481; Tower v. Whip, 53 W. Va. 158, 63 L. R. A. 937, 44 S. E. 179; Dunlop v. Silver, 8 Fed. Cas. No. 4169, 1 Cranch C. C. 27, 2 L. Ed. 139, 1 Cranch Append. 367; Tower v. Whip, 53 W. Va. 158, 63 L. R. A. 937, 44 S. E. 179 (plea).

⁴² Travers v. Snyder, 38 Ill. App. 379; Springer v. Hall, 83 Mo. 693, 53 Am. Rep. 598; Kernin v. Hill, 37 Ill. 209. In Forbes v. Wiggins, 112 N. C. 122, 16 S. E. 905, the court refused to allow a pleading to go to the jury to compare an interlineation in it with the rest of the document.

⁴³ See Wilber v. Eicholtz, 5 Colo. 240; Elsenrath v. Kallmeyer, 61 Mo. App. 430; State v. De Graff, 113 N.

§ 555 (568, 569). **Writings used for comparison must be shown to be genuine.**—In those states in which the common-law rule has not been followed, or in which statutes authorize the comparison with other writings, proved or admitted to be genuine, it is, of course, not necessary that the writing used as a standard should be in evidence or relevant for any other purpose.⁴⁴ Where writings, otherwise irrelevant, are allowed to be used for the purpose of comparison, such writings should clearly *be proved to be the genuine handwriting* of the party sought to be charged.⁴⁵ Any other rule would lead to many collateral issues, and thus be clearly open to the most serious objection which has been urged against the comparison of handwriting. It has been held that a paper, proposed to be used as a standard, cannot be proved to be original and

C. 688, 18 S. E. 507; Moore v. United States, *supra*; 1 Greenl. Ev., §§ 578, 581.

⁴⁴ See cases cited in § 552, *ante*. See, also, the late cases. Williams v. Williams (Me.), 85 Atl. 43; Cochran v. Stein, 118 Minn. 323, 136 N. W. 1037.

⁴⁵ Griffin v. Working Women's Home Assn., 151 Ala. 597, 44 South. 605; Spottiswood v. Weir, 80 Cal. 448, 22 Pac. 289; Tyler v. Todd, 36 Conn. 218; McVicker v. Conkle, 96 Ga. 584, 24 S. E. 23; Shorb v. Kinzie, 100 Ind. 429; Walker v. Steele, 121 Ind. 436, 22 N. E. 142, 23 N. E. 271; Sankey v. Cook, 82 Iowa, 125, 47 N. W. 1077; Gaunt v. Harkness, 53 Kan. 405, 42 Am. St. Rep. 297, 36 Pac. 739; Holmberg v. Johnson, 45 Kan. 197, 25 Pac. 575; Morse v. Commonwealth, 129 Ky. 294, 111 S. W. 714, 33 Ky. Law Rep. 831; Conrad v. Louisiana Bank, 10 Mart. (La.), O. S., 700; State v. Thomson, 80 Me. 194, 6 Am. St. Rep. 172, 13 Atl. 892; Costello v. Crowell, 133 Mass. 352; Commonwealth

v. Coe, 115 Mass. 481; Martin v. Maguire, 7 Gray (Mass.), 177; Commonwealth v. Eastman, 1 Cush. (Mass.) 189, 48 Am. Dec. 596; People v. Cline, 44 Mich. 290, 6 N. W. 671; State v. Minton, 116 Mo. 605, 22 S. W. 808; Rose v. First Nat. Bank, 91 Mo. 399, 60 Am. Rep. 258, 3 S. W. 876; State v. Hastings, 53 N. H. 452; Farrell v. Manhattan R. Co., 178 N. Y. 596, 70 N. E. 1098, 83 App. Div. 393, 82 N. Y. Supp. 334; People v. Corey, 148 N. Y. 476, 42 N. E. 1066; Jarvis v. Vanderford, 116 N. C. 147, 21 S. E. 302; Koons v. State, 36 Ohio St. 195; State v. Branton, 49 Or. 86, 87 Pac. 535; Baker v. Haines, 6 Whart. (Pa.) 284, 36 Am. Dec. 224; Desbrow v. Farrow, 3 Rich. (S. C.) 382; Taylor v. State (Tex. Cr. App.), 138 S. W. 615; Hanriot v. Sherwood, 82 Va. 1; Rowell v. Fuller's Estate, 59 Vt. 688, 10 Atl. 853; State v. Simmons, 52 Wash. 132, 100 Pac. 269; Clay v. Robinson, 7 W. Va. 348; Green v. Terwilliger, 56 Fed. 384; United States v. North, 184 Fed. 151.

genuine merely by the *opinion* of a witness that it is so, when such opinion is derived solely from his general knowledge of the handwriting of the person whose handwriting it purports to be.⁴⁶ The genuineness of a writing offered for comparison cannot be shown merely by comparison with another writing.⁴⁷ A concession by counsel at the trial that a specimen writing offered in evidence was a

⁴⁶ Eborn v. Zimpelman, 47 Tex. 503, 26 Am. Rep. 315; Commonwealth v. Eastman, 1 Cush. (Mass.) 189, 48 Am. Dec. 596; Jester v. Steiner, 86 Tex. 415; Sankey v. Cook, 82 Iowa, 125, 47 N. W. 1077. But a more liberal rule has been adopted in New York and Ohio: McKay v. Lasher, 121 N. Y. 477, 24 N. E. 711; Bell v. Brewster, 44 Ohio St. 690, 10 N. E. 679. The *production* of a written instrument *by a party* is not such an admission that the body of the instrument or the signature is in his handwriting, that the writing can be used for the purpose of comparison: Commonwealth v. Coe, 115 Mass. 481; Martin v. Maguire, 7 Gray (Mass.), 177 (in Michigan such writing was received where a witness *admitted* its genuineness on cross-examination: Dietz v. Fourth Nat. Bank, 69 Mich. 287, 37 N. W. 220; but see Doud v. Ried, 53 Mo. App. 553); nor for this purpose is the *possession* of a diary proof that the owner is the writer of its contents: Van Sickle v. People, 29 Mich. 61; nor is the possession of papers proof that they are genuine: McCombs v. State, 109 Ga. 496, 34 S. E. 1021; nor does the *certificate of acknowledgment* of a deed prove the signature so that it is competent for this purpose: Hyde v. Woolfolk, 1 Iowa, 159; nor is a *letter* admissible for this purpose, when the only proof of its genuineness is the fact that it has been received, purporting to be a reply to

another letter: Desbrow v. Farrow, 3 Rich. (S. C.) 382; White S. M. Co. v. Gordon, 124 Ind. 495, 19 Am. St. Rep. 109, 24 N. E. 1053. This rule has been applied to *copies* of letters in letter-books: Commonwealth v. Eastman, 1 Cush. (Mass.) 189, 48 Am. Dec. 596; Cohen v. Teller, 93 Pa. 123; Spottiswood v. Weir, 66 Cal. 525, 6 Pac. 381; to photographic or enlarged copies of writings: Taylor's Will Case, 10 Abb. Pr. N. S., 300, (N. Y.); Crane v. Dexter, Horton & Co., 5 Wash. 479, 32 Pac. 223; White S. M. Co. v. Gordon, 124 Ind. 495, 19 Am. St. Rep. 109, 24 N. E. 1053; but in other cases, after preliminary proofs as to the accuracy of such copies, they have been allowed as proper standards of comparison: Marcy v. Barnes, 16 Gray (Mass.), 161, 77 Am. Dec. 405; Hynes v. McDermott, 82 N. Y. 41, 37 Am. Rep. 538; Buzard v. McAnulty, 77 Tex. 438, 14 S. W. 138; Rowell v. Fuller's Estate, 59 Vt. 688, 10 Atl. 853; see § 581, *post*; and the jury may use a *magnifying-glass* in comparing handwriting: White S. M. Co. v. Gordon, 124 Ind. 495, 19 Am. St. Rep. 109, 24 N. E. 1053; Kannon v. Galloway 2 Baxt. (Tenn.) 230 (see note by M. D. Elwell in 29 Am. L. Reg. 553, as to the use of the microscope and camera in the detection of forgery).

⁴⁷ Archer v. United States, 9 Okl. 569, 60 Pac. 268; Winch v. Norman, 65 Iowa, 186, 21 N. W. 511.

power of attorney given by his client to his attorney in fact, by virtue of which he appeared and presented his claim to the court, amounted to a declaration that it was in his hand.⁴⁸ And failure to object to the use by the other party, while examining witnesses, of a writing as a standard of comparison, amounts to a practical admission of its genuineness, and a later objection to its admission in evidence and use by the jury comes too late.⁴⁹ Mere evidence of admission by a party that a writing was his is not enough.⁵⁰ The admission might not be in good faith. In an interesting Missouri case,⁵¹ the subject was clearly dealt with by Ellison, J. The action was founded on a promissory note executed by the defendants as sureties. The defense was a denial under oath of the execution of the note, and there was judgment for the plaintiff. In the opinion the learned judge said: "It is next objected that the trial court ruled out the following question propounded on cross-examination to a bank cashier, one of plaintiff's witnesses, to prove the signatures to the note, and who was familiar with the signatures of some of the defendants, viz.: 'In signatures that would be copied what would be the

⁴⁸ Moore v. United States, 91 U. S. 270, 23 L. Ed. 346.

⁴⁹ Sanderson v. Osgood, 52 Vt. 309.

⁵⁰ Jones v. State, 60 Ind. 241.

⁵¹ Doud v. Reid, 53 Mo. App. 553. From the useful note to University of Illinois v. Spalding, 62 L. R. A. 817, to which we are already indebted for many useful references, we extract that in some jurisdictions an offered writing is sufficiently established as a standard for comparison if the party against whose interest it is offered is estopped to deny that it is a genuine writing. So a plaintiff suing executors was estopped to deny the genuineness of the signature to the will under which the

defendants had qualified: Croom v. Sugg, 110 N. C. 259, 14 S. E. 748. So, obviously, of papers introduced as genuine by the person against whose interest they were later offered as standards of comparison: Kennedy v. Upshaw, 64 Tex. 411; Smyth v. Caswell, 67 Tex. 567, 4 S. W. 848. And on a trial for forging a certificate of record upon a deed of trust, the indorsement of the defendant upon the accompanying notes was a legitimate standard of comparison, since, the defendant being estopped to deny the genuineness of his signature on the notes, which he had transferred, no collateral issue could be raised upon them: State v. Tompkins, 71 Mo. 613.

distinction in a signature copied from a signature made by the party; what would be the rule in regard to that?' This witness had already testified that the signatures to the note in suit looked like the signatures of defendants, Reid and Holloway, but that he might be mistaken as to its being their genuine signature. The most the witness would say was that the signatures to the note in suit looked like the signatures of these defendants. We cannot see, therefore, what test of the witness an answer to this question could have been, in view of his testimony preceding the question. But it may be, and probably was, the object of counsel to institute comparison of handwriting by bringing in bank checks which these defendants had signed on the bank of which the witness was the cashier. For in the next question the witness was asked to get from his bank the signatures of defendant Holloway. Plaintiff denied that they were genuine signatures of Holloway. Defendants then offered some checks purporting to have been signed by defendant Reid, and the genuineness of these was also denied by plaintiff. The court thereupon refused to permit the checks of either to be introduced in evidence, and we think its action was correct in this respect. Defendants recognize that the rule is, in this state, that in order to make such signatures proper evidence they must be conceded to be genuine.^{51a} But their contention is that, if the party which the writing purports to be the signature of admits it to be his signature, this is sufficient regardless of what the other party may say. This will not do, at least when the question arises as this has. One of the principal reasons for the rule excluding such testimony is that it brings in collateral issues which would produce endless confusion in trials. In the case at bar the plaintiff declared these signatures were not genuine and could have tendered that collateral issue in the midst of the trial, an issue which would frequently be as tedious to investigate

^{51a} *Rose v. First Nat. Bank*, 91 Mo. App. 346; *State v. Henry*, 45 Mo. App. 346; *State v. Clinton*, 67 Mo. 380.
Mo. 399, 3 S. W. 876; *Edmonston v. Clinton*, 67 Mo. 380.

and as doubtful of correct result as the main matter in litigation. The concession of the genuineness of the signature must be such concession as will prevent and avoid an issue over the matter. To permit a party to introduce in his own behalf, over the protest of his opponent as to its genuineness, a signature which he claims to have written, or, indeed, which he may have written, would put it in the power of such party to make evidence for himself. A signature not genuine might be admitted to be so, if it would serve the purpose of defense. So signatures might be made with a view to future use. The view we have taken of this is supported in New York as well as in this state."^{51b} Generally, where such writings are admitted for the purpose of comparison, they must be *proved to the satisfaction of the judge as a preliminary question*;⁵² and his decision on such preliminary question is *conclusive*, unless it appears to have been based on some erroneous view of law, or was clearly not justified by the state of the evidence at that time.⁵³ It has been well put in an Iowa case that before the comparison can be made by the expert or jury, the genuineness of the standard writing must be proved, established, and no longer a question of fact in the case. It should be so that the court can say to the jury that the standard, as a matter of law, is genuine, and leave to the jury the inquiry whether the disputed signature was written by the same

^{51b} Van Wyck v. McIntosh, 14 N. Y. 433; Bank of the Commonwealth v. Mudgett, 44 N. Y. 514.

⁵² People v. Creegan, 121 Cal. 554, 53 Pac. 1082; Walker v. Steele, 121 Ind. 436, 22 N. E. 142, 23 N. E. 271; Sankey v. Cook, 82 Iowa, 125, 47 N. W. 1077; State v. Thompson, 80 Me. 194, 6 Am. St. Rep. 172, 13 Atl. 892; Costello v. Crowell, 139 Mass. 588, 2 N. E. 698; Commonwealth v. Coe, 115 Mass. 481; University of Illinois v. Spaulding, 71 N. H. 163, 62 L. R. A. 817, 51 Atl.

731; People v. Corey, 148 N. Y. 476, 42 N. E. 1066; McKay v. Lasher, 121 N. Y. 477, 24 N. E. 711; People v. Molineux, 168 N. Y. 264, 61 N. E. 286, 62 L. R. A. 193; Powers v. McKenzie, 90 Tenn. 167, 16 S. W. 559; Rowell v. Fuller's Estate, 59 Vt. 688, 10 Atl. 853.

⁵³ State v. Thompson, 80 Me. 194, 6 Am. St. Rep. 172, 13 Atl. 892; Rowell v. Fuller's Estate, 59 Vt. 688, 10 Atl. 853; Commonwealth v. Coe, 115 Mass. 481.

hand Such a conclusive condition, as to genuineness, does not arise from opinions based on knowledge of handwriting.⁵⁴ Upon the question whether a given writing or written word is sufficiently proved to have been written by the defendant to allow it to be submitted to the jury as a standard of comparison, the judge at the trial must pass in the first instance. So far as his decision is of a question of fact merely, it must be final, if there is any proper evidence to support it. As in all questions of that nature, exceptions to the ruling at the trial will be sustained only when they show clearly that there was some erroneous application of the principles of law to the facts of the case, or that the evidence was admitted without proper proof

⁵⁴ *Sankey v. Cook*, 82 Iowa, 125, 47 N. W. 1077. "It appears to us that the genuineness of the writing made the basis of comparison, called sometimes the 'standard writing,' should be proved by direct and positive evidence": *Winch v. Norman*, 65 Iowa, 186, 21 N. W. 511. See, also, the following interesting decisions: *Spottiswood v. Weir*, 80 Cal. 448, 22 Pac. 289; *Sankey v. Cook*, 82 Iowa, 125, 47 N. W. 1077; *State v. Stegman*, 62 Kan. 476, 63 Pac. 746; *Costello v. Crowell*, 133 Mass. 352; *Mortimer v. Chambers*, 63 Hun, 335, 17 N. Y. Supp. 874; *Bell v. Brewster*, 44 Ohio St. 690, 10 N. E. 679; *Cohen v. Teller*, 93 Pa. 123; *Jester v. Steiner*, 86 Tex. 415, 25 S. W. 411; *State v. Ward*, 39 Vt. 225; *Green v. Terwilliger*, 56 Fed. 384. In *Johnson v. Commonwealth*, 102 Va. 927, 46 S. E. 789, the court said: "It was not error to admit as evidence other writings of the prisoner, proved to be genuine, and writings of his deceased wife, shown to be genuine, for the purpose of comparing by expert testimony the genuine handwritings with the handwriting of the alleged

forged will. Nor was it error to admit enlarged photographs of these genuine writings for the purpose of facilitating such comparison": *Hanriot v. Sherwood*, 82 Va. 1; *United States v. Ortiz*, 176 U. S. 422, 44 L. Ed. 529, 20 Sup. Ct. Rep. 466. Nor was it error for the jury to take the genuine papers, thus introduced, to their room. After the papers had become part of the evidence in the case, no reason is perceived why they should be excluded from the inspection of the jury. The Virginia Code of 1887 (section 3388) provides that "papers used in evidence, though not under seal, may be carried from the bar by the jury." See, also, *Hansbrough v. Stinnett*, 25 Gratt. (Va.) 495, 505. In *State v. Cottrell*, 56 Wash. 543, 106 Pac. 179, in a prosecution for forgery, a photograph of a letter purporting to have been written by the accused was held not improperly admitted in evidence, the accused having, after the state had rested its case, admitted under oath as a witness on his own behalf that it was a photographic copy of his handwriting.

of the qualifications requisite for its competency.⁵⁵ The comparison of handwriting should be made *at the trial*,⁵⁶ and the writing used for comparison as well as the disputed writing should be before the court and jury.⁵⁷

§ 556 (570, 571). Proof of handwriting—Expert evidence.—It is often necessary to make use of the testimony of experts in the proof of handwriting. This rule has been illustrated in a great variety of cases.⁵⁸ *When com-*

⁵⁵ Commonwealth v. Coe, 115 Mass. 481.

⁵⁶ Kendall v. Collier, 97 Ky. 446, 30 S. W. 1002.

⁵⁷ Spottiswood v. Weir, 66 Cal. 525, 6 Pac. 381; Hynes v. McDermott, 82 N. Y. 41, 37 Am. Rep. 538; Collins v. Ball, 82 Tex. 259, 27 Am. St. Rep. 877, 17 S. W. 614. See, also, the Canadian cases: Thompson v. Thompson, 4 O. L. R. 442; The Queen v. Dixon, 29 N. S. R. 462.

⁵⁸ Whether certain words on a paper were written *before or after* the paper was folded: Bacon v. Williams, 13 Gray (Mass.), 525; whether a certain writing was thirty years old or more, or whether it had been *recently* written: Eisenfield v. Dill, 71 Iowa, 442, 32 N. W. 420; whether the whole of an instrument was written by the same hand, with the same pen and ink and *at the same time*: Fulton v. Hood, 34 Pa. 365, 75 Am. Dec. 664; Reese v. Reese, 90 Pa. 89, 35 Am. Rep. 634; Quinsigamond Bank v. Hobbs, 11 Gray (Mass.), 250; Cooper v. Bockett, 4 Moore P. C. 433, 10 Jur. 930; Porell v. Cavanaugh, 69 N. H. 364, 41 Atl. 860; whether certain words were written over others: DuBois v. Baker, 30 N. Y. 355; whether *words* have been *added* since the execution of the paper: Moye v. Herndon, 30 Miss. 110 (but see Jewett v. Draper, 6 Allen (Mass.), 434);

whether *anonymous letters* written in a disguised hand and calculated to divert suspicion from the defendant are in his handwriting: Commonwealth v. Webster, 5 Cush. (Mass.) 295, 52 Am. Dec. 711, and note; whether a word or writing has been *altered*: Vinton v. Peck, 14 Mich. 287; Ballentine v. White, 77 Pa. 20; Edelin v. Sanders, 8 Md. 118; whether an old deed originally had a *seal*: Follett v. Rose, 3 McLean (U. S.), 332, Fed. Cas. No. 4900; what *differences* exist between the disputed parts and other parts of the instrument, and whether erasures and insertions have been made: Hawkins v. Grimes, 13 B. Mon. (Ky.) 257 (but see Swan v. O'Fallon, 7 Mo. 231); whether two writings were written by the *same hand*, and which of two writings exhibits the greater ease and facility of writing: Demeritt v. Randall, 116 Mass. 331; whether a certain writing could be that of a very old man: Lansing v. Russell, 3 Barb. Ch. (N. Y.) 325; whether writings were written by a *feigned* or a *natural* hand: King v. Cator, 4 Esp. 117; Doe v. Suckermore, 5 Ad. & E. 703, 111 Eng. Reprint, 1331; Tally v. Cross, 124 Ala. 567, 26 South. 912; and in deciphering *illegible writings*: Kux v. Central Mich. Bank, 93 Mich. 511, 53 N. W. 828; Dresler v. Hard, 127 N. Y. 235, 12 L. R. A. 456, 27

parison of handwriting is allowed, the testimony of experts is, of course, admissible; and they may express their opinions after making such comparison.⁵⁹ But the courts have often spoken of evidence derived from the comparison of handwriting as *weak and unsatisfactory*.⁶⁰ The theory upon which these expert witnesses are permitted to testify is that handwriting is always in some degree the reflex of the nervous organization of the writer, which, independently of his will, and unconsciously, causes him to stamp his individuality in his writing.⁶¹ Handwriting

N. E. 823; *State v. Wetherell*, 70 Vt. 274, 40 Atl. 728. But it is not competent, for the purpose of proving the genuineness of a signature against a party to be charged thereby, to show by such testimony that the signature is not in a *simulated* handwriting: *Kowing v. Manly*, 49 N. Y. 192, 10 Am. Rep. 346; and it has been held that it is not competent for experts to testify whether, in their opinion, accounts purporting to extend through a period of time were *all written at the same time*: *Phoenix Fire Ins. Co. v. Philip*, 13 Wend. (N. Y.) 81; *Ellingwood v. Bragg*, 52 N. H. 488. As to expert testimony in general, see §§ 359, 392, *ante*. See note to *Ratliff v. Ratliff*, 63 L. R. A. 935.

⁵⁹ *State v. Shinborn*, 46 N. H. 497, 88 Am. Dec. 224; *State v. Ward*, 39 Vt. 225; *Commonwealth v. Williams*, 105 Mass. 62; *Lyon v. Lyman*, 9 Conn. 55; *Finch v. Gridley*, 25 Wend. (N. Y.) 469; *Himrod v. Gilman*, 147 Ill. 293, 35 N. E. 373; *Hanriot v. Sherwood*, 82 Va. 1; *Johnston Co. v. Miller*, 72 Mich. 265, 16 Am. St. Rep. 536, 40 N. W. 429; *State v. Thompson*, 80 Me. 194, 6 Am. St. Rep. 172, 13 Atl. 892; *Bennett v. Mathewes*, 5 S. C. 478; *State v. Harris*, 5 Ired. (N. C.) 287. In the following cases the rule was not followed: *Herrick*

v. Swomley, 56 Md. 439; *Huston v. Schindler*, 46 Ind. 38; *Moye v. Herndon*, 30 Miss. 110; *Hanley v. Gandy*, 28 Tex. 211, 91 Am. Dec. 315; *Territory v. O'Hare*, 1 N. D. 30, 44 N. W. 1003; *Fee v. Taylor*, 83 Ky. 259; *Snider v. Burks*, 84 Ala. 53, 4 South. 225. See note to *Tower v. Whip*, 63 L. R. A. 937-944.

⁶⁰ *Turner v. Hand*, 3 Wall. Jr. 115, Fed. Cas. No. 14,257; *Foster's Will*, 34 Mich. 21; *Whitaker v. Parker*, 42 Iowa, 585. See note to *Hammond v. Woodman*, 66 Am. Dec. 240; see §§ 390, 392, *ante*.

⁶¹ In *re Gordon's Case*, 50 N. J. Eq. 397, 26 Atl. 268. In this case the valuable opinion of the ordinary commands more than passing attention. He held that while the theory is sound, in many cases it is unreliable when put to practical test. He says: "It must contend not only with disguise, but also with the influence of possible abnormal mental and physical conditions existing when the writing was made,—such, for instance, as the position of the body, whether reclining, sitting, or standing; the height and stability of that upon which the writing rests, and the character of its surface; the character of the paper written upon; the ink; the pen, and holder of the pen; the health of the writer's body

is an art concerning which correctness of opinion is susceptible of demonstration, and "the value of the opinion of every handwriting expert as evidence must depend upon the clearness with which the expert demonstrates its correctness. That demonstration will naturally consist in the indication of similar characteristics or lack of similar characteristics between the disputed writing and the standards, and the value of the expert's conclusion will largely depend upon the number of those characteristics which appear or are wanting. The appearance or lack of one characteristic may be accounted to coincidence or accident, but, as the number increases, the probability of coincidence or accident will disappear, until conviction will become irresistible. Thus comparison is rated after the fashion of circumstantial evidence, depending for strength upon the number and prominence of the links in the chain. Without such demonstration the opinion of an expert in handwriting is a low order of testimony, for, as the correctness of his opinion is susceptible of ocular demonstration, and it is a matter of common observation that an expert's conclusion is apt to be influenced by his employer's interest, the absence of demonstration must be attributed either to deficiency in the expert or lack of merit in his conclusion. It follows that the expert who can most clearly point out will be most highly regarded and most successful."⁶² The idiosyncrasy of the writer may manifest itself in a variety of ways and his peculiar orthography furnish a convincing link in the chain of his identity.

We are pleased to be able to place before our readers an instructive paper by John B. Clayberg, formerly chief commissioner of the supreme court of Montana, on the

and member with which the writing is made, not only generally, but also with reference to the accidents and influences of the moment. It follows that unreliability is greater when the disputed writing is short, or the standards for comparison are

meager, or are all written at one time, and also that uncertainty lessens when the disputed writing is long, and the standards are numerous and the products of different dates."

⁶² In *re* Gordon's Case, *supra*.

comparison of writings in respect to peculiarities of orthography.^{62a} The following is the text of the paper referred to:

There is, doubtless, a conflict of authority upon the proposition as to whether, in absence of statutory enactment, writings having no relevancy to the issues may be proven and introduced in evidence, for the sole purpose of creating a standard for the comparison of the handwriting by juxtaposition, with disputed documents relative to the issue, with a view to determine the genuineness or falsity of the latter. Some jurisdictions exclude such writings, following the doctrine as established in England prior to the act of parliament of 1854 (which allowed the introduction of such standards): while others have refused to adopt such stringent rule, and have announced the more liberal doctrine, allowing the introduction of standards for the purpose of comparison, under various requirements as to proof of genuineness of such standards and under various rules as to the manner in which and the persons by whom, the comparison may be made. Whatever may be the condition of the law in reference to this proposition, the authorities are almost uniform in holding that irrelevant writings may be proven and introduced in evidence, for the purpose of comparison with a disputed document, in respect to any peculiarities of spelling. Even in jurisdictions where the old English rule is adopted and enforced, this principle is recognized. The basis of this doctrine seems to be, that it is allowing the proof of a material fact to be made by the best evidence obtainable. If, in the disputed instrument, certain words are wrongly spelled, and it is a fact that the person alleged to be the author misspells the same words whenever he makes use of them, such fact tends to prove the authorship of the disputed writing; the more numerous the misspelled words, the more cogent the proof, for the reason that while two or

^{62a} 2 Mich. Law Journal, 16, "Hand-writing in Respect to Peculiarities of Orthography," by John B. Clayberg,

formerly chief commissioner of the supreme court of Montana.

more persons may misspell one word in the same manner, it is less probable that they will misspell two or more words in the same manner. If many words are misspelled, and proof can be made of numerous instances in which such words have been used, and it can be shown that the same words have always been misspelled in the same manner, the identity of the authorship is shown almost to a demonstration. The existence of the habit or peculiarity of a party in misspelling certain words, under such circumstances, must tend to prove the authorship of the disputed writing; and proof of that habit or peculiarity would surely be admissible. This evidence might be given by witnesses who were familiar with the fact, their testimony being based upon recollection of having seen writings made by the person, in which the words existed misspelled in the same manner, or having heard the person misspell the same words in the same manner. If such testimony would be admissible, the introduction of the letters themselves, showing the misspelling, would surely be admissible. It would be stronger proof, and more nearly approach primary evidence; certainly being more convincing than the mere recollection of the witnesses. It has been almost universally held that the showing of this peculiarity or habit, even by the introduction of the papers in which it occurs, does not conflict with the rule with reference to the comparison of handwriting; and none of the objections urged against the admission of irrelevant writings in evidence, for the purpose of comparing handwriting, can be urged against the principles upon which this doctrine is based. The distinction may be somewhat shadowy, and in many instances the proof of habit or peculiarities generally may so nearly approach the comparison of handwriting as to leave one in doubt as to the rule. In case of spelling, however, the distinction seems very plain. The *character* of the handwriting is always in question on a comparison of handwriting, while on a comparison in respect to spelling no reference is had to it. The word misspelled

may be in any character or style. The fact to be proven is the *habit* or *peculiarity* of spelling; and while a comparison of handwriting might aid in determining the *authorship* of a disputed writing, it would have no tendency to prove a habit or peculiarity of spelling any particular word or words.

This rule is directly recognized by the text-writers.^{62b} It is also announced in the cases cited.^{62c} In other cases cited proof has been allowed of the same general character, with reference to other peculiarities and habits.^{62d} In *Smith v. Fenner* evidence was allowed as to the habit of the writer in the use of double hyphens and the peculiar formation of the letter "t." It was claimed that a certain clause in the will had been altered; but Judge Story says, in the course of the trial: "The plaintiff's counsel offered witnesses acquainted with the handwriting of the scribe, who drafted the will, to prove that the altered word was not in his handwriting; and the witnesses mainly relied upon the manner of forming the letter 't' and the use of the double hyphens. To rebut this evidence, the defendant offered witnesses who were acquainted also with, and swore to the scribe's handwriting, and who swore that certain deeds, etc., then in their possession, which they produced to the jury, were in the handwriting of the scribe, and contained the peculiarity as to the 't' and the habits observable in the will, and that they had frequently known the scribe to write in this manner." The plaintiff's counsel objected to the production of these deeds to this jury,

^{62b} 1 Wharton on Evidence, § 717; Wharton's Criminal Evidence, § 851; Folkard's Starkie on Libel, Wood's ed., 564; Newell on Defamation, ed. 1900, p. 579; 2 Starkie on Evidence, 7th Am. ed., star p. 516; Lawson's Expert Evidence, pp. 277, 278, 417, and note 1; 2 Taylor on Evidence, 8th ed., § 1871, and note 2; Rogers on Expert Testimony, § 143.

^{62c} *Machin v. Grindon*, 2 Lee's Ecc.

Rep. 335; *Brookes v. Tichborne*, 20 L. J. Ex., N. S., 89, 2 Eng. L. & Eq. 374, 5 Ex. 929; *United States v. Chamberlain*, 12 Blatchf. 390, Fed. Cas. No. 14,778; *Yeomans v. Petty*, 13 Stew. Eq. (N. J.) 495.

^{62d} *Smith v. Fenner*, 1 Gall. 170, Fed. Cas. No. 13,046; *Crisp v. Walpole*, 2 Hagg. Ecc. Rep. 535, 536; *De Costa v. Pym*, Peake's Law of Evidence, App. 83.

because it was a mere comparison of handwriting. The court overruled the objection. "Nothing is clearer than that this is not a mere comparison of handwriting. The witnesses swore as to the facts of peculiarities of handwriting and produced the best possible proof of their own accuracy. The evidence goes completely to rebut the testimony on the other side; and it rests on the same basis as the admission of witnesses to prove handwriting in ordinary cases." In *De Costa v. Pym*, the propriety of a witness, basing his opinion on the authenticity of a disputed writing, by a comparison of the misuse of capitals and small letters in it, with the alleged writer's usual correct use of them, was recognized by Lord Kenyon. In *Crisp v. Walpole* the court stated the rule of the ecclesiastical courts, on application to probate a will, as to the introduction of irrelevant papers, for comparison of handwriting, as follows: "Although such comparison was admissible, it was not of itself sufficient to establish the will, in the absence of other confirmatory testimony." The judge then said: "There are other circumstances unfavorable to the genuineness of the instrument: the day of the month is written *after* the name of the month, whereas it is proved to have been the habit of the deceased almost universally observed by him to write the day of the month *before* its name. It was also the habit of deceased to write his names of baptism in full length, and not by initials to formal instruments, though not to common letters, but to this codicil there are only the initials of the christened names." Thus, it appears that other habits and peculiarities may be proven, and such proof is not considered within the rule as to the comparison of handwriting.

Some of the instances in which the rule has been applied, as to comparison in respect to spelling, are quite interesting. In *Brookes v. Tichborne* the action was for libel. The defendant pleaded as a justification that the plaintiff had sent to the defendant a libel on him, the defendant, in which defendant's name was spelled "Titch-

borne" instead of "Tichborne." Defendant offered to show that the plaintiff had on other occasions spelled the defendant's name in a similar manner: and for that purpose offered in evidence some letters, not in evidence in the case, or relevant to the issue raised in the pleadings, which he proposed to prove were in the plaintiff's handwriting, and in which the defendant's name was so spelled by plaintiff. This evidence was excluded by the trial judge. Verdict passed for plaintiff and defendant obtained a rule *nisi* for a new trial. It was insisted in the argument, upon the return of such rule, that the introduction of such letters, for the purpose offered, would be clearly within the rule excluding irrelevant papers for the purpose of comparison of handwriting. It was contended that the fact, if it existed, could only be proved by general questions, and not by the introduction of other letters. During the argument, Parke, B., said to counsel: "There is no doubt about the relevancy of this evidence in the present case. What you contend is, that the fact can be proved by general question, and not by specimens of handwriting." Counsel replied: "Yes, the mode proposed in the present case lets in all the inconveniences of comparison of handwriting." Parke, B., replied: "It seems to me that the proof of the fact itself is relevant; the only question is as to the proper mode of proof. The present case stands on the dividing line, and might be pushed to the length of causing the admissibility of comparison of handwriting. We will take time to consider our judgment." Afterward, Parke, B., delivered the judgment of the court as follows: "On showing cause it was hardly disputed that, if the habit of the plaintiff so to spell the word was proved, it was some evidence against the plaintiff to show that he wrote the libel; indeed, we think that proposition cannot be disputed, the value of such evidence depending upon the degree of peculiarity in the mode of spelling; and the number of occasions on which the plaintiff had used it; but it was objected, that the mode of

proof of that habit was improper, and that the habit should be proved as to the character of handwriting, not by producing one or more specimens and comparing them by some witness who was acquainted with it from having seen the party write or corresponding with him. But we think this is not like the case of general style or character of handwriting; the object is not to show similarity in the form of letters, and the mode of writing of a particular word, but to prove a peculiar mode of spelling words, which might be evidenced by the plaintiff having orally spelt it in a different way, or written it in that way once or oftener in any sort of character; the more frequently the greater the value of the evidence. For that purpose, one or more specimens of writing by him with that peculiar orthography would be admissible. We are of the opinion, therefore, that this evidence should have been received, and not having been received, the rule for a new trial must be made absolute." In *United States v. Chamberlain*, on indictment for depositing scurrilous postal cards in the mail, such cards displayed characteristic instances of misspelling. It was held competent to prove that other writings of the defendant contained identical errors in spelling, and to introduce them in evidence for the purpose of connecting the defendant with the cards which formed the subject of the charge.

Taylor, in his work on Evidence, in speaking of the probative value of a comparison of the spelling, says: "This is a test which may often be successfully applied. At the Greenwich county court, a plaintiff on one occasion denied most positively that a receipt produced was in his handwriting. It was thus worded, 'Received the *Hole* of the above.' On being asked to write a sentence in which the word '*whole*' was introduced, he took evident pains to disguise his writing, but he adopted the above phonetic style of spelling, and also persisted in using the capital 'H.' On being subsequently threatened with an indictment for perjury he absconded." A case is cited in the note to 2

Starkie on Evidence, above referred to, as follows: "On the trial of an issue out of chancery of the county of Palatine of Lancaster, to try whether a document purporting to have been signed by a party deceased was his genuine signature, different documents proved to have been in his handwriting in which he spelled his name in a different manner were submitted to the jury for the purpose of comparison, by Gurney, B., after consultation with Alderson, J., Lancaster Spring Assizes, 1833."

There is an anecdote told by Lord Meadowbank in the year 1839, in the course of his charge to the jury on the trial of Alexander, the claimant to the title of the Earl of Stirling, which may be referred to as showing the probative value of a comparison of misspelling, in a controversy over the authenticity of documents; the anecdote also seems to show that in the case referred to by Lord Meadowbank, the court compelled the suspected forgerer to write at the dictation of the court for the very purpose of comparing what he so wrote with the documents in controversy, and thus to connect him with the authorship of them through similarity of misspelling. This anecdote is referred to in Wharton's Criminal Evidence, 8th ed., § 851, as reported in 1 Townshend Modern State Trials, pp. 465, 466. Lord Meadowbank said: "I recollect of a case of forgery that occurred about thirty years ago,—the case of a person named Alexander,—and that coincidence in the name has probably brought it to my recollection. A tailor in Ayr had learned that a person of that name, and which was also his own, had died leaving considerable property without any apparent heirs existing. He got access to a garret in the family mansion, and it was said, found there a collection of old letters about the family. These he carried off, and with their aid fabricated a whole mass of similar productions, which it was said clearly proved his connection with the family of the deceased, and the Lord Ordinary decided the case in his favor. The case, however, was carried to the Inner House by reclaim-

ing petition. When it came into court certain circumstances led me, then a young man at the bar, to doubt the authenticity of the documents. One of the circumstances I recollect was this, that there were a number of words in the letters, purporting to be from different individuals, spelled, or rather I should say, misspelled in the same way, and some of them so very peculiar that on examining them minutely there was no doubt left in my mind that they all came from the same pen, and were all written by the same hand. The case attracted the attention of the Inner House. The party was brought to the clerk's table, and was examined in the presence of the court. He was desired to write to dictation, to the Lord President, then Lord Justice Clark, and it so happened that he misspelled all the words that were misspelled in the letters, in precisely the same way; and this, and other circumstances, proved to a demonstration that he had fabricated all of them himself. He then confessed the truth of his having written the letters on old paper, which, if I recollect, he had found in the garret;—and what is instructive, is this, that this result was arrived at in the teeth of the testimony of half a dozen engravers, all saying that they thought the letters were written by different hands."

Bentham, in his *Rationale of Judicial Evidence*, book 7, chapter 4, discusses the modes of what he defines as "Deauthentication," meaning thereby, to use his own words, "The source from which the persuasion that the document in question is spurious or falsified may be obtained." In this discussion Bentham clearly recognizes the essential difference which exists between similarity or dissimilarity of *handwriting*, and similarity and dissimilarity of *spelling*, style and other *peculiarities* and *habits* of the writer. After stating dissimilarity of handwriting as shown in four ways, as one mode of impeaching a writing alleged to be genuine, he states as another mode, "Marks of spuriousness or falsification apparent on the face of it," among which we find the following: "Seventh.

In the script in question the style, phraseology or mode of spelling manifestly dissimilar to those of the individual in question ascertained from other sources. The idea attached to the word 'style' being as yet extremely vague, the indication grounded upon it will be proportionately vague. Another indication that applies principally to written evidence of the causal kind as above." Whether Bentham be considered an authority on strictly legal points he is certainly an authority upon what constitutes relevancy from a logical standpoint.

A further illustration of the probative value of such testimony may be found in a Georgia case.^{62a} In that case the authorship of a certain letter was in controversy. Mr. Justice Lumpkin said: "One of the main errors alleged was the method of proving the handwriting of the defendant. Thomas W. Reveire, the owner of a stolen negro, and prosecutor, testified that he procured Reid, the accused, to write in his presence, for the purpose of becoming acquainted with his handwriting; and from his knowledge of it, obtained in this way, he believes the letter dated 20th of November, 1885, at Milledgeville to be in James M. Reid's handwriting. He further stated that there was a peculiarity in his penmanship, both as to the formation of letters and spelling of words, as, for instance, always using 'hit' for 'it.' " The court proceeded to hold that this mode of proving handwriting was admissible, and then added, "Slightly as counsel treat the identity of orthography, writing 'hit' for 'it' in both documents, it is a pretty decided 'hit' after all."

There are a few cases which are sometimes referred to as announcing a doctrine opposed to the foregoing proposition.^{62f} In *Jackson v. Phillips*, one of the issues was upon the genuineness of a deed. A witness testified that the grantor was a bad writer, and always wrote his name "Abraham barnes," while the signature to the deed was

^{62a} *Reid v. State*, 20 Ga. 681.

Matlock v. Glover, 63 Tex. 23; *Bevan*

^{62f} *Jackson v. Phillips*, 9 Cow. (N. Y.) 94; *State v. Miller*, 47 Wis. 530;

v. Atlanta National Bank, 142 Ill. 302, 31 N. E. 679.

“Abraham Barnes.” The witness identified an old account-book containing the grantor’s name written in the manner testified by her. Counsel offered to prove its genuineness, and the genuineness of the grantor’s signature therein contained. The book and signatures were rejected by the court below, on the ground that it would be a comparison of handwriting. Savage, C. J., in delivering the opinion of the court of appeals, said: “The deed from Barnes to Fowler being properly in evidence showing title out of the lessors, they had a right to show that the deed was a forgery by proper testimony; and they contended that Barnes’ account-book was proper for that purpose, by way of comparison of handwriting. The rule is settled in England, and I believe in this state, that comparison of hands by juxtaposition of two writings, in order to ascertain whether both were written by the same person, is inadmissible.” No effort was made to introduce the account-book and signatures upon the theory of original evidence to show a habit or peculiarity of the grantor in writing his name; nor was such proposition contended for by counsel or considered by the court.

In *State v. Miller*, while the defendant was being examined and questioned generally by the police officers, after his arrest, concerning his participation in the crime charged, a letter, supposed to have been written by him, containing threats of arson was repeated in his hearing; and he was requested to write, and did write, on another paper the same words, in the presence of such officers; the original letter was repeated, and contained words of peculiar form and style of orthography, and the copy so made was in its orthography a *fac-simile* of the original. Such officers, as witnesses on the trial, produced such copy, while testifying to the admissions of the defendant in such examination, and it was received in evidence, and submitted to the jury for the purpose of comparison with the original letter, and determining thereby the authenticity of the same. The state, recognizing the rule then established in

Wisconsin, that only papers in evidence in the case could be used for comparison, offered this writing as a confession or admission of the defendant, for the purpose of having it in the case, so that comparison might be made, under the rule. It was not offered on the theory of original evidence to show a habit or peculiarity in orthography. No such proposition was discussed by counsel or considered by the court. Counsel stated that if it was not in the case for some other purpose, no comparison could be made, and the supreme court held that it not being admissible as a confession, it was not properly in the case, and no comparison could be made relying solely on the law relative to comparison of handwriting.

In *Matlock v. Glover*, the question of the forgery of certain papers was sought to be raised, and to prove such forgery counsel offered in evidence certain letters for comparison of handwriting and spelling. They were objected to as *irrelevant*, and not because they would not be *competent* testimony, if the fact itself were relevant. The court determined that the liability was fixed, even if the paper was a forgery. The question of *competency* of the proof was not passed upon, but only the *relevancy* of the offered proof to the issue. In *Bevan v. Atlanta National Bank*, one of the issues was as to the genuineness of a signature of a deceased person to a note. One witness, who had testified on direct examination that he believed the signature was genuine, was shown other notes by the deceased, by the name of "Allie Williams," while the disputed signature was "Alice Williams" and asked if he based his opinion upon having seen the deceased sign these particular papers. Counsel offered to prove the genuineness of the notes, and that deceased signed her name "Allie Williams" to all important papers, and then sought to introduce the other notes in evidence. Objection was made and sustained to the questions, and to the introduction of the proof proposed. The supreme court decided that there was error in excluding the questions on cross-examination,

as they tended to test the accuracy of the information of the witness as to the genuineness of the disputed signature; but there was no error in excluding the documents from evidence. The court said: "We perceive no ground upon which the notes were admissible in evidence. The law is well settled in this state that the genuineness of a signature to a note or other instrument in writing cannot be proved or disproved by comparing it with another signature admitted to be the signature." In this, as in the other cases above quoted, the papers were not offered upon the theory of proving a habit or peculiarity, and the court makes no reference to such theory. All of these cases can only be construed as authorities against the proposition, because of their silence. (This paper was contributed to the Michigan Law Journal, and by the courtesy of the learned judge who wrote it we have been permitted to republish it.)

In other respects the court or jury ordinarily will derive aid by a comparison in the light of testimony by experts, but the nonexpert is not able to point out differences or similarities such as mentioned, and their testimony by comparison would be of little or no value if received. Especially is this true where comparison is attempted to be made with an instrument not seen for many years.⁶³ Testimony of experts by comparison repeatedly has been declared of the lowest order.⁶⁴ It has been declared weak and unsatisfactory.⁶⁵ But its weight is for the jury. Nevertheless it is admissible, and often necessary, in order to bring out the essential traits and characteristics of a person's handwriting, which might not otherwise be noticed by the untrained eye of the ordinary judge or juror. By constant practice in examining signatures and handwritings, it is but natural that an expert will readily dis-

⁶³ *Murphy v. Murphy*, 146 Iowa, 255, 125 N. W. 191.

⁶⁴ *Patton v. Lumd*, 114 Iowa, 201, 86 N. W. 296; *Borland v. Walrath*, 33 Iowa, 130; *Whitaker v. Parker*,

42 Iowa, 585; *Jackson v. Adams*, 100 Iowa, 163, 69 N. W. 427.

⁶⁵ *Browning v. Gosnell*, 91 Iowa, 448, 59 N. W. 340.

cover many peculiarities—many distinctive features—of the handwriting, by the aid of tests they have often made and applied, that would not at first blush be discernible to persons unaccustomed to such methods of investigation. “The objection to professional expert testimony consists, to a great extent, in the fact that in many cases the witness becomes an active partisan in favor of the party by whom he is employed, and conducts his investigation in the character of an attorney, upon lines most favorable to his side of the case, and when this position is taken the testimony is sometimes given in such a manner as is calculated to deceive and mislead, instead of to enlighten or aid, the court or jury; and this occurs so frequently that courts have often condemned this character of testimony, and declared it to be entitled to but little weight, and that it should be received with caution. But in all cases the court, if the case is tried without a jury, must be the final and impartial arbiter to determine the credibility and the weight of this kind and character of testimony. It is the duty of the court to observe all the facts stated and conclusions reached by the witnesses, and, after a careful consideration and verification thereof, decide their credibility and weight by the guiding lights of precedent, experience and conscience, with due regard to the rules and presumptions of the law, the character of the witnesses, and the property rights of individuals.”⁶⁶ On the *cross-examination* of experts on the subject of handwriting very considerable *latitude* should be allowed. Thus, any writings or parts of writings may be exhibited to them for their opinion as to the identity of the handwriting with that in question. It was even held in a Georgia case that neither the expert nor the opposite counsel is entitled to know what writings will be used for this purpose, or whether they are genuine.⁶⁷

⁶⁶ Green v. Terwilliger, 56 Fed. 384; Ball v. Skinner, 134 Iowa, 298, 111 N. W. 1022.

⁶⁷ Travelers' Ins. Co. v. Sheppard,

85 Ga. 751, 12 S. E. 18; Johnston Harvester Co. v. Miller, 72 Mich. 265, 16 Am. St. Rep. 536, 40 N. W. 429. But see Gaunt v. Harkness, 53

In some cases spurious writings or writings prepared for the purpose have been allowed to be used in cross-examination.⁶⁸ In order that a witness should be competent as an expert in respect to handwriting, it is not necessary that he should belong to any particular calling or profession.⁶⁹

Kan. 405, 42 Am. St. Rep. 297, and note, 36 Pac. 739. See § 389, *ante*.

⁶⁸ Hoag v. Wright, 174 N. Y. 36, 63 L. R. A. 163, 66 N. E. 579; First Nat. Bank v. Allen, 100 Ala. 476, 46 Am. St. Rep. 80, 27 L. R. A. 426, 14 South. 335; Johnston Harvester Co. v. Miller, 72 Mich. 265, 16 Am. St. Rep. 536, 40 N. W. 429; Browning v. Gosnell, 91 Iowa, 448, 59 N. W. 340. *Excluded*: Gaunt v. Harkness, 53 Kan. 405, 42 Am. St. Rep. 297, 36 Pac. 739; Howard v. Patrick, 43 Mich. 121, 5 N. W. 84.

⁶⁹ Any person who by reason of his employment, or otherwise, has acquired skill in the comparison of signatures, and in the detection of forgeries and counterfeits, is competent to testify respecting the genuineness of an instrument or signature from a proper comparison, or as to alterations, etc.: Ort v. Fowler, 31 Kan. 478, 47 Am. Rep. 501, 2 Pac. 580; Murphy v. Hagerman, Wright, 293; Jones v. Finch, 37 Miss. 461, 75 Am. Dec. 73. Thus a writing master professing skill in detecting forgery is competent to give an opinion from comparison as to the genuineness of the signature: Moody v. Rowell, 28 Am. Dec. 317. So experienced bank tellers, cashiers, etc., may testify as experts, whether a bank bill or other writing is counterfeit or forged, from comparison with genuine instruments, or from internal marks: Speiden v. State, 3 Tex. App. 156, 30 Am. Rep. 126; State v. Cheek, 13 Ired. (N. C.) 114; People v. Hewit, 2 Park. Cr. (N. Y.)

20. So such a witness may, of course, testify as to the genuineness of the bills of a bank, whose paper he has been accustomed to handle: Johnson v. State, 35 Ala. 370. So a bank cashier is competent to say whether a particular writing shown him has been altered: Pate v. People, 3 Gilm. (Ill.) 644; or as to whether writing on an erasure was written before or after the body of the note: Dubois v. Baker, 40 Barb. (N. Y.) 556. A postoffice clerk accustomed to inspect franks to detect forgeries is also competent to determine whether a writing is in a simulated or natural hand: Goodtitle v. Graham, 4 Term Rep. 497, 100 Eng. Reprint, 1139; King v. Cator, 4 Esp. 187. A photographer who has been accustomed to examine handwriting with a view to detecting forgeries is also competent to testify to the genuineness of a signature: Marcy v. Barnes, 16 Gray (Mass.) 161, 77 Am. Dec. 405; or as to whether certain words were written before or after the paper was folded: Bacon v. Williams, 13 Gray (Mass.), 525. So an engraver may be a competent expert to determine whether an instrument has been written over pencil marks: Reg. v. Williams, 8 Car. & P. 434; or to distinguish between a genuine impression of a seal and a false one: Folkes v. Chadd, 3 Doug. 157, 99 Eng. Reprint, 589. An experienced police officer, familiar with bogus bonds, may testify as to whether a particular bond is of that charac-

But his qualification must be established to the reasonable satisfaction of the court.⁷⁰ It is only necessary that the business opportunities and intelligence of the witness

ter: *State v. Norton*, 76 Mo. 180. The fact that the experience of a witness has been confined to a comparison of promissory notes does not render him any the less competent with respect to other writings: *Commonwealth v. Williams*, 105 Mass. 62. Where a witness testifies that he has skill and experience in judging of handwritings, the fact that his business has not required him to distinguish between genuine and simulated handwritings was held not sufficient, *per se*, to exclude his opinion, based upon a comparison of writings, in *Sweetser v. Lowell*, 33 Me. 446. But in *Goldstein v. Black*, 50 Cal. 462, it was decided that a court clerk of several years' experience, who had a good deal of experience in copying handwriting and tracing signatures and figures, but had made no study of the subject, was not a competent expert as to the genuineness of a signature. In *Ellingwood v. Bragg*, 52 N. H. 488, an attorney of forty years' practice, who had had his attention called to the comparison of handwritings on several occasions, but had made no study of it, was declared incompetent to testify whether certain entries in a book were made at the same or different times. The rule has been applied to *bank officers* or clerks: *Stone v. Hubbard*, 7 Cush. (Mass.) 595; *Speiden v. State*, 3 Tex. App. 156, 30 Am. Rep. 126; *Pate v. People*, 8 Ill. 644; *Birmingham Nat. Bank v. Bradley*, 108 Ala. 205, 19 South. 791; *merchants*: *Hyde v. Woolfolk*, 1 Iowa, 159; *Edmonston v. Henry*, 45 Mo. App. 346; *writing engravers*: *Reg. v. Williams*, 8 Car.

& P. 434; *lawyers*: *Hyde v. Woolfolk*, 1 Iowa, 159; *State v. Phair*, 48 Vt. 366; *conveyancers*: *Vinton v. Peck*, 14 Mich. 287; *teachers*: *Bacon v. Williams*, 13 Gray (Mass.), 525; *bookkeepers*: *State v. Ward*, 39 Vt. 225; *State v. De Graff*, 113 N. C. 688, 18 S. E. 507; *Bradford v. People*, 22 Colo. 157, 43 Pac. 1013; and *officials* in public offices: *Yates v. Yates*, 76 N. C. 142; *State v. Phair*, 48 Vt. 366; *State v. De Graff*, 113 N. C. 688, 18 S. E. 507; *register of deeds*: *Kornegay v. Kornegay*, 117 N. C. 242, 23 S. E. 257; *county clerk*: *Wheeler & W. M. Co. v. Buckhout*, 60 N. J. L. 102, 36 Atl. 772. See cases cited 6 Ency. of Ev. 416. For an interesting review of the law of North Carolina on this subject, generally, see *Martin v. Knight*, 147 N. C. 564, 61 S. E. 447. On the "Competency of Expert Witness for Comparison," see note to *Tower v. Whip*, 63 L. R. A. 937.

⁷⁰ *Griffin v. Working Women's Home Assn.*, 151 Ala. 597, 44 South. 605; *In re Thomas*, 155 Cal. 488, 101 Pac. 798; *Ausmus v. People*, 47 Colo. 167, 19 Ann. Cas. 491, 107 Pac. 204; *Tyler v. Todd*, 36 Conn. 218; *McDonald v. McDonald*, 142 Ind. 55, 41 N. E. 336; *Mixer v. Bennett*, 70 Iowa, 329, 30 N. W. 587; *Buchanan v. Buckler*, 8 Ky. Law Rep. 617; *Woodman v. Dana*, 52 Me. 9; *Nunes v. Perry*, 113 Mass. 274; *People v. Adams*, 162 Mich. 371, 127 N. W. 354; *State v. David*, 131 Mo. 380, 33 S. W. 28; *First Nat. Bank v. Hedgecock*, 87 Neb. 220, 127 N. W. 171; *Gordon's Case*, 50 N. J. Eq. 397, 26 Atl. 268; *Johnson Service Co. v. MacLeron*, 142 App. Div. 677, 127 N.

should be such as to enable him to have reasonable skill in judging of handwriting.⁷¹ While it is not necessary that the witness should have made the comparison of handwriting a specialty, it should appear that he has been engaged in some business which calls for frequent comparisons, and that he has in fact been in the habit for a length of time of making such comparison.⁷² For example, where the witness testified that he had been a student of penmanship for about thirty years; that he had given special attention to the study and comparison of signatures; that he had attended a business college and had taught penmanship during all these years; that he was familiar with all the different systems of penmanship; and that he had been frequently called upon to compare signatures for the purpose of determining whether they were genuine or not,—it was held that this was a sufficient foundation to permit him to give his opinion as to the genuineness of a signature.⁷³ And the cashier of a bank who had been with them for fifteen years and whose duty was to determine whether signatures to commercial paper were genuine was held to be a competent witness to compare a disputed signature with a genuine one.⁷⁴

Y. Supp. 431; *Bivings v. Gosnell*, 141 N. C. 341, 53 S. E. 861; *Koons v. State*, 36 Ohio St. 195; *Groff v. Groff*, 209 Pa. 603, 59 Atl. 65; *Weaver v. Whilden*, 33 S. C. 190, 11 S. E. 686; *Powers v. McKenzie*, 90 Tenn. 167, 16 S. W. 559; *Dolan v. Meehan* (Tex. Civ. App.), 80 S. W. 99; *Stevenson v. Gunning's Estate*, 64 Vt. 601, 25 Atl. 697; *Hanriot v. Sherwood*, 82 Va. 1; *United States v. Mathias*, 36 Fed. 892.

⁷¹ Cases cited in note 69, *supra*. The mere fact that one is skilled in the use of a microscope does not make him competent to testify as to handwriting as an expert: *Stevenson v. Gunning's Estate*, 64 Vt. 601, 25 Atl. 697.

⁷² *Ort v. Fowler*, 31 Kan. 478, 47 Am. Rep. 501, 2 Pac. 580. In some cases a somewhat stricter rule has been enforced than in the cases already cited: *Heacock v. State*, 13 Tex. App. 97; *State v. Tompkins*, 71 Mo. 613.

⁷³ *Ort v. Fowler*, 31 Kan. 478, 47 Am. Rep. 501, 2 Pac. 580; *Vinton v. Peck*, 14 Mich. 287; *Yates v. Yates*, 76 N. C. 142; *Eisfield v. Dill*, 71 Iowa, 442, 32 N. W. 420; *Heffernan v. O'Neill*, 1 Neb. (Unof.) 363, 96 N. W. 244.

⁷⁴ *Councilman v. Towson Nat. Bank*, 103 Md. 469, 64 Atl. 358. See, also, *Johnson v. State*, 35 Ala. 370; *Bradford v. People*, 22 Colo. 157, 43 Pac. 1013; *Ort v. Fowler*, 31

§ 557 (572). Effect of alteration of instruments—What constitutes alteration.—An alteration is an act done upon the instrument by which the meaning or language is changed. The term is usually applied to the act of the party entitled under the instrument, and imports some fraud or improper design to change its effect, and therefore an alteration made by accident or mistake could not have the effect to avoid the instrument.⁷⁵ The definition is rendered in varied form in the cases, but that adopted in the Indiana case cited will be found to cover the due signification,⁷⁶ and to include cases of unfinished or inchoate alteration.⁷⁷ The great body of law and of decided cases relating to the effect of the unauthorized alteration of writings is made up entirely of interpretations, qualifications of, and exceptions to, one general and well-established rule. Briefly stated, it is, that any change in a material part of a written instrument, after such instrument has been fully executed, by a party to such instrument or one claiming under him, and without the consent of the party sought to be charged, renders such instrument void even in the hands of an innocent holder. With certain qualifications peculiar to each state, the above rule is now firmly established in all of the states. The strictness of the

Kan. 478, 47 Am. Rep. 501, 2 Pac. 580; *Marcy v. Barnes*, 16 Gray (Mass.), 161, 77 Am. Dec. 405; *Kornegay v. Kornegay*, 117 N. C. 242, 23 S. E. 257; *Bratt v. State*, 38 Tex. Cr. 121, 41 S. W. 622; *Savage v. Bowen*, 103 Va. 540, 49 S. E. 668.

⁷⁵ *Cochran v. Nebeker*, 48 Ind. 459; 2 Greenl. Ev., §§ 565, 566; *Chitty, Con.*, 1169.

⁷⁶ The following cases contain more or less slightly divergent expressions on the subject: *Ryan v. Springfield First Nat. Bank*, 148 Ill. 349, 35 N. E. 1120; *Church v. Fowle*, 142 Mass. 12, 6 N. E. 764; *Bridges v. Winters*, 42 Miss. 135, 97 Am. Dec. 443, 2 Am. Rep. 598; *Morrill v.*

Otis, 12 N. H. 466; *Cheek v. Nall*, 112 N. C. 370, 17 S. E. 80; *Holland v. Hatch*, 15 Ohio St. 464; *Bingham v. Reddy*, 5 Ben. (U. S.) 266, 3 Fed. Cas., No. 1414.

⁷⁷ Words in a deed over which a crooked line is drawn with pencil, as if for erasure or cancellation, but which are not actually erased or canceled, form a part of the deed; and if the purchaser accepts the deed, he will be bound thereby, although he insisted that such words should not be in the deed, and was told that they had been canceled: *Rosenkrans v. Snover*, 19 N. J. Eq. 420, 97 Am. Dec. 668.

ancient rule as to the alteration of documents is well illustrated in an early case, known as Henry Pigot's case,⁷⁸ in which it was declared that a *deed* becomes void when the obligor or a stranger alters it in any material point, without the privity of the obligee, be it by interlineation, addition, erasing or by the drawing of a pen through the midst of any material word. It was also declared that "if the obligee himself alters the deed by any of said ways, although it is in words not material, yet the deed is void." Afterward the same rigid doctrine was applied in the case of other contracts.⁷⁹ But it has been wholly repudiated, both in England and in this country, and has been declared repugnant to justice and common sense.⁸⁰ While the *present rule* of law is much *more liberal* on this subject, it is still the rule "that any change in the terms of a written contract which varies its original legal effect and operation, whether in respect to the obligation it imports or to its force as a matter of evidence, when made by any party to the contract, is an alteration thereof, unless all the parties to the contract gave their express or implied consent to such change. And the *effect* of such alteration is to nullify and destroy the altered instrument as a legal obligation, whether made with fraudulent intent or not."⁸¹ The rea-

⁷⁸ Pigot's Case, 11 Coke Rep. 27, 77 Eng. Reprint, 1177. See note to Burgess v. Blake, 86 Am. St. Rep. 102 et seq.

⁷⁹ Master v. Miller, 4 Term Rep. 320, 100 Eng. Reprint, 1042, 1 Smith's Lead. Cas. 857 (star paging), and valuable note; Powell v. Divett, 15 East, 29, 104 Eng. Reprint, 755; Davidson v. Cooper, 11 Mees. & W. 778, 12 L. J. Ex. 467, 13 M. & M. 343, 13 L. J. Ex. 276. See note to Burgess v. Blake, 86 Am. St. Rep. 102 et seq.

⁸⁰ Aldous v. Cornwell, L. R. 3 Q. B. 573; United States v. Spalding, 2 Mason (U. S.), 478, Fed. Cas. No. 16,365; Bigelow v. Stilphen, 35 Vt.

521; Bellows v. Weeks, 41 Vt. 590; Ames v. Brown, 22 Minn. 257. As to this general subject, see notes to Woodworth v. Bank of America, 10 Am. Dec. 267-273; 1 Smith's Lead. Cas. 1304-1316; Neil v. Case, 37 Am. Rep. 260; Fordyce v. Kosminski, 4 Am. St. Rep. 25; Palmer v. Largent, 25 Am. Rep. 481-484; Draper v. Wood, 17 Am. Rep. 97-106; Burgess v. Blake, 86 Am. St. Rep. 80-134.

⁸¹ Benton v. Clemmons, 157 Ala. 658, 47 South. 582; Little Rock Trust Co. v. Martin, 57 Ark. 277, 21 S. W. 468; Pelton v. San Jacinto Lumber Co., 113 Cal. 21, 45 Pac. 12; Murray v. Klinzing, 64 Conn. 78, 29 Atl. 244; Warder v. Stewart, 2 Marv. (Del.)

sons for the rule are obvious. A written instrument in the hands of an adverse party is easily susceptible of alteration to the injury of the maker. Many written contracts are negotiable, and perform important functions in commercial transactions. It is of the highest importance to the commercial world that they be preserved in their original state or condition. Public policy demands this for the prevention of frauds, and of loss to innocent persons. The most effectual means of preserving the integrity of such instruments is the rule that a material alteration destroys the instrument, so that no recovery can be had upon it, either in its original or its altered condition. The object of the rule is to enjoin the highest care upon the holder, and to punish him with loss for his neglect and

275, 36 Atl. 88; *Landt v. McCullough*, 206 Ill. 214, 69 N. E. 107; *Basey v. McKinney*, 43 Ind. App. 422, 87 N. E. 693; *Eckert v. Louis*, 84 Ind. 99; *Taylor v. Acom*, 1 Ind. Ter. 436, 45 S. W. 130; *Shea v. Cutler*, 147 Iowa, 366, 126 N. W. 366; *Adair v. England*, 58 Iowa, 314, 12 N. W. 277; *Davis v. Eppler*, 38 Kan. 629, 16 Pac. 793; *Mitchell v. Reed*, 32 Ky. Law Rep. 683, 106 S. W. 833; *Lee v. Starbird*, 55 Me. 491; *Owen v. Hall*, 70 Md. 97, 16 Atl. 376; *Osgood v. Stevenson*, 143 Mass. 399, 9 N. E. 825; *Greenfield Sav. Bank v. Stowell*, 123 Mass. 196, 25 Am. Rep. 67; *Aldrich v. Smith*, 37 Mich. 468, 26 Am. Rep. 536; *Henderson v. Wilson*, 6 How. (Miss.) 65; *Bull Remedy Co. v. Clark*, 109 Minn. 396, 18 Ann. Cas. 413, 124 N. W. 20; *Barnes-Smith Mercantile Co. v. Tate*, 156 Mo. App. 236, 137 S. W. 619; *Ball v. Beaumont*, 66 Neb. 56, 92 N. W. 170; *Gerrish v. Glines*, 56 N. H. 9; *Ruby v. Talbott*, 5 N. M. 251, 3 L. R. A. 724, 21 Pac. 72; *Stone v. Lord*, 80 N. Y. 60; *Perry v. Hackney*, 142 N. C. 368, 115 Am. St. Rep. 741, 9

Ann. Cas. 244, 55 S. E. 289; *First Nat. Bank of Decorah v. Laughlin*, 4 N. D. 391, 61 N. W. 473; *Commonwealth Nat. Bank v. Baughman*, 27 Okl. 175, 111 Pac. 332; *Newman v. King*, 54 Ohio St. 273, 56 Am. St. Rep. 705, 35 L. R. A. 471, 43 N. E. 683; *Typewriter Co. v. Cleaver*, 38 Pa. Sup. Ct. 376; *Keene v. Weeks*, 19 R. I. 309, 33 Atl. 446; *White v. Harris*, 69 S. C. 65, 104 Am. St. Rep. 791, 48 S. E. 41; *Rochford v. McGee*, 16 S. D. 606, 102 Am. St. Rep. 719, 61 L. R. A. 335, 94 N. W. 695; *Moss v. Maddux*, 108 Tenn. 405, 67 S. W. 855; *Matson v. Jarvis* (Tex. Civ. App.), 133 S. W. 941; *American Pub. Co. v. Fisher*, 10 Utah, 147, 37 Pac. 259; *Batchelder v. White*, 80 Va. 103; *Hershman v. Stafford*, 58 W. Va. 459, 52 S. E. 533; *Matteson v. Ellsworth*, 33 Wis. 488, 14 Am. Rep. 766; *Kilkelly v. Martin*, 34 Wis. 525; *Mersman v. Werges*, 112 U. S. 139, 28 L. Ed. 641, 5 Sup. Ct. Rep. 65; *Wood v. Steele*, 6 Wall. (U. S.) 80, 18 L. Ed. 725; *Daniel*, Neg. Inst., 5th ed., § 1373. See full note to *Burgess v. Blake*, 86 Am. St. Rep. 80-134.

fraudulent conduct.⁸² Lord Kenyon, in dealing with the alteration of a bill of exchange, said: "That the alteration in this instrument would have avoided it, if it had been a deed, no person can doubt. And why, in point of policy, would it have had that effect in a deed? Because no man shall be permitted to take the chance of committing a fraud, without running any risk of losing by the event, when it is detected. At the time when the cases cited, of deeds, were determined, forgery was only a misdemeanor; now the punishment of the law might well have been considered as too little, unless the deed also were avoided; and therefore the penalty for committing such an offense was compounded of these two circumstances, the punishment for the misdemeanor, and the avoidance of the deed. And though the punishment has been increased, the principle still remains the same."⁸³ Another reason is found in the fact that a material alteration of a written contract by a party to it discharges a party who does not authorize or consent to the alteration, because it destroys the identity of the contract and substitutes a different agreement for that into which he entered.⁸⁴ In other words, the later cases make a distinction, not recognized by the earlier ones, between the *alteration* and the *spoliation* of written instruments, that is, between a change made by a party or privy and that made by a stranger; and it is now the rule that parties are not to be deprived of the benefit of their contracts through the wrongful act of a stranger.⁸⁵ "It is

⁸² Kingan & Co. v. Silvers, 13 Ind. App. 80, 37 N. E. 413.

⁸³ Master v. Miller, 4 Term Rep. 320, 100 Eng. Reprint, 1042. See, also, McCauley v. Gordon, 64 Ga. 221, 37 Am. Rep. 68; Lee v. Butler, 167 Mass. 426, 57 Am. St. Rep. 466, 46 N. E. 52; Humphreys v. Guillo, 13 N. H. 385, 38 Am. Dec. 499; Gettysburg Nat. Bank v. Chisolm, 169 Pa. 564, 47 Am. St. Rep. 929, 32 Atl. 730; Moss v. Maddux, 108 Tenn. 405, 67 S. W. 855; Newell v. Mayberry,

3 Leigh (Va.), 250, 23 Am. Dec. 261.

⁸⁴ Mersman v. Werges, 112 U. S. 139, 28 L. Ed. 641, 5 Sup. Ct. Rep. 65. See, also, Sudler v. Collins, 2 Houst. (Del.) 538; Taylor v. Acom, 1 Ind. Ter. 436, 45 S. W. 130; Woodworth v. Bank of America, 19 Johns. (N. Y.) 391, 10 Am. Dec. 239; Low v. Merrill, 1 Pinn. (Wis.) 340.

⁸⁵ Clopton v. Elkin, 49 Miss. 95; Fuller v. Green, 64 Wis. 159, 54 Am. Rep. 600, 24 N. W. 907; Bigelow v.

difficult to understand why a man who has done no wrong, nor consented that any should be done, should be punished to the extent of the amount of his demand by having his claim canceled by operation of law, solely because another has been guilty of an act for which he ought to be punished. Public policy does not require any such rule. Declaring the instrument void in case of alteration has no tendency to deter a stranger from making such alteration. Punishment inflicted upon the innocent has no terror for the guilty. We think the rule, as indicated by reason and authority, is, that an alteration of a written instrument by a stranger without authority does not render such instrument void."⁸⁶ There is in this connection, however, a dis-

Stilphen, 35 Vt. 521; Piersol v. Grimes, 30 Ind. 129, 95 Am. Dec. 673; Bellows v. Weeks, 41 Vt. 590; Fisher v. King, 153 Pa. 3, 25 Atl. 1029; Ames v. Brown, 22 Minn. 257; Rees v. Overbaugh, 6 Cow. (N. Y.) 746; Gleason v. Hamilton, 138 N. Y. 353, 21 L. R. A. 210, 34 N. E. 283, and cases cited; Lubbering v. Kohlbrecher, 22 Mo. 596; Lee v. Alexander, 9 B. Mon. (Ky.) 25, 48 Am. Dec. 412; Nichols v. Johnson, 10 Conn. 192; Boyd v. McConnell, 10 Humph. (Tenn.) 68; Hunt v. Gray, 35 N. J. L. 227, 10 Am. Rep. 232; Ford v. Ford, 17 Pick. (Mass.) 418; City of Orlando v. Gooding, 34 Fla. 244, 15 South. 770; White v. Harris, 69 S. C. 65, 104 Am. St. Rep. 791, 48 S. E. 41.

⁸⁶ Bigelow v. Stilphen, 35 Vt. 521. See, also, Lowremore v. Berry, 19 Ala. 130, 54 Am. Dec. 183; Andrews v. Calloway, 50 Ark. 358, 7 S. W. 449; Langenberger v. Kroeger, 48 Cal. 147, 17 Am. Rep. 418; Walsh v. Hunt, 120 Cal. 46, 39 L. R. A. 697, 52 Pac. 115; Nichols v. Johnson, 10 Conn. 192; Orlando v. Gooding, 34 Fla. 244, 15 South. 770; Scott v. Walker, Dud. (Ga.) 243; Condict v.

Flower, 106 Ill. 105; Vogle v. Ripper, 34 Ill. 100, 85 Am. Dec. 298; Piersol v. Grimes, 30 Ind. 129, 95 Am. Dec. 673; Mathias v. Leathers, 99 Iowa, 18, 68 N. W. 449; Lee v. Alexander, 48 Ky. 25, 48 Am. Dec. 412, overruling Letcher v. Bates, 6 J. J. Marsh. (Ky.) 524, 22 Am. Dec. 92; Wickes v. Caulk, 5 Har. & J. (Md.) 36; Chessman v. Whittemore, 40 Mass. 231; White etc. Machine Co. v. Dakin, 86 Mich. 581, 13 L. R. A. 313, 49 N. W. 583; Russell v. Reed, 36 Minn. 376, 31 N. W. 452; Croft v. White, 36 Miss. 455; Kelly v. Thuey, 143 Mo. 422, 45 S. W. 300; Medlin v. Platte Co., 8 Mo. 235, 40 Am. Dec. 135; Perkins Windmill Co. v. Tillman, 55 Neb. 652, 75 N. W. 1098; State v. Manhattan Silver Min. Co., 4 Nev. 318; Chesley v. Frost, 1 N. H. 145; Ruby v. Talbott, 5 N. M. 251, 3 L. R. A. 724, 21 Pac. 72; Hunt v. Gray, 35 N. J. L. 227, 10 Am. Rep. 232; Elizabeth v. Force, 29 N. J. Eq. 587; Martin v. Tradesmen's Ins. Co., 101 N. Y. 498, 5 N. E. 338; Waring v. Smyth, 2 Barb. Ch. (N. Y.) 119, 47 Am. Dec. 299; Tarbill v. Richmond City Mill Works, 2 Ohio C. C. 564; Whitlock

tion to be observed between paper already issued and that not fully executed. An alteration by a stranger in the former case could have no possible effect in vitiating the instrument. An alteration by a stranger, however, before both parties to the instrument had signed it, but after its execution by one, might very effectually prevent the formation of a contract. This, not because of the law of alteration of instruments, but simply because by reason of such alteration, the necessary meeting of minds had been prevented and a contract thus rendered impossible.⁸⁷ If it appears that the alteration has been made since the instrument came into the hands of the plaintiff, he may show that it was not his act or the act of any agent; and may recover, if the jury believe that the alteration was made by a stranger, and that it was therefore a spoliation.⁸⁸ While an unambiguous, valid, written contract is not ordinarily variable by parol testimony, a dispute as to the existence of the contract, including questions as to alterations, is an inquiry into which parol evidence is ordinarily admissible. *Parol evidence* is admissible to show that a contract has been materially altered since execution.⁸⁹

v. Manciet, 10 Or. 166; Neff v. Horner, 63 Pa. 327, 3 Am. Rep. 555; Sykes v. Gerber, 98 Pa. 179; Port Huron etc. Co. v. Sherman, 14 S. D. 461, 85 N. W. 1008; Organ v. Allison, 68 Tenn. 459; Tutt v. Thornton, 57 Tex. 35; Newell v. Mayberry, 3 Leigh (Va.), 250, 23 Am. Dec. 261; Murray v. Peterson, 6 Wash. 418, 33 Pac. 969; Yeager v. Musgrave, 28 W. Va. 90; Gordon v. Robertson, 48 Wis. 493, 4 N. W. 579; Smith v. United States, 2 Wall. (U. S.) 219, 17 L. Ed. 788; Wylie v. Missouri Pac. Ry. Co., 41 Fed. 623.

⁸⁷ Blakey v. Johnson, 13 Bush (Ky.), 197, 26 Am. Rep. 254.

⁸⁸ Drum v. Drum, 133 Mass. 566; Murray v. Peterson, 6 Wash. 418,

33 Pac. 969; Cheek v. Nall, 112 N. C. 370, 17 S. E. 80; White Sewing Mach. Co. v. Dakin, 86 Mich. 581, 13 L. R. A. 313, 49 N. W. 583; Union Nat. Bank v. Roberts, 45 Wis. 373. See note to Wolfertman v. Bell, 36 Am. St. Rep. 128.

⁸⁹ Where the maker of an instrument, given for the purchase price of property, claims that the written contract, when executed, designated a certain sum as the purchase price, and since the execution of the instrument had been altered, so as to raise the amount to be paid, it is relevant to show, in corroboration of testimony as to the alteration, that in the parol negotiations which the parties undertook to embody in the written contract the smaller sum was the one agreed upon. In such

§ 558 (573). Same rule although change is to the disadvantage of the wrongdoer.—When a material alteration is made, the contract is vitiated, even though the change might operate to the *disadvantage of the wrongdoer* or to the benefit of the other party. A material alteration of a contract by any of the parties thereto discharges from liability thereon all other parties not consenting to or authorizing such alteration; and this without regard to whether the alteration is apparently or presumably to the benefit or detriment of the parties objecting. Courts cannot undertake to say that a party would have made the contract as altered, and thus make it for him, merely because its terms are more favorable to him than those embodied in the original instrument, any more than a like conclusion could be justified where the alteration imports additional liability. In the one case, no less than in the other, the altered paper is not the contract which the party has made; and in neither case can the courts declare it to be his contract, or enforce it as such. The law proceeds on the idea that the *identity of the contract* has been *destroyed*; that the contract made is not the contract before the court; that the party did not make the contract which is before the court, and so adjudging, it cannot go further, and hold him bound by it on speculations, however probable and plausible, that he would or ought to have entered into the altered agreement, because it involved less liability than the original and only paper executed by him.⁹⁰ As *illus-*

cases it is also relevant to show as a circumstance that the maker of the instrument had frequently asked the payee for a copy of it, and the payee had refused to give it: *Howard Piano Co. v. Glover*, 7 Ga. App. 548, 67 S. E. 277. See, also, *Montgomery v. Crossthwait*, 90 Ala. 553, 24 Am. St. Rep. 832, 12 L. R. A. 140, 8 South. 498; *Goodwin v. Norton*, 92 Me. 532, 43 Atl. 111; *Courcamp v. Weber*, 39 Neb. 533, 58 N.

W. 187; *Winters v. Mowrer*, 163 Pa. 239, 29 Atl. 916.

⁹⁰ *Montgomery v. Crossthwait*, 90 Ala. 553, 24 Am. St. Rep. 832, 12 L. R. A. 140, 8 South. 498; *Woodworth v. Bank of America*, 19 Johns. (N. Y.) 391, 10 Am. Dec. 239, and elaborate note; *Angle v. Northwestern M. L. Ins. Co.*, 92 U. S. 330, 23 L. Ed. 556; *Greenfield Sav. Bank v. Stowell*, 123 Mass. 196, 25 Am. Rep. 67; *Draper v. Wood*, 112 Mass. 315,

trations of this rule, a change in the date of payment of a note, although the payment is delayed, vitiates the note;⁹¹ and the addition of a new surety vitiates the note as to a surety who has already signed.⁹² The same is true of a change diminishing the amount of interest to be paid,⁹³

17 Am. Rep. 92; *Brown v. Straw*, 6 Neb. 536, 29 Am. Rep. 369; *Benedict v. Cowden*, 49 N. Y. 396, 10 Am. Rep. 382; *Miller v. Finley*, 26 Mich. 249, 12 Am. Rep. 306; *Warrington v. Early*, 2 El. & B. 763, 118 Eng. Reprint, 953; *Fordyce v. Kosminski*, 49 Ark. 40, 4 Am. St. Rep. 18, 3 S. W. 892; *National Ulster Co. Bank v. Madden*, 114 N. Y. 280, 11 Am. St. Rep. 633, 21 N. E. 408; *Burrows v. Klunk*, 70 Md. 451, 14 Am. St. Rep. 371, 3 L. R. A. 576, 17 Atl. 378; *Hartley v. Corboy*, 150 Pa. 23, 24 Atl. 295. See notes to *Holland v. Hatch*, 71 Am. Dec. 369; *Burgess v. Blake*, 86 Am. St. Rep. 87 et seq. Although there are a few cases to the contrary, the sounder doctrine, and certainly the one supported by the overwhelming weight of authority, is that stated in *Anderson v. Bellenger*, 87 Ala. 334, 13 Am. St. Rep. 46, 4 L. R. A. 680, 6 South. 82, and there applied to a surety: that any material alteration by one not a stranger to the paper, whether injurious or not, avoids the contract as to all parties not consenting. It is enough that if the instrument were genuine it would operate differently from the original; or, as otherwise expressed, avoidance will result "if the alteration is one which causes the paper to speak a language different in legal effect from that which it originally spoke": *Mahaiwe Bank v. Douglass*, 31 Conn. 170; *Lesser v. Scholtze*, 93 Ala. 338, 9 South. 273; *Chism v. Toomer*, 27 Ark. 108;

Coburn v. Webb, 56 Ind. 96, 26 Am. Rep. 15; *Dickerman v. Miner*, 43 Iowa, 508; *McCormick Harvesting Mach. Co. v. Lauber*, 7 Kan. App. 730, 52 Pac. 577; *Phoenix Ins. Co. v. McKernan*, 100 Ky. 97, 18 Ky. Law Rep. 617, 37 S. W. 490; *Hewins v. Cargill*, 67 Me. 554; *Doane v. Eldridge*, 16 Gray (Mass.), 254; *Moore v. Hutchinson*, 69 Mo. 429; *Lunt v. Silver*, 5 Mo. App. 186; *State Bank of St. Joseph v. Shaffer*, 9 Neb. 1, 31 Am. Rep. 394, 1 N. W. 980; *Humphreys v. Guillo*, 13 N. H. 385, 38 Am. Dec. 499; *Morrill v. Otis*, 12 N. H. 466; *Reeves v. Piereson*, 23 Hun (N. Y.), 185; *McCaughy v. Smith*, 27 N. Y. 39; *Heffner v. Wenrich*, 32 Pa. 423; *Keene v. Weeks*, 19 R. I. 309, 33 Atl. 446; *Organ v. Allison*, 9 Baxt. (68 Tenn.) 459; *Wood v. Steele*, 6 Wall. (U. S.) 80, 18 L. Ed. 725; *Gardner v. Walsh*, 5 El. & B. 83, 85 E. C. L. 83, 119 Eng. Reprint, 412; 2 *Parsons on Bills and Notes*, 551-564; *Tiedeman on Commercial Paper*, § 394; 3 *Randolph on Commercial Paper*, § 1743.

⁹¹ *Brown v. Straw*, 6 Neb. 536, 29 Am. Rep. 369.

⁹² *Woodworth v. Bank of America*, 19 Johns. (N. Y.) 391, 10 Am. Dec. 239, and note; *Browning v. Gosnell*, 91 Iowa, 448, 59 N. W. 340; *Barnes v. Van Keuren*, 31 Neb. 165, 47 N. W. 848; *Little Rock Trust Co. v. Martin*, 57 Ark. 277, 21 S. W. 468.

⁹³ *Coburn v. Webb*, 56 Ind. 96, 26 Am. Rep. 15; *Palmer v. Poor*, 121

and of adding after the rate of interest in a promissory note the words "after maturity."⁹⁴ The materiality of the alteration is obvious.

§ 559 (574). Immaterial alterations—Conflicting views.

It does not necessarily follow that all alterations made by a party or privy after delivery vitiate the contract. In a great variety of cases where such alterations have been made, the instrument has been admitted as evidence of the rights of the parties. But in such cases, they have been alterations of so little importance as to be *wholly immaterial*, not affecting the identity or effect of the writing;⁹⁵ or they have been made *to correct obvious and clerical errors*, and for the purpose of making the contract con-

Ind. 135, 6 L. R. A. 469, 22 N. E. 984; *Sanders v. Bagwell*, 37 S. C. 145, 15 S. E. 714, 16 S. E. 770; *First Nat. Bank v. Hall*, 83 Iowa, 645, 50 N. W. 944.

⁹⁴ *Coburn v. Webb*, *supra*.

⁹⁵ *Winter v. Pool*, 100 Ala. 503, 14 South. 411; *Souza v. Lucas* (Cal. App.), 100 Pac. 115; *Hill v. Fruita Mercantile Co.*, 42 Colo. 491, 126 Am. St. Rep. 172, 94 Pac. 354; *Nichols v. Johnson*, 10 Conn. 192; *Warder v. Stewart*, 2 Marv. (Del.) 275, 36 Atl. 88; *Broughton v. West*, 8 Ga. 248; *Mulkey v. Long*, 5 Idaho, 213, 47 Pac. 949; *Ryan v. Springfield First Nat. Bank*, 148 Ill. 349, 35 N. E. 1120; *Crowe v. Beem*, 36 Ind. App. 207, 75 N. E. 302; *Taylor v. Acom*, 1 Ind. Ter. 436, 45 S. W. 130; *Davis v. Campbell*, 93 Iowa, 524, 61 N. W. 1053; *Phillips v. Breck*, 79 Ky. 465; *Provenzano v. Claesser*, 122 La. 378, 47 South. 688; *Cushing v. Field*, 70 Me. 50, 35 Am. Rep. 293; *James v. Tilton*, 183 Mass. 275, 67 N. E. 326; *Prudden v. Nester*, 103 Mich. 540, 61 N. W. 777; *Minnesota etc. Cattle Co. v. Chicago*

etc. R. Co., 108 Minn. 470, 122 N. W. 493; *Bridges v. Winters*, 42 Miss. 135, 97 Am. Dec. 443, 2 Am. Rep. 598; *Mercantile Co. v. Tate*, 156 Mo. App. 236, 137 S. W. 619; *Blenkiron v. Rogers*, 87 Neb. 716, Ann. Cas. 1912A, 1043, 127 N. W. 1062; *Cole v. Hills*, 44 N. H. 227; *Casoni v. Jerome*, 58 N. Y. 315; *Sturges v. Williams*, 9 Ohio St. 443, 75 Am. Dec. 473; *Express Pub. Co. v. Aldine Press Co.*, 126 Pa. 347, 17 Atl. 608; *Arnold v. Jones*, 2 R. I. 345; *Blair v. Bank of Tennessee*, 11 Humph. (Tenn.) 84; *Baldwin v. Haskell Nat. Bank* (Tex. Civ. App.), 124 S. W. 443; *Derby v. Thrall*, 44 Vt. 413, 8 Am. Rep. 389; *Bashaw v. Wallace*, 101 Va. 733, 45 S. E. 290; *Pitt v. Little*, 58 Wash. 355, 108 Pac. 941; *Philip Carey Mfg. Co. v. Watson*, 58 W. Va. 189, 52 S. E. 515; *Fuller v. Green*, 64 Wis. 159, 54 Am. Rep. 600, 24 N. W. 907; *McLaughlin v. Venine*, 2 Wyo. 1; *Gordon v. Third Nat. Bank*, 144 U. S. 97, 36 L. Ed. 360, 12 Sup. Ct. Rep. 657; *Isaacs v. Grothe*, 29 N. Brunsw. 420.

form to the actual agreement.⁹⁶ *Alterations in deeds* are governed by the same rule where neither the rights, interests, duties nor obligations of either of the parties are in any manner affected or changed.⁹⁷ Inasmuch as the alteration must change the rights or obligations of the parties

⁹⁶ Adding words "*on demand*" to a note expressing no time of payment: *Aldous v. Cornwell*, L. R. 3 Q. B. 573 (see notes to *Wolferman v. Bell*, 36 Am. St. Rep. 128; *Draper v. Wood*, 17 Am. Rep. 101); inserting in a note the *rate of interest* which had actually been agreed upon: *First Nat. Bank v. Carson*, 60 Mich. 432, 27 N. W. 589; *Rainbolt v. Eddy*, 34 Iowa, 440, 11 Am. Rep. 152 (in *Weyerhauser v. Dun*, 100 N. Y. 150, 2 N. E. 274, it was held material, and discharged the indorser); inserting in a promissory note the words "*in gold*": *Bridges v. Winters*, 42 Miss. 135, 97 Am. Dec. 443, 2 Am. Rep. 598 (in *Bogarth v. Breedlove*, 39 Tex. 561, it is held that it avoids the note as to sureties); adding an immaterial *date*: *English v. Breneman*, 5 Ark. 377, 41 Am. Dec. 96; changing the date or the *name* of a payee so as to conform to the intent and agreement of the parties: *Duker v. Franz*, 7 Bush (Ky.), 273, 3 Am. Rep. 314; *Jessup v. Dennison*, 2 Disn. (Ohio) 150; *Derby v. Thrall*, 44 Vt. 413, 8 Am. Rep. 389; *Cole v. Hills*, 44 N. H. 227; *Ames v. Colburn*, 11 Gray (Mass.), 390, 71 Am. Dec. 723; *King v. Rea*, 13 Colo. 69, 21 Pac. 1084; *Westmoreland v. Westmoreland*, 92 Ga. 233, 17 S. E. 1033; *retracing* of a name: *Dunn v. Clements*, 7 Jones (N. C.), 58; *Reed v. Roark*, 14 Tex. 329, 65 Am. Dec. 127; inserting a *dollar-mark* before numbers: *Houghton v. Francis*, 29 Ill. 244; adding the name of a *witness*, omitted in a note: *Fuller v. Green*, 64 Wis. 159, 54 Am. Rep. 60,

24 N. W. 907; changing the *figures* so as to make the marginal figures and the written amount correspond: *Smith v. Smith*, 1 R. I. 398, 53 Am. Dec. 652; *Johnston Harvester Co. v. McLean*, 57 Wis. 258, 15 N. W. 177, 46 Am. Rep. 39; changing phraseology *without affecting sense* or legal effect of instrument: *State v. Riebe*, 27 Minn. 315, 7 N. W. 262; *Cushing v. Field*, 70 Me. 50, 35 Am. Rep. 293; interlining the word "*before*" over word "*by*," held not material under circumstances: *Express Pub. Co. v. Aldine Press*, 126 Pa. 347, 17 Atl. 608; changing the serial *numbers* of railroad *bonds*: *Wylie v. Missouri Pac. R. Co.*, 41 Fed. 623; *indorser* erasing his name from face of note and placing it on the back: *Ryan v. First Nat. Bank*, 148 Ill. 349, 35 N. E. 1120; red ink memorandum on back of note stating amount of interest due and resulting total: *Yost v. Watertown Steam Engine Co.* (Tex. Civ. App.), 24 S. W. 657. For further illustrations, see 1 Ency. of Ev., 784 et seq. See, also, note to *Burgess v. Blake*, 86 Am. St. Rep. 87 et seq.

⁹⁷ *Smith v. Crooker*, 5 Mass. 538; *Derby v. Thrall*, 44 Vt. 413, 8 Am. Rep. 389; *Ryan v. First Nat. Bank*, 148 Ill. 349, 35 N. E. 1120; *Gordon v. Third Nat. Bank*, 144 U. S. 97, and note, 36 L. Ed. 360, 12 Sup. Ct. Rep. 657. Same rule as to contracts: *Consaul v. Sheldon*, 35 Neb. 247, 52 N. W. 1104; *Cline v. Goodale*, 23 Or. 406, 31 Pac. 956. See note, 1 Smith's Lead. Cas. 1304-1316.

to the instrument in order to have a vitiating effect, it has been repeatedly held, and is the undoubted law, that an alteration which merely incorporates into a contract terms which the law would otherwise supply is an immaterial alteration. So an insertion of the legal rate of interest in a note which would otherwise bear it has been held an immaterial alteration.⁹⁸ And, on the same principle, the insertion, substitution, or erasure of terms which the court would supply by construction is deemed immaterial. Thus, where in a deed the court would, under established rules of construction, be able to say that certain land was in Illinois, it was held an immaterial alteration to strike out "Vermont" and insert "Illinois."⁹⁹ Where the words following the name of the maker are mere *descriptio personae*, even though he may have intended to sign only in a representative capacity, it is held in some states that the addition or erasure of such words produces no change in the legal effect of the instrument, and such alterations are therefore held to be immaterial,¹⁰⁰ but this does not appear

⁹⁸ *First Nat. Bank v. Wolff*, 79 Cal. 69, 21 Pac. 551, 748; *James v. Dalbey*, 107 Iowa, 463, 78 N. W. 51; or the erasure of "with grace" from a note by law entitled to grace: *Portsmouth Sav. Bank v. Wilson*, 5 App. Dec. (D. C.) 8; or any other terms which the law implies: *Crawford v. Simonton & Co.*, 163 Ala. 609, 50 South. 1024; *Kelly v. Trumble*, 74 Ill. 428; *Harris v. State*, 54 Ind. 2; *First Nat. Bank v. Nordstrom*, 70 Kan. 485, 78 Pac. 804; *Brown v. Pinkham*, 18 Pick. (Mass.) 172; *Bridges v. Winters*, 42 Miss. 135, 97 Am. Dec. 443, 2 Am. Rep. 598; *Western Bldg. etc. Assn. v. Fitzmaurice*, 7 Mo. App. 283; *Fisherdieck v. Hutton*, 44 Neb. 122, 62 N. W. 488; *Cole v. Hills*, 44 N. H. 227; *Kinney v. Schmitt*, 12 Hun (N. Y.), 521; *Houston v. Potts*, 64 N. C. 33; *Blair v. Bank of Tennessee*, 11 Humph. (Tenn.) 84; *Kleeb v.*

Bard, 12 Wash. 140, 40 Pac. 733; *Waugh v. Bussell*, 5 Taunt. 707, 1 Eng. Com. L. 362, 128 Eng. Reprint, 868.

⁹⁹ *Sanitary Dist. v. Allen*, 178 Ill. 330, 53 N. E. 109. So where "year" was added to the phrase "in the of our Lord 1805," it was held immaterial, as the word would have been supplied by construction. In this case the court, through Parsons, C. J., said: "It would be unworthy the wisdom of the law to decide that an incautious interlineation of a word, which the same law would necessarily imply, should defeat the contract": *Hunt v. Adams*, 6 Mass. 519. See, to same effect, *Briscoe v. Reynolds*, 51 Iowa, 673, 2 N. W. 529; *Miller v. Reed*, 27 Pa. 244, 67 Am. Dec. 459; *Burnham v. Ayer*, 35 N. H. 351.

¹⁰⁰ *Thackaray v. Hanson*, 1 Colo. 365; *Coit v. Starkweather*, 8 Conn.

to be a rule to be followed, because in some cases words which are mere *descriptio personae*, so far as attaching liability to a principal is concerned, have a certain effect as evidence of the capacity in which the party signed; and so may be very material portions of the instrument. Thus where a party signed "surety" after his name, and the payee erased it, the court held the erasure a material alteration. "By the erasure of the word 'surety' after Paine's name, he became liable to be subjected to the necessity of showing by parol, as between him and the principal, what his true relation to the instrument was, whereas, before the alteration, it appeared upon its face. Nor is this a trifling matter. The evidence when wanted might not be obtainable."¹ In two states, however, Missouri and New Jersey, the question of the immateriality of an alteration does not arise, as they hold that *any* alteration, however immaterial, vitiates the instrument altered.² There are two distinct lines of decisions as to whether an alteration, which would otherwise be immaterial, made by the party interested, with a *fraudulent intent* and with a view to gain some improper advantage, will prevent the use of the instrument as evidence. The older decisions hold that, if the alteration be *fraudulently* made, it makes little difference whether it be in a material or immaterial part, for, in either case, the person has transgressed the rule for the prevention of fraud, and having fraudulently destroyed the identity of the instrument, he must accept all

289; *Burlingame v. Brewster*, 79 Ill. 515, 22 Am. Rep. 177; *Hayes v. Matthews*, 63 Ind. 412, 30 Am. Rep. 226; *Casto v. Evinger*, 17 Ind. App. 298, 46 N. E. 648; *Manufacturers' etc. Bank v. Follett*, 11 R. I. 92, 23 Am. Rep. 418.

¹ *Laub v. Paine*, 46 Iowa, 550, 26 Am. Rep. 163, disapproving *Humphreys v. Crane*, 5 Cal. 173. See, also, *Hodge v. Farmers' Bank*, 7 Ind. App. 94, 34 N. E. 123 (addition of word "cashier" to a signature).

² *McCormick Harvesting Mach. Co. v. Blair*, 146 Mo. App. 374, 124 S. W. 49; *Hunt v. Gray*, 35 N. J. L. 227, 10 Am. Rep. 232. See, also, extensive note to *Burgess v. Blake*, 86 Am. St. Rep. 80, to which we are indebted for much excellent matter. There seems a disposition in Missouri to ameliorate the rigidity of the rule: See *New England Loan etc. Co. v. Brown*, 59 Mo. App. 461; *Williams v. Jensen*, 75 Mo. 681.

the consequences.³ This view is thus expressed by Lord Kenyon: "No man shall be permitted to take the chance of committing a fraud without running any risk of losing by the event when it is detected."⁴ But the *later* and, in the opinion of the author, the better *rule* is that as such an alteration is wholly immaterial, and in no way changes the liability of the parties, it is also immaterial with what intent such alteration was in fact made. Many of the cases often cited to support the other doctrine are *obiter*, being in reference to changes which were in fact material, whereby the document had lost its identity; but these reasons will not apply when such alterations are wholly immaterial. According to this view, an immaterial alteration is not made material simply by a fraudulent intent, and, if such intent was not effectuated into a material change, the intent alone does not make it material. The motive for the act cannot be inquired into, unless the act itself affects materially the rights of the parties.⁵ That which cannot by possibility work a change in the substantial part of the contract cannot be said to be an alteration of it in a legal sense. If one party can receive no more than he was to receive under the terms of the contract, and the liability of the other remained the same as when he gave his consent to it, the change, whatever it may be, or may have been, cannot be said to be material, and if not material, it must be treated as nothing. If this position be true, the act cannot be the subject of a judicial investigation, and if the act itself be unimportant, upon what principle is it that the court can undertake to probe the motives

³ *First Nat. Bank v. Fricke*, 75 Mo. 178, 42 Am. Rep. 397; *Turner v. Billagram*, 2 Cal. 520; *Den v. Wright*, 2 Halst. (N. J.) 175, 11 Am. Dec. 546; *Hunt v. Gray*, 35 N. J. 227, 10 Am. Rep. 232; *Greenl. Ev.*, § 568.

⁴ Cited in *Hunt v. Gray*, 35 N. J. L. 227, 10 Am. Rep. 232.

⁵ *Vogle v. Ripper*, 34 Ill. 100, 85 Am. Dec. 298; *Robinson v. Phoenix Ins. Co.*, 25 Iowa, 430; *Tranter v. Hibberd*, 21 Ky. Law Rep. 1710, 56 S. W. 169; *Thornton v. Appleton*, 29 Me. 298; *Moye v. Herndon*, 30 Miss. 110; *Miller v. Gilleland*, 19 Pa. 119; *Fuller v. Green*, 64 Wis. 159, 24 N. W. 907, 54 Am. Rep. 600; *McLaughlin v. Venine*, 2 Wyo. 1.

of the party who committed it? Any other rule would simply amount to this: the defendant would say to the plaintiff, it is true your act was harmless, and amounted to nothing, but your motives were bad, and I therefore claim an exemption from my contract. It may be stated as a rule without exception that when men's acts cannot be the subject of judicial investigation, their motives cannot be inquired into.⁶ And, although an alteration by the party, if unexplained, may authorize the inference of a fraudulent intent, such inference may be rebutted.⁷

§ 560 (575). Test of the materiality of the alteration.—It will be observed that the cases in which it has been held that alterations are not fatal to the contract are all those in which the alteration was of such a character as not to change the legal effect or operation of the contract. But within the meaning of the rule under discussion, very *slight changes* in the instrument *may be material*, and prevent its use as evidence, or as the foundation of any claim. The rule rests not only upon the principle that the altered contract is not the one agreed upon, but also upon the ground that a party who has the custody of an instrument made for his benefit is bound to preserve it in its original state.⁸ The public interest demands that the integrity of legal instruments should be preserved; and the party who may suffer by reason of his own alteration of such an

⁶ If there be fraud at all in such a case, it can only be such as a bad motive can affix to an immaterial act, and if the act itself is incapable of working an injury, to wit, of changing the rights or obligations of the parties to the contract, it cannot in a legal sense be said to be fraudulent, for the obvious reason that courts of justice only regard that as fraudulent which is capable of producing an injury or loss to the

other party to the controversy: *Moye v. Herndon, supra*.

⁷ *Shroeder v. Webster*, 88 Iowa, 627, 55 N. W. 569; *Booth v. Powers*, 56 N. Y. 22. *Moore v. Hutchinson*, 69 Mo. 429, and other Missouri cases are, for the reason above stated, of course, opposed to this.

⁸ A failure to insert a provision in an agreement is not a fraudulent alteration of it: *Bindseill v. Federal Union Surety Co.*, 130 App. Div. 775, 115 N. Y. Supp. 447.

instrument has no right to complain.⁹ The following is the *test* given by Stephen *for determining whether the change is material*: "An alteration is said to be material when, if it had been made with the consent of the party charged, it would have affected his interest or varied his obligations in any way whatever."¹⁰ That is a material

⁹ Davidson v. Cooper, 11 Mees. & W. 795, 12 L. J. Ex. 467, 13 Mees. & W. 343, 13 L. J. Ex. 276. On the subject of materiality of alterations, see notes to Draper v. Wood, 17 Am. Rep. 101; Fordyce v. Kosminski, 4 Am. St. Rep. 25; Burgess v. Blake, 86 Am. St. Rep. 86 et seq.; and notes cited under § 557, *ante*.

¹⁰ Steph. Ev., art. 89; White S. M. Co. v. Saxon, 121 Ala. 399, 25 South. 784; McCormick Harv. Mach. Co. v. Lauber, 7 Kan. App. 730, 52 Pac. 577; Phoenix Ins. Co. v. McKernan, 100 Ky. 97, 37 S. W. 490. Among *illustrations* of alterations in contracts, which have been held *material*, are change of name of *grantee* or *payee*: Abbott v. Abbott, 189 Ill. 488, 82 Am. St. Rep. 470, 59 N. E. 958; Erickson v. First Nat. Bank, 44 Neb. 622, 48 Am. St. Rep. 753, 28 L. R. A. 577, 62 N. W. 1078; change of name of *maker* or *drawer*: Sharpe v. Bellis, 61 Pa. 69, 100 Am. Dec. 618; erasure of name of *obligor*: State v. Polke, 7 Blackf. (Ind.) 27; addition of *parties*: O'Neale v. Long, 4 Cranch (U. S.), 60, 2 L. Ed. 550; addition of *surety*: Hall v. McHenry, 19 Iowa, 521, 87 Am. Dec. 451; addition of *maker*: Ford v. First Nat. Bank (Tex. Civ. App.), 34 S. W. 684; addition or erasure of provision for *attorney's fees*: Coles v. Yorks, 28 Minn. 464, 10 N. W. 775; First Nat. Bank v. Laughlin, 4 N. D. 391, 61 N. W. 473; alteration of *subject matter*: Willard v. Ostrander, 51 Kan. 481,

37 Am. St. Rep. 294, 32 Pac. 1092; Richardson v. Fellner, 9 Okl. 513, 60 Pac. 270; alterations in the *date*: Wood v. Steele, 6 Wall. (U. S.) 80, 18 L. Ed. 725; Miller v. Gilleland, 19 Pa. 119; Lisle v. Rogers, 18 B. Mon. (Ky.) 528; Taylor v. Taylor, 12 Lea (Tenn.), 714; Outhwaite v. Luntley, 4 Camp. 179, 16 R. R. 771; Bathe v. Taylor, 15 East, 412, 104 Eng. Reprint, 900; McCormick Harv. Mach. Co. v. Lauber, 7 Kan. App. 730, 52 Pac. 577; Ruby v. Talbott, 5 N. M. 251, 3 L. R. A. 724, 21 Pac. 72; Low v. Merrill, 1 Pinn. (Wis.) 340 (see notes to Draper v. Wood, 17 Am. Rep. 101; Woodworth v. Bank of America, 10 Am. Dec. 268; Ames v. Colburn, 71 Am. Dec. 724; Burgess v. Blake, 86 Am. St. Rep. 99; Lombardo v. Lombardini, 32 L. R. A., N. S., 515); in the *place* of *payment* by erasing or inserting the place of payment: Winter v. Pool, 100 Ala. 503, 14 South. 411; Baugh v. Anderson, 91 Ga. 831, 18 S. E. 44; Woodworth v. Bank, 19 Johns. (N. Y.) 391, 10 Am. Dec. 239, and full note; note to Burgess v. Blake, 86 Am. St. Rep. 98; Diamond Distilleries Co. v. Gott, 31 L. R. A., N. S., 643; or by erasing the place and inserting another: Tidmarsh v. Grover, 1 Maule & S. 735, 105 Eng. Reprint, 274; Bank of Ohio Valley v. Lockwood, 13 W. Va. 392, 31 Am. Rep. 768; by writing "*wave notice and protest*" over an indorsement in blank: Davis v. Eppler, 38 Kan. 629, 16 Pac. 793; by inserting a place of *payment*, when

alteration which makes the instrument speak a language different in legal effect from that which it originally spoke, which carries with it some change in the rights, interests

none is mentioned: *Nazro v. Fuller*, 24 Wend. (N. Y.) 374; *Townsend v. Star Wagon Co.*, 10 Neb. 615, 35 Am. Rep. 493, 7 N. W. 274; *Whitesides v. Northern Bank*, 10 Bush (Ky.), 501, 19 Am. Rep. 74; by changing the name: *McAra v. Watson*, 2 S. (Scotch, June, 1823) 366; *Home v. Purvis*, 14 S. (Scotch, June, 1836) 898; *Hollis v. Harris*, 96 Ala. 288, 11 South. 377; by adding or erasing "junior" in the signature: *Broughton v. Fuller*, 9 Vt. 373; by changing the nature of the note, as to its being *joint* or *joint and several*: *Perring v. Home*, 4 Bing. 28, 12 Moore, 135, 2 Car. & P. 401, 130 Eng. Reprint, 678; *Heath v. Blake*, 28 S. C. 406, 5 S. E. 842; *Humphreys v. Guillow*, 13 N. H. 385, 38 Am. Dec. 499; *Hemmenway v. Stone*, 7 Mass. 58, 5 Am. Dec. 27; *Eckert v. Louis*, 84 Ind. 99; by striking off or adding signatures: *Hamilton v. Hooper*, 46 Iowa, 515, 26 Am. Rep. 161; *Wallace v. Jewell*, 21 Ohio St. 163, 8 Am. Rep. 48; *Lunt v. Silver*, 5 Mo. App. 186; *Houck v. Graham*, 106 Ind. 195, 55 Am. Rep. 727, 6 N. E. 594; *Sullivan v. Rudisill*, 63 Iowa, 158, 18 N. W. 856; *Monson v. Drakeley*, 40 Conn. 552, 16 Am. Rep. 74; *Gardner v. Welsh*, 5 El. & B. 82, 119 Eng. Reprint, 412; *Smith v. United States*, 2 Wall. (U. S.) 219, 17 L. Ed. 788; *Mason v. Bradley*, 11 Mees. & W. 590, 12 L. J. Ex. 425, 1 D. & L. 380; note to *Burgess v. Blake*, 86 Am. St. Rep. 91 et seq.; by changing the *consideration*: *Knill v. Williams*, 10 East, 431, 103 Eng. Reprint, 839; *Low v. Argrove*, 30 Ga. 129; or amount to be paid: *Brown v. Jones*, 3 Port. (Ala.)

420; *Waterman v. Vose*, 43 Me. 504; *Schwarz v. Oppold*, 74 N. Y. 307; *Jones v. Bangs*, 40 Ohio St. 139, 48 Am. Rep. 664; *Neff v. Horner*, 63 Pa. 327, 3 Am. Rep. 555; *Green v. Snead*, 101 Ala. 205, 46 Am. St. Rep. 119, 43 South. 277; note to *Burgess v. Blake*, 86 Am. St. Rep. 96; by changing the amount or mode of paying interest: *Schnewind v. Hackett*, 54 Ind. 248; *Gwin v. Anderson*, 91 Ga. 827, 18 S. E. 48; *Harsh v. Klepper*, 28 Ohio St. 200; *Hoopes v. Collingwood*, 10 Colo. 107, 3 Am. St. Rep. 565, 13 Pac. 909; *Heath v. Blake*, 28 S. C. 406, 5 S. E. 842; *Woodworth v. Anderson*, 63 Iowa, 503, 19 N. W. 296; *Davis v. Henry*, 13 Neb. 497, 14 N. W. 523; see note to *Jones v. Bangs*, 48 Am. Rep. 667; *Burgess v. Blake*, 86 Am. St. Rep. 96; by inserting the rate of interest: *Merritt v. Dewey*, 218 Ill. 599, 2 L. R. A., N. S., 217 and note, 75 N. E. 1066; by adding or inserting any special stipulations: *American Pub. Co. v. Fisher*, 10 Utah, 147, 37 Pac. 259; *McIntyre v. Velte*, 153 Pa. 350, 25 Atl. 739; *Flanigan v. Phelps*, 42 Minn. 186, 43 N. W. 1113; by making a change in the description of property: *Marcy v. Dunlap*, 5 Lans. (N. Y.) 365; *Sherwood v. Merritt*, 83 Wis. 233, 53 N. W. 512; *Hollingsworth v. Holbrook*, 80 Iowa, 151, 20 Am. St. Rep. 411, 45 N. W. 561; by changing a non-negotiable to a negotiable instrument: *Croswell v. Labree*, 81 Me. 44, 10 Am. St. Rep. 238, 16 Atl. 331; *Johnson v. Bank of United States*, 2 B. Mon. (Ky.) 310; *Pepoon v. Stagg & Co.*, 1 Nott & McC. (S. C.) 102; *Brown v. Straw*, 6 Neb. 536, 29 Am. Rep. 369;

or obligations of the parties to the writing.¹¹ The true test of materiality, then, being whether or not the instrument speaks a different language in legal effect, it is of no importance whether, as a matter of fact, the alteration has changed the situation of the parties. "That is material which might become material," and any alteration which may in any event alter the rights, duties, or obligations of the party sought to be charged is material in the legal sense.¹² Whether or not an alteration is material is uniformly held to be a *question for the court*. The materiality of an alteration is, of course, dependent upon the change it would effect with reference to the legal rights of the parties, and this is obviously a question of law.¹³

McCauley v. Gordon, 64 Ga. 221, 37 Am. Rep. 68; *Union Nat. Bank v. Roberts*, 45 Wis. 373; *Needles v. Shaffer*, 60 Iowa, 65, 14 N. W. 129; *Walton Plow Co. v. Campbell*, 35 Neb. 173, 16 L. R. A. 468, 52 N. W. 883; *First Nat. Bank v. Laughlin*, 4 N. D. 391, 61 N. W. 473; note to *Burgess v. Blake*, 86 Am. St. Rep. 95 et seq.; by adding the words "subject to settlement between us" to a note: *Payne v. Long*, 121 Ala. 385, 25 South. 780; by the erasure of the name of a surety from a bond: *Smith v. United States*, 2 Wall. (U. S.) 219, 17 L. Ed. 788; note to *Burgess v. Blake*, 86 Am. St. Rep. 90, 91; by cutting off: *Sharp v. Bagwell*, 1 Dev. Eq. (N. C.) 115; or adding the name of a witness: *Brackett v. Mountfort*, 11 Me. 115; *Homer v. Wallis*, 11 Mass. 309, 6 Am. Dec. 169; although it has been held otherwise where the name has been accidentally omitted: *Smith v. Dunham*, 8 Pick. (Mass.) 246. Any alteration as to the time of payment: *Wyman v. Yeomans*, 84 Ill. 403; *Long v. Moore*, 3 Esp. 155, and note; *Alderson v. Langdale*, 3 Barn. & Ad. 660, 110 Eng. Reprint, 241; or as to the

mode or article in which payment is to be made has the same effect: *Stephens v. Graham*, 7 Serg. & R. (Pa.) 505, 10 Am. Dec. 485; *Martendale v. Follet*, 1 N. H. 95; *Schwalm v. McIntyre*, 17 Wis. 232; *Angle v. Northwestern etc. Ins. Co.*, 92 U. S. 330, 23 L. Ed. 556. For further illustrations, see 1 Ency. of Ev. 788 et seq.

¹¹ *Payne v. Long*, 121 Ala. 385, 25 South. 780; *Murray v. Klinzing*, 64 Conn. 78, 29 Atl. 244; *Vogle v. Ripper*, 34 Ill. 100, 85 Am. Dec. 298; *Iowa Valley St. Bank v. Sigstad*, 96 Iowa, 491, 65 N. W. 407; *Martin v. Good*, 14 Md. 398, 74 Am. Dec. 545; *Wheelock v. Freeman*, 13 Pick. (Mass.) 165, 23 Am. Dec. 674; *Kinney v. Schmitt*, 12 Hun (N. Y.), 521; *Sturges v. Williams*, 9 Ohio St. 443, 75 Am. Dec. 473; *Craighead v. McLoney*, 99 Pa. 211; *Organ v. Allison*, 9 Baxt. (Tenn.) 459.

¹² *Soaps v. Eichberg*, 42 Ill. 375; *Townsend v. Star Wagon Co.*, 10 Neb. 615, 35 Am. Rep. 493, 7 N. W. 274; *Booth v. Powers*, 56 N. Y. 22.

¹³ *Brown v. Johnson*, 127 Ala. 292, 85 Am. St. Rep. 134, 51 L. R. A. 403, 28 South. 579; *Pritchard v. Smith*,

Whether there was in fact an alteration of the instrument is always a *question for the jury*¹⁴ to consider in the light of all the evidence, intrinsic or extrinsic. The *fact* of alteration is for the jury, its *materiality* for the court.

§ 561 (576). By whom and when made—Implied consent to alteration—Blanks.—It has already been pointed out that the vitiation of an instrument for alteration does not depend solely upon the fact of the alteration, but that the personality of the alterant is a most important factor in the effect; that no person can by the deliberate alteration of an instrument relieve himself from liability thereon; and that the alteration to be noxious must be by one not a stranger to the instrument. The alteration by a stranger is properly styled *spoliation*.¹⁵ Who is a

77 Ga. 463; Milliken v. Marlin, 66 Ill. 13; Cochran v. Nebeker, 48 Ind. 459; Johnson v. Moore, 33 Kan. 90, 5 Pac. 406; Belfast Nat. Bank v. Harriman, 68 Me. 522; Love v. Shoape, 1 Miss. 508; State v. Dean, 40 Mo. 464; Palmer v. Largent, 5 Neb. 223, 25 Am. Rep. 479; Burnham v. Ayer, 35 N. H. 351; Chappell v. Spencer, 23 Barb. (N. Y.) 584; Stephens v. Graham, 7 Serg. & R. (Pa.) 505, 10 Am. Dec. 485; Keen v. Monroe, 75 Va. 424; Newell v. Mayberry, 3 Leigh (Va.), 250, 23 Am. Dec. 261; Wood v. Steele, 6 Wall. (U. S.) 80, 18 L. Ed. 725; Vance v. Lowther, L. R. 1 Ex. D. 176. See, also, the late cases: Fry v. P. Bannon etc. Co. (Ind.), 101 N. E. 10; Wicker v. Jones, 159 N. C. 102, 74 S. E. 801.

¹⁴ Sharpe v. Orme, 61 Ala. 263; Chapman v. Sargent, 6 Colo. App. 438, 40 Pac. 849; Bailey v. Taylor, 11 Conn. 531, 29 Am. Dec. 321; Winkles v. Guenther, 98 Ga. 472, 25 S. E. 527; De Long v. Soucie, 45 Ill. App. 234; Hagan v. Merchants' Ins. Co., 81 Iowa, 321, 25 Am. St. Rep.

493, 46 N. W. 1114; Hatch v. Hatch, 9 Mass. 307, 6 Am. Dec. 67; Wilson v. Hayes, 40 Minn. 531, 12 Am. St. Rep. 754, 4 L. R. A. 196, 42 N. W. 467; McCormick v. Fitzmorris, 39 Mo. 24; McClintock v. State Bank, 52 Neb. 130, 71 N. W. 978; Hills v. Barnes, 11 N. H. 395; Boyd v. Brotherson, 10 Wend. (N. Y.) 93; Kennedy v. Moore, 17 S. C. 464; Moddie v. Breiland, 9 S. D. 506, 70 N. W. 637; Beaman v. Russell, 20 Vt. 205, 49 Am. Dec. 775; Conner v. Fleshman, 4 W. Va. 693. See § 565, *post*.

¹⁵ Forbes v. Taylor, 139 Ala. 286, 35 South. 855; Andrews v. Calloway, 50 Ark. 358, 7 S. W. 449; Walsh v. Hunt, 120 Cal. 46, 39 L. R. A. 697, 52 Pac. 115; Nichols v. Johnson, 10 Conn. 192; Orlando v. Gooding, 34 Fla. 244, 15 South. 770; Mulkey v. Long, 5 Idaho, 213, 47 Pac. 949; Condict v. Flower, 106 Ill. 105; John v. Hatfield, 84 Ind. 75; Shenberg Co. v. Porter, 137 Iowa, 245, 111 N. W. 890; Terry v. Hazlewood, 1 Duv. (Ky.) 104; Provenzano v. Glaesser, 122 La. 378, 47 South. 688; Wickes

"stranger" to the instrument, and who is an authorized agent, present difficult questions. The cases in which express authority to alter has been given by the holder are plain and of infrequent occurrence. But exactly what facts shall be held to give rise to an implied authority to alter, in one who would otherwise be a stranger, is a question by no means free from difficulty, and which is most often presented to the courts. Perhaps the only rule of any general application here possible is that the law will not ordinarily imply an authority from the holder of an instrument, making another an agent for the purpose of altering such instrument.¹⁶ Where, however, the party guilty of the alteration has himself an interest in the paper, he cannot be considered a "stranger."¹⁷ In general, it

v. Caulk, 5 Har. & J. (Md.) 36; *Drum v. Drum*, 133 Mass. 566; *Young v. Young*, 157 Mich. 80, 121 N. W. 264; *Spreng v. Juni*, 109 Minn. 85, 18 Ann. Cas. 222, 122 N. W. 1015; *Clapton v. Elkin*, 49 Miss. 95; *Moore v. Ivers*, 83 Mo. 29; *Perkins Windmill etc. Co. v. Tillman*, 55 Neb. 652, 75 N. W. 1098; *State v. Manhattan Silver Min. Co.*, 4 Nev. 318; *Gleason v. Hamilton*, 138 N. Y. 353, 34 N. E. 283, 52 N. Y. St. 882; *Mathis v. Mathis*, 20 N. C. 55; *Thompson v. Massie*, 41 Ohio St. 307; *Whitlock v. Manciet*, 10 Or. 166; *Pace v. Yost*, 10 Kulp (Pa.), 538; *White v. Harris*, 69 S. C. 65, 104 Am. St. Rep. 791, 48 S. E. 41; *Deering Harvester Co. v. White*, 110 Tenn. 132, 72 S. W. 962; *Tutt v. Thornton*, 57 Tex. 35; *Bellows v. Weeks*, 41 Vt. 590; *Murray v. Peterson*, 6 Wash. 418, 33 Pac. 969; *Yeager v. Musgrave*, 28 W. Va. 90; *Fuller v. Green*, 64 Wis. 159, 54 Am. Rep. 600, 24 N. W. 907; *Henfree v. Bromley*, 6 East, 309, 102 Eng. Reprint, 1305.

¹⁶ *Langenberger v. Kroeger*, 48 Cal. 147, 17 Am. Rep. 418; *Paterson*

v. Higgins, 58 Ill. App. 268; *Brooks v. Allen*, 62 Ind. 401; *Mathias v. Leathers*, 99 Iowa, 18, 68 N. W. 449; *Hollingsworth v. Holbrook*, 80 Iowa, 151, 20 Am. St. Rep. 411, 45 N. W. 561; *White Sewing Machine Co. v. Dakin*, 86 Mich. 581, 13 L. R. A. 313, 49 N. W. 583; *Ames v. Brown*, 22 Minn. 257; *Hunt v. Gray*, 35 N. J. L. 227, 10 Am. Rep. 232; *Ruby v. Talbott*, 5 N. M. 251, 3 L. R. A. 724, 21 Pac. 72; *Waldorf v. Simpson*, 15 App. Div. 297, 44 N. Y. Supp. 921. So from a mere authority to receive a note, an agent will not have presumed authority to alter it: See cases above cited.

¹⁷ *McMurtrey v. Sparks*, 71 Mo. App. 126. For the purpose of determining the effect of an alteration made by a thief while in possession of the paper it was held in *Dinsmore v. Duncan*, 57 N. Y. 573, 15 Am. Rep. 534, that such thief was not a "holder" of the instrument, but a stranger to it, and such is undoubtedly the true rule: *Elizabeth v. Force*, 29 N. J. Eq. 587; *Commonwealth v. Emigrant Industrial Sav. Bank*, 98 Mass. 12, 93 Am. Dec. 126;

is held that public officers who alter bonds, etc., intrusted to them in their official capacity are not strangers to such instruments, and that alterations by them have the effect of discharging all parties from liability on such instruments.¹⁸ Where the authority to alter is express, no doubt as to the law of the case can arise. But such cases are infrequent, and, as a consequence, the doctrine of implied authority is continually being invoked to fasten the act of the holder or a third person upon the party setting up the defense of alteration. The general rule is that an authority from the maker or party whom it is sought to charge to alter an instrument will not ordinarily be presumed. And a party claiming authority from the maker to alter must show such authority. The burden of proof is on him.¹⁹ In accordance with this rule, it is held that one obligor has no authority from a co-obligor to alter after the latter has signed. This is supported by the weight of authority where both parties are principal makers.²⁰ And it is equally well settled where, even before negotiation, the terms of an instrument are altered by the principal debtor, such alteration will discharge a surety or accommodation indorser. No agency will be implied either from the relation of the parties or from the fact that the surety has intrusted the instrument to the principal debtor to deliver or negotiate.²¹ And in general, no agency to

Colson v. Arnot, 57 N. Y. 253, 15 Am. Rep. 496. See, also, Vermilye & Co. v. Adams Express Co., 21 Wall. (U. S.) 138, 22 L. Ed. 609.

¹⁸ Dover v. Robinson, 64 Me. 183; Wegner v. State, 28 Tex. App. 419, 13 S. W. 608.

¹⁹ White v. Hass, 32 Ala. 430, 70 Am. Dec. 548; Harris v. Bank of Jacksonville, 22 Fla. 501, 1 Am. St. Rep. 201, 1 South. 140; Warder etc. Co. v. Willyard, 46 Minn. 531, 24 Am. St. Rep. 250, 49 N. W. 300; Capital Bank v. Armstrong, 62 Mo. 59; Gleason v. Hamilton, 138 N. Y.

353, 21 L. R. A. 210, 34 N. E. 283; North v. Henneberry, 44 Wis. 306; Sneed v. Sabinal Min. etc. Co., 73 Fed. 925, 20 C. C. A. 230.

²⁰ Greenfield Sav. Bank v. Stowell, 123 Mass. 196, 25 Am. Rep. 67; Flanigan v. Phelps, 42 Minn. 185, 43 N. W. 1113; Willoughby v. Irish, 35 Minn. 63, 59 Am. Rep. 297, 27 N. W. 379; Draper v. Wood, 112 Mass. 315, 17 Am. Rep. 92.

²¹ State v. Churchill, 48 Ark. 426, 3 S. W. 352, 880; Blakey v. Johnson, 13 Bush (Ky.), 197, 26 Am. Rep. 254; Waterman v. Vose, 43 Me. 504;

alter will be implied from any other agency, special in its nature, such as an agency to deliver or negotiate a written instrument.²² Many of the cases already cited afford illustrations of the rule that material alterations in negotiable paper avoid the contract, even in the hands of a *bona fide* holder.²³ But if the *maker leave room for alterations* to be made or *blanks to be filled* in such manner as to excite no suspicion, he may be liable to a *bona fide* holder, if such changes are made when there are no marks on the instrument giving notice of the alterations.²⁴ If the alteration

Stoddard v. Penniman, 108 Mass. 366, 11 Am. Rep. 363; Trigg v. Taylor, 27 Mo. 245, 72 Am. Dec. 263; Hagler v. State, 31 Neb. 144, 28 Am. St. Rep. 514, 47 N. W. 692; Jones v. Bangs, 40 Ohio St. 139, 48 Am. Rep. 664; Neff v. Horner, 63 Pa. 327, 3 Am. Rep. 555; McVey v. Ely, 5 Lea (Tenn.), 438; Wood v. Steele, 6 Wall. (U. S.) 80, 18 L. R. A. 725.

²² Walsh v. Hunt, 120 Cal. 46, 39 L. R. A. 697, 52 Pac. 115; Aetna Nat. Bank v. Winchester, 43 Conn. 391; Prettyman v. Goodrich, 23 Ill. 330; Blakey v. Johnson, *supra*; Mace v. Heath, 30 Neb. 620, 46 N. W. 918; Schwalm v. McIntyre, 17 Wis. 232; Hall v. Weaver, 34 Fed. 104, 13 Saw. 188.

²³ Benedict v. Cowden, 49 N. Y. 296, 10 Am. Rep. 382; Angle v. Northwestern Mut. L. Ins. Co., 92 U. S. 330, 23 L. Ed. 556.

²⁴ Bank of Pittsburg v. Neal, 22 How. (U. S.) 96, 16 L. Ed. 323; Goodman v. Simonds, 20 How. (U. S.) 343, 15 L. Ed. 934; Angle v. Northwestern M. Life Ins. Co., 92 U. S. 330, 23 L. Ed. 556; Garrard v. Lewis, L. R. 10 Q. B. Div. 30; Abbott v. Rose, 62 Me. 194, 16 Am. Rep. 427; Benedict v. Cowden, 49 N. Y. 396, 10 Am. Rep. 382; Garrard v. Haddan, 67 Pa. 82, 5 Am. Rep. 412; Blakey v. Johnson, 13 Bush

(Ky.), 197, 26 Am. Rep. 254; Canon v. Grigsby, 116 Ill. 151, 56 Am. Rep. 769, 5 N. E. 362; Johnston Harvester Co. v. McLean, 57 Wis. 258, 15 N. W. 177, 46 Am. Rep. 39. This must be taken to mean the intention of the maker that blanks should be filled or alterations made. If the instrument is complete when it leaves his hands, the text does not apply. The law relating to carelessness of makers in leaving room unintentionally in their documents which have facilitated forgery is dealt with in full in the cases of Holmes v. Trumper, 22 Mich. 427, 7 Am. Rep. 661, and Greenfield Savings Bank v. Stowell, 123 Mass. 196, 25 Am. Rep. 67. The law is well declared in the former of these cases that whenever a party in good faith signs a complete promissory note, however awkwardly drawn, he should, we think, be equally protected from its alteration by forgery, in whatever mode it may be accomplished; and, unless perhaps when it has been committed by someone in whom he has authorized others to place confidence as acting for him, he has quite as good a right to rest upon the presumption that it will not be criminally altered as any person has to take the paper on the presumption that it has not

is made *before delivery or with the consent* of all the parties, of course the validity of the instrument as a contract or as a means of evidence is not affected.²⁵ Such consent is often implied where an instrument is signed and delivered, and blank places are left unfilled. It has often been held in such cases that the holder has the implied authority to fill the blanks in conformity to the general character of the paper.²⁶ This exception has reference to the authority

been; and the parties taking such paper must be considered as taking it upon their own risk, so far as the question of forgery is concerned, and as trusting to the character and credit of those from whom they receive it, and of the intermediate holders. "If promissory notes were only given by first-class business men, who are skillful in drawing them up in the best possible manner to prevent forgery, it might be well to adopt the high standard of accuracy and perfection which the argument in behalf of the plaintiff in error would require. But for the great mass of the people, who are not thus skillful, nor in the habit of frequently drawing or executing such paper, such a standard would be altogether too high, and would place the great majority of men, of even fair education and competency for business, at the mercy of knaves, and tend to encourage forgery by the protection it would give to forged paper": See notes to *Woodworth v. Bank of America*, 10 Am. Dec. 267; *Fordyce v. Kosminski*, 4 Am. St. Rep. 25. See, also, as to pleading that blank filled without authority, *Hager v. Sidebottom*, 130 Ky. 687, 113 S. W. 870.

²⁵ *Ravies v. Alston*, 5 Ala. 297; *Stewart v. Preston*, 1 Fla. 1, 44 Am. Dec. 621; *Wickes v. Caulk*, 5 Har. & J. (Md.) 36; *Boston v. Benson*, 12

Cush. (Mass.) 61; *Camden Bank v. Hall*, 14 N. J. L. 583; *Lewis v. Payn*, 8 Cow. (N. Y.) 71, 18 Am. Dec. 427; *Bell v. Boyd*, 76 Tex. 133, 13 S. W. 232; *Janney etc. Co. v. Goehringer*, 52 Minn. 428, 54 N. W. 481.

²⁶ *Bank of Commonwealth v. Mechord*, 4 Dana (Ky.), 191, 29 Am. Dec. 398; *Spitler v. James*, 32 Ind. 202, 2 Am. Rep. 334; *Redlich v. Doll*, 54 N. Y. 234, 13 Am. Rep. 573; *Gillaspie v. Kelley*, 41 Ind. 158, 13 Am. Rep. 318; *Garrard v. Haddan*, 67 Pa. 82, 5 Am. Rep. 412; *McGrath v. Clark*, 56 N. Y. 34, 15 Am. Rep. 372; *Rainbolt v. Eddy*, 34 Iowa, 440, 11 Am. Rep. 152; *Van Duzer v. Howe*, 21 N. Y. 531; *Yocum v. Smith*, 63 Ill. 321, 14 Am. Rep. 120; *Geddes v. Blackmore*, 132 Ind. 551, 32 N. E. 567. See long notes to *Woodworth v. Bank of America*, 10 Am. Dec. 271; *Stahl v. Berger*, 13 Am. Dec. 669; *Draper v. Wood*, 17 Am. Rep. 97. As *deeds*: *Eagleton v. Gutteridge*, 11 Mees. & W. 465, 12 L. J. Ex. 359, 2 D., N. S., 1053; *West v. Steward*, 14 Mees. & W. 47; *Vose v. Dolan*, 108 Mass. 155, 11 Am. Rep. 331; *Devin v. Himer*, 29 Iowa, 297; *Clark v. Allen*, 34 Iowa, 190; *Schintz v. McManamy*, 33 Wis. 299; *Murray v. Klinzing*, 64 Conn. 78, 29 Atl. 244; *powers of attorney* to transfer stock: *Commercial Bank v. Kortright*, 22 Wend. (N. Y.) 348, 34 Am. Dec. 317; *promissory notes*:

from the maker implied from the delivery to another of an instrument containing blanks which should ordinarily be filled. Briefly stated, it is, that where one has intrusted an instrument, containing blanks, to another with the intent to become bound thereon, he will be liable upon the instrument though the blanks be filled. He is deemed to have given an implied authority to the payee or holder to fill the blanks with the proper terms. Thus, instruments blank as to date, payee, or place of payment, may be supplied with any date, payee, or place of payment;²⁷ and there is this implied authority in the case of such blanks.²⁸

Angle v. Northwestern M. L. Ins. Co., 92 U. S. 330, 23 L. Ed. 556; *Redlich v. Doll*, 54 N. Y. 234, 13 Am. Rep. 573; *Wilson v. Henderson*, 17 Miss. 375, 48 Am. Dec. 716; *Michigan Bank v. Eldred*, 9 Wall. 544; *appeal bonds*: *Ex parte Decker*, 6 Cow. (N. Y.) 59; *Ex parte Kerwin*, 8 Cow. (N. Y.) 118; *bail bonds*: *Hale v. Russ*, 1 Me. 334; *Gordon v. Jeffery*, 2 Leigh (Va.), 410 (Gilbert v. Anthony, 1 Yerg. (Tenn.) 69, 24 Am. Dec. 439, was a case of a blank piece of paper signed and sealed and afterward filled in, but there was no subsequent delivery or acknowledgment); *blank indorsements* on promissory notes: *Edwards v. Scull*, 11 Ark. 325; *Dunham v. Clogg*, 30 Md. 284; *Spitler v. James*, 32 Ind. 202, 2 Am. Rep. 334. See note to *Burgess v. Blake*, 86 Am. St. Rep. 107 et seq. See, also, the late case: *Shows v. Steiner* (Ala.), 57 South. 700.

²⁷ *Montgomery v. Crossthwait*, 90 Ala. 553, 24 Am. St. Rep. 832, 12 L. R. A. 140, 8 South. 498; *Visher v. Webster*, 8 Cal. 109; *Harris v. Bank of Jacksonville*, 22 Fla. 501, 1 Am. St. Rep. 201, 1 South. 140; *Canon v. Grisby*, 16 Ill. App. 558; *Gillaspie v. Kelley*, 41 Ind. 158, 13 Am. Rep. 318; *Iowa etc. Bank v. Sigstad*, 96 Iowa, 491, 65 N. W. 407;

State v. Matthews, 44 Kan. 596, 10 L. R. A. 308, 25 Pac. 36; *Jones v. Shelbyville Fire etc. Ins. Co.*, 58 Ky. 58; *Burrows v. Klunk*, 70 Md. 451, 14 Am. St. Rep. 371, 3 L. R. A. 576, 17 Atl. 378; *Whitmore v. Nickerson*, 125 Mass. 496, 28 Am. Rep. 257; *Wilson v. Henderson*, 17 Miss. 375, 48 Am. Dec. 716; *Capital Bank v. Armstrong*, 62 Mo. 59, overruling *Washington Sav. Bank v. Ecky*, 51 Mo. 272; *Reed v. Morton*, 24 Neb. 760, 8 Am. St. Rep. 247, 1 L. R. A. 736, 40 N. W. 282; *McGrath v. Clark*, 56 N. Y. 34, 15 Am. Rep. 372; *Campbell v. McArthur*, 2 Hawks (N. C.), 33, 11 Am. Dec. 738; *Marshall v. Wilhite*, 2 Ohio C. D. 500; *Wessell v. Glenn*, 108 Pa. 104; *Witte v. Williams*, 8 S. C. 290, 28 Am. Rep. 294; *Waldron v. Young*, 56 Tenn. 777; *Butler v. United States*, 21 Wall. (U. S.) 272, 22 L. Ed. 614; *Angle v. Northwestern Mut. Life Ins. Co.*, 92 U. S. 330, 23 L. Ed. 556; *Russell v. Langstaffe*, 2 Doug. 516, 99 Eng. Reprint, 328; *Montague v. Perkins*, 22 Eng. L. & Eq. 516.

²⁸ See as to blank filled with *sum*: *Johnson v. Blasdale*, 9 Miss. 17, 40 Am. Dec. 85; *Hall v. Bank of Commonwealth*, 5 Dana (Ky.), 258, 30 Am. Dec. 685; *place of payment*:

It is axiomatic that an alteration made before the execution of an instrument has no effect whatever. Strictly speaking, it is not to be regarded as an alteration at all. An alteration, properly speaking, is an alteration of the instrument as executed by the parties and cannot properly refer to an erasure appearing upon the instrument at the time of execution.²⁹

§ 562 (577). Unauthorized filling of blanks—Deeds.—

The implied authority which we have discussed in the preceding section is by no means unlimited. While it is permissible to fill blanks as therein shown, it is not permissible to erase any portion of the instrument. Any alteration of the instrument in a part in which it is complete and perfect is a material alteration, and vitiates the instrument. The implied authority does not carry with it authority to vary or alter the material terms by erasing what is written or printed as a part thereof, nor to pervert its scope or meaning with terms repugnant to what was plainly expressed in the instrument, nor by adding terms which are not necessary to the completion of the writing or instrument. Where one indorses an inchoate instrument, the presumed authority which passes from the indorser with the instrument is only to fill up existing blanks, in order to complete the instrument begun. It can never be pre-

Waggoner v. Millington, 8 Hun (N. Y.), 142; *Redlich v. Doll*, 54 N. Y. 234, 13 Am. Rep. 573; *Light v. Killinger*, 16 Ind. App. 102, 59 Am. St. Rep. 313, 44 N. E. 760; *date of payment*: *Bingham v. Reddy*, 5 Ben. 266, Fed. Cas. No. 1414; *rate of interest*: *Holmes v. Trumper*, 22 Mich. 427, 7 Am. Rep. 661; *Rainbolt v. Eddy*, 34 Iowa, 440, 11 Am. Rep. 152; *name of maker*: *Whitmore v. Nickerson*, 125 Mass. 496, 28 Am. Rep. 257; *where entire instrument was blank*: *Ives v. Farmers' Bank*, 2 Allen (Mass.), 236; *date*: *Page v. Morrell*, 3 Abb. Dec.

(N. Y.) 433; *name of payee*: *Schooler v. Tilden*, 71 Mo. 580; *Stahl v. Berger*, 10 Serg. & R. (Pa.) 170, 13 Am. Dec. 666.

²⁹ *Roberts v. Unger*, 30 Cal. 676; *Chapman v. Sargent*, 6 Colo. App. 438, 40 Pac. 849; *Wardner etc. Co. v. Stewart*, 2 Marv. (Del.) 275, 36 Atl. 88; *Winkles v. Guenther*, 98 Ga. 472, 25 S. E. 527; *Fowles v. Bebee*, 59 Mo. App. 401; *Hills v. Barnes*, 11 N. H. 395; *Xander v. Commonwealth*, 102 Pa. 434; *Bell v. Boyd*, 76 Tex. 133, 13 S. W. 232; *Williams v. Starr*, 5 Wis. 534.

sumed that a special agent is authorized, not only to do what his principal has left undone, but also to undo what his principal has done, and do another thing instead of it.³⁰ In other words, the depository of a written instrument containing blanks has no *implied authority* to make a new instrument by erasing what is written or printed, nor by filling the blanks with stipulations repugnant to the plainly expressed intention of the same, as shown by its written or printed terms.³¹ Closely allied with such cases are those wherein an authority is given but exceeded. As between the maker and the party who exceeded his authority the maker cannot be held on the instrument as altered. The agent has only such authority as is given him by his principal, and as between himself and the principal, any act done in excess of such authority is void.³² Where, however, the question arises between the maker and a *bona fide* holder, no rule is better settled than that which affirms the liability of one intrusting his name in blank to another, to the full extent to which such other may see fit to bind

³⁰ Mahaiwe Bank v. Douglass, 31 Conn. 170.

³¹ Angle v. Northwestern M. L. Ins. Co., 92 U. S. 330, 23 L. Ed. 556; McCoy v. Lockwood, 71 Ind. 319. As to *adding interest* clause, see Hoopes v. Collingwood, 10 Colo. 107, 3 Am. St. Rep. 565, 13 Pac. 909; Schnewind v. Hackett, 54 Ind. 248; Weyerhauser v. Dun, 100 N. Y. 150, 2 N. E. 274; Holmes v. Trumper, 22 Mich. 427, 7 Am. Rep. 661; McGrath v. Clark, 56 N. Y. 34, 15 Am. Rep. 372. It was held that the addition of "or order" was a vitiating alteration: Marshall v. Wilhite, 2 Ohio C. D. 500; Bruce v. Westcott, 3 Barb. (N. Y.) 374. And blanks left in an instrument cannot be filled with an unusual undertaking: Clawson v. Gustin, 5 N. J. L. 821. Nor with a clause entirely unnecessary to the completion of the instrument:

Holland v. Hatch, 11 Ind. 497, 71 Am. Dec. 363; Coburn v. Webb, 56 Ind. 96, 26 Am. Rep. 15; Burrows v. Klunk, 70 Md. 451, 14 Am. St. Rep. 371, 3 L. R. A. 576, 17 Atl. 378; Ivory v. Michael, 33 Mo. 398. See, also, Adair v. Egland, 58 Iowa, 314, 12 N. W. 277; Grimes v. Piersol, 25 Ind. 246; Lisle v. Rogers, 57 Ky. 528.

³² Green v. Sneed, 101 Ala. 205, 46 Am. St. Rep. 119, 13 South. 277; Fisher v. Dennis, 6 Cal. 577, 65 Am. Dec. 534; Yost v. Minneapolis Harvester Works, 41 Ill. App. 556; Pope v. Branch County Sav. Bank, 23 Ind. App. 210, 54 N. E. 835; Conger v. Crabtree, 88 Iowa, 536, 45 Am. St. Rep. 249, 55 N. W. 335; State v. Matthews, 44 Kan. 596, 10 L. R. A. 308, 25 Pac. 36; Johnson v. Blasdale, 9 Miss. 17, 40 Am. Dec. 85.

him, when the paper is taken in good faith and without notice, actual or implied, that the authority given had been exceeded, or that the confidence reposed had been abused. The rule is founded not only upon the principle which casts the loss, when one of two equally innocent persons must suffer, upon him who has put it in the power of another to do the injury; but also upon the rule which makes the principal liable for the acts of his agent, notwithstanding his private instructions have been disregarded, when he has held the agent out as having a more enlarged authority.³³ Although the name of a grantee in a *deed* may be inserted after execution, pursuant to parol authority, there is no implied authority to insert the name of a person other than the one designated.³⁴ But the authority to insert a name after the delivery of the deed,³⁵ or to fill up the blanks of a deed which has nothing but the signature and seals attached, will not be implied.³⁶ The filling in of blanks in deeds has been the subject of severe conflict both in England and the United States.³⁷ Although it was at one time doubted whether a parol authority was adequate to authorize an alteration or addition to a sealed instrument, the better opinion at this day is, that the power is sufficient.³⁸ But there are two conditions essential to make a deed thus executed in blank operate as a conveyance of the property described in it; the blank must be filled by the party au-

³³ Fullerton v. Sturges, 4 Ohio St. 529. See, also, State v. Matthews, 44 Kan. 596, 10 L. R. A. 308, 25 Pac. 36; Woolfolk v. Bank of America, 73 Ky. 504; Ives v. Farmers' Bank, 2 Allen (Mass.), 236; Redlich v. Doll, 54 N. Y. 234, 13 Am. Rep. 573; Waldron v. Young, 56 Tenn. 777; Michigan Bank v. Eldred, 9 Wall. (U. S.) 544, 19 L. Ed. 762.

³⁴ Schintz v. McManamy, 33 Wis. 299.

³⁵ Allen v. Withrow, 110 U. S. 119, 28 L. Ed. 90, 3 Sup. Ct. Rep. 517.

³⁶ In such case it is no deed at

all: Byers v. McClanahan, 6 Gill & J. (Md.) 250; Burns v. Lynde, 6 Allen (Mass.), 305; Gilbert v. Anthony, 1 Yerg. (Tenn.) 69, 24 Am. Dec. 439; Ayres v. Harness, 1 Ohio, 368, 13 Am. Dec. 629; Permynter v. McDaniel, 1 Hill (S. C.), 267, 26 Am. Dec. 179.

³⁷ For English cases, see Davidson v. Cooper, 11 Mees. & W. 778, 12 L. J. Ex. 467; Hibblewhite v. McMorine, 6 Mees. & W. 200, 9 L. J. Ex. 217, 4 Jur. 769.

³⁸ Drury v. Foster, 2 Wall. (U. S.) 33, 17 L. Ed. 781.

thorized to fill it, and this must be done before or at the time of the delivery of the deed to the grantee named.³⁹ It may be fairly taken from the authorities that while a parol authority is sufficient to fill in blanks in a deed after delivery, the authority must be express and cannot be implied. An *alteration in a deed* of conveyance after delivery does not operate to reconvey the title to the original grantor. The title remains in the grantee, and he may bring ejectment upon it. The title passed by the deed has performed its office; and its continued existence or integrity is not essential to the title, although a fraudulent and material change may disable the holder from bringing an action upon its covenants;⁴⁰ and there is doubt whether such a deed can be used as any evidence of title.⁴¹ The preceding discussion relates only to material alterations. It is now well settled that an immaterial alteration of a sealed instrument will not invalidate it, though made by the party claiming under it.⁴²

§ 563 (578). Presumptions in case of alteration—English rule.—Having thus far addressed ourselves to the consideration of the facts and different kinds of alterations, we shall proceed now to discuss the effect of an altered document when presented as evidence in a cause. When alterations appear in written instruments offered as evidence, what presumptions arise, and on whom rests the burden of proof? These are questions which have given rise to elaborate dis-

³⁹ Allen v. Withrow, *supra*.

⁴⁰ Woods v. Hilderbrand, 46 Mo. 284, 2 Am. Rep. 513; Lewis v. Payn, 8 Cow. (N. Y.) 71, 18 Am. Dec. 427; Jackson v. Gould, 7 Wend. (N. Y.) 364; Herrick v. Malin, 22 Wend. (N. Y.) 388; Alexander v. Hickox, 34 Mo. 496, 86 Am. Dec. 118; Waring v. Smyth, 2 Barb. Ch. (N. Y.) 119, 47 Am. Dec. 299; Burgess v. Blake, 128 Ala. 105, 86 Am. St. Rep. 78, and note, 28 South. 963.

⁴¹ Woods v. Hilderbrand, 46 Mo. 284, 2 Am. Rep. 513; Waring v.

Smyth, 2 Barb. Ch. (N. Y.) 119, 47 Am. Dec. 299; Burgess v. Blake, 128 Ala. 105, 86 Am. St. Rep. 78, and note, 28 South. 963. See § 417, *ante*. On alteration of deed after delivery, see note to Waldron v. Waller, 32 L. R. A., N. S., 284.

⁴² Murray v. Klinzing, 64 Conn. 78, 29 Atl. 244; Vose v. Dolan, 108 Mass. 155, 11 Am. Rep. 331; Kinney v. Schmitt, 12 Hun (N. Y.), 521; Martin v. Buffaloe, 121 N. C. 34, 27 S. E. 995; Preston v. Hull, 23 Gratt. (Va.) 600, 14 Am. Rep. 153.

cussion in England, and as to which great diversity of opinion exists in this country. Stephen thus states the rule as now established in England: "Alterations and interlineations appearing on the face of a *deed* are, in the absence of all evidence relating to them, presumed to have been made before the deed was completed. Alterations and interlineations appearing on the face of a *will* are, in the absence of all evidence relating to them, presumed to have been made after the execution of the will. There is no presumption as to the time when alterations and interlineations appearing on the face of *writings, not under seal*, were made, except that it is presumed that they were so made that the making would not constitute an offense."⁴³ As will be seen when the different views are stated, it would be in vain to attempt to reconcile the decisions upon this subject in the United States. It will be found, however, that the distinction which exists in England with respect to deeds and other instruments is not generally made in this country. The mere fact that there is an interlineation or alteration would not seem to call for any explanation, provided the appearance of the writing and ink is such as to indicate that the whole was written *at the same time and by the same person*. In such cases, it is clear that the usual *presumption* in favor of *innocence* and against wrongdoing will obtain; and the burden will rest upon the person asserting that a wrongful alteration has been made.⁴⁴ So the alteration may be sufficiently ex-

⁴³ Steph. Ev., art. 89. See Franklin v. Baker, 48 Ohio St. 296, 29 Am. St. Rep. 547, 27 N. E. 550. See, also, note to Burgess v. Blake, 86 Am. St. Rep. 128 et seq. As to "Burden of Explaining Erasures or Alterations Appearing on Face of Will," see note to Scott v. Thrall, 17 L. R. A., N. S., 184.

⁴⁴ Yakima Bank v. Knipe, 6 Wash. 348, 33 Pac. 834; Wolferman v. Bell, 6 Wash. 84, 36 Am. St. Rep.

126, 32 Pac. 1017, and note; Des Moines Bank v. Harding, 86 Iowa. 153, 53 N. W. 99; Houston v. Jordan, 82 Tex. 352, 18 S. W. 702; McLain v. Bedgood, 89 Ga. 793, 15 S. E. 670; Shroeder v. Webster, 88 Iowa, 627, 55 N. W. 569; Conger v. Crabtree, 88 Iowa, 536, 45 Am. St. Rep. 249, 55 N. W. 335; Zimmerman v. Camp, 155 Pa. 152, 25 Atl. 1086. See note to Burgess v. Blake, 86 Am. St. Rep. 128 et seq.

plained, if properly noted in the *attestation clause*.⁴⁵ The difficulty arises when it is evident from the difference in handwriting or ink, or from other indications, that an alteration has been made; and in those cases where it may seem doubtful whether the interlineation or change was made in the *same ink and handwriting*. But the chief difficulty lies in formulating any general rules by reason of the heterogeneity of the decisions, attributable, doubtless, not only to the adoption of standards in different jurisdictions at different times, but also to a divergence of opinion in the same jurisdiction. We shall, however, deal with the principal phases of the question which have presented themselves, but it is to be borne in mind that each case must be governed as well by its circumstances as by the law of its particular forum.

§ 564 (579). Same—Conflicting views in the United States.—Before dealing with the conflict on alterations which are apparent on the face of the document, it is well to note that there is at least one principle upon which the authorities are in harmony. This is, that where an alteration in an instrument is alleged to have been made, and such alteration is not apparent upon the face of the instrument, the burden of showing that the latter has been altered is upon the party who alleges it.⁴⁶ Where, how-

⁴⁵ *Smith v. United States*, 2 Wall. (U. S.) 232, 17 L. Ed. 788.

⁴⁶ *Glover v. Gentry*, 104 Ala. 222, 16 South. 38; *Chism v. Toomer*, 27 Ark. 108; *Harris v. Bank of Jacksonville*, 22 Fla. 501, 1 Am. St. Rep. 201, 1 South. 140; *Brown v. Colquitt*, 73 Ga. 59, 54 Am. Rep. 867; *Dewey v. Merritt*, 106 Ill. App. 156; *Fudge v. Marquell*, 164 Ind. 447, 72 N. E. 565, 73 N. E. 895; *McGee v. Allison*, 94 Iowa, 527, 63 N. W. 322; *Scott v. Thrall*, 77 Kan. 688, 127 Am. St. Rep. 449, 17 L. R. A., N. S., 184, 95 Pac. 563; *Thacker v. Booth*, 9 Ky. Law Rep. 754, 6 S. W.

460; *Pierce Co. v. Casler*, 194 Mass. 423, 80 N. E. 494; *Jackson v. Day*, 80 Miss. 800, 31 South. 536; *Anderson v. Chicago etc. R. Co.*, 88 Neb. 430, 129 N. W. 1008; *Conable v. Keeney*, 61 Hun (N. Y.), 624, 16 N. Y. Supp. 719, 40 N. Y. St. 939; *Riley v. Riley*, 9 N. D. 580, 84 N. W. 347; *Galloway v. Bartholomew*, 44 Or. 75, 74 Pac. 467; *Cosgrove v. Fanebust*, 10 S. D. 213, 72 N. W. 469; *Ormsby v. Johnson*, 24 S. D. 494, 124 N. W. 436; *Smith v. Parker* (Tenn.), 49 S. W. 285; *Wadsworth v. Vinyard* (Tex. Civ. App.), 131 S. W. 1171; *Kansas Mut. Ins.*

ever, the alteration is apparent, the authorities are hopelessly divided as to the presumptions arising from such apparent alteration. Any attempt to reconcile them would be useless, and an accurate classification of their varying views is impossible. They seem to fall, however, into four classes: 1. One line of cases holds that no presumption arises from an alteration apparent on the face of the instrument, but that the entire question of the time when the alteration was made is for the jury to consider in the light of all the evidence, intrinsic and extrinsic; 2. Another holds that an alteration apparent on the face of the paper raises a presumption that it was made after execution and delivery; 3. A third line of authorities holds that the presumption that the alteration was made after execution arises only where the alteration or the facts surrounding it are suspicious; and finally, it is held by another group of courts: 4. That an alteration apparent on the face of the paper is, without explanation, presumed to have been made before delivery.⁴⁷ We shall deal with these classes in their order. 1. The rule that no presumption as to the time when the instrument was altered arises from an alteration appearing on its face would seem the only one maintainable upon principle, and has the support of a long line of authorities. Most of these cases are, however, weakened as authority for the rule itself by the limitations that such apparent alteration is in itself suspicious, and requires explanation by the party offering the instrument in evidence. This takes from the rule nearly all its practical

Co. v. Coalson, 22 Tex. Civ. App. 64, 54 S. W. 388; Davis v. Fuller, 12 Vt. 178, 36 Am. Dec. 334; Lawrence v. Meenach, 45 Wash. 632, 88 Pac. 1120; Bank v. Liewer, 187 Fed. 16; Sturm v. Boker, 150 U. S. 312, 737 L. Ed. 1093, 14 Sup. Ct. Rep. 99.

⁴⁷ This classification is adapted from the compendious note of the late A. C. Freeman, in Burgess v. Blake, 86 Am. St. Rep. 80, as being

the best possible attempt at reducing the chaotic mass of decisions to anything like order. As he says, however, it is approximate only, as many of the courts have taken compromise positions, holding the presumption to depend upon various matters, such as denial under oath that the paper was executed, the nature of the instrument, i. e., whether a specialty or not, and others.

value, since, once in evidence, the alteration would require explanation.⁴⁸ And in the courts which follow this doctrine, it is held that, even if suspicious, the alteration will not be presumed to have been made either before or after execution. In such case, the law presumes nothing, and leaves to the jury the entire question of the time when the alteration was made.⁴⁹ 2. The second doctrine is that

⁴⁸ *Huston v. Plato*, 3 Colo. 402; *Warren v. Layton*, 3 Harp. (Del.) 404; *Merritt v. Boyden*, 191 Ill. 136, 85 Am. St. Rep. 246, 60 N. E. 907; *Robinson v. State*, 60 Ind. 26; *McGee v. Allison*, 94 Iowa, 527, 63 N. W. 322; *Neil v. Case*, 25 Kan. 510, 37 Am. Rep. 259; *Adair v. Egland*, 58 Iowa, 314, 12 N. W. 277; *Pipes v. Hardesty*, 9 La. Ann. 152, 61 Am. Dec. 202; *Newman v. Wallace*, 121 Mass. 323; *Eddy v. Bond*, 19 Me. 461, 36 Am. Dec. 767; *State v. Chick*, 146 Mo. 645, 48 S. W. 829; *Hoey v. Jarman*, 39 N. J. L. 523; *Marshall v. Wilhite*, 2 Ohio C. D. 500; *Dolph v. Barney*, 5 Or. 191; *Estate of Nagle (Appeal of Hess)*, 134 Pa. 31, 19 Am. St. Rep. 669, 19 Atl. 434; *Vaughan v. Fowler*, 14 S. C. 355, 37 Am. Rep. 731; *Bullock v. Sprowls (Tex. Civ. App.)*, 54 S. W. 657; *Piercy v. Piercy*, 5 W. Va. 199.

⁴⁹ *Ward v. Cheney*, 117 Ala. 238, 22 South. 996; *Welch v. Coulborn*, 3 Houst. (Del.) 647; *Gillett v. Sweat*, 6 Ill. 475; *Paramore v. Lindsey*, 63 Mo. 63; *Wicker v. Pope*, 12 Rich. (S. C.) 387, 75 Am. Dec. 732. This doctrine is well stated by the court in *Cole v. Hills*, 44 N. H. 227: "It seems to us that the proper rule is, that the instrument, with all the circumstances of its nature, its history, the appearance of the alteration, the possible or probable motives to the alteration, or against it, on the part of all the persons

connected with it, or in whose possession it may have been, and the effect of the alteration upon the rights and obligations of the parties, respectively, ought to be submitted to the jury, who should find from all these whether the alteration was made before or after execution, and if after, whether it was with the assent of the adverse party, and consequently, whether it rendered the instrument invalid or not. Whether the handwriting of the alteration is the same with the body of the instrument; whether it is the same with that of the signature; whether the ink is the same or different; whether, from appearance, the body of the instrument and the alteration were written at the same time or at different times; whether the party claiming or the party sought to be charged is to be benefited by it; whether the alteration was made before or after execution, and if after, by whom, and for what purpose,—are all questions of fact for the consideration of the jury. It could serve no good, practical purpose for the court to go into these inquiries first, to determine whether a party has made a *prima facie* case. Upon the usual proof of the execution of the instrument, it should, without reference to the character of any alteration upon it, be admitted in evidence, leaving all testimony in relation to such alteration to be

an unexplained alteration apparent upon the face of the instrument is presumed to be made after execution.⁵⁰ Whatever may have been its origin, this rule is certainly unsound on principle, and is but little followed. The law never presumes fraud, and it is, moreover, opposed to general experience and modern commercial usage to assume that all instruments are issued without erasure or blemish of any kind. The mere existence of an interlineation or erasure in an instrument would not naturally or ordinarily produce an inference in the minds of men that it had been fraudulently altered after execution. Indeed, unless the alteration was of such a suspicious character as to furnish intrinsic evidence to the contrary, we think the natural inference would be, that it was a legitimate part of the instrument, and was made at or before its execu-

given to the jury, with proper instructions upon the facts in each case": Citing *Beaman v. Russell*, 20 Vt. 205, 49 Am. Dec. 775; *Bailey v. Taylor*, 11 Conn. 531, 29 Am. Dec. 321.

⁵⁰ *Cole v. Hills*, 44 N. H. 227; *Prevost v. Gratzs*, Pet. C. C. 384, Fed. Cas. No. 11,406; *United States v. Linn*, 1 How. (U. S.) 104, 11 L. Ed. 64; *Morris v. Vanderen*, 1 Dall. (Pa.) 64, 1 L. Ed. 38; *Barrington v. Bank of Washington*, 14 Serg. & R. (Pa.) 405; *Jackson v. Osborn*, 2 Wend. (N. Y.) 555, 20 Am. Dec. 649; *Herrick v. Malin*, 22 Wend. (N. Y.) 388; *Hills v. Barnes*, 11 N. H. 395; *McMicken v. Beauchamp*, 2 La. 290; *Von Eherenkrook v. Weber*, 100 Mich. 314, 58 N. W. 665, 60 N. W. 761; *Hodnett v. Pace*, 84 Va. 873, 6 S. E. 217; *Catlin Coal Co. v. Lloyd*, 180 Ill. 398, 72 Am. St. Rep. 216, 54 N. E. 214. In *Cole v. Hills*, *supra*, the court, after a consideration of the rules in the various states, and after holding no preliminary explanation necessary,

finally held that this presumption (that the alteration was after execution) was to be made only where the jury "could not find any preponderance of evidence as to when the alteration was made, or, if there is an entire absence of evidence and of circumstances both in the instrument itself and in the evidence *aliunde*, from which an inference can be legitimately drawn as to the time when it was actually made." See notes to 1 Smith's Lead. Cas. 1314, and *Burgess v. Blake*, 86 Am. St. Rep. 128 et seq. In California, by the provisions of the code, an alteration after execution must be explained by the party producing the instrument: Code, § 1982; *Galland v. Jackson*, 26 Cal. 79, 85 Am. Dec. 172. The rule is less rigid, however, when words in a printed form are erased: *Corcoran v. Doll*, 32 Cal. 82. As to statutory provisions in some states, see *Mulkey v. Long*, 5 Idaho, 213, 47 Pac. 949; *First Nat. Bank v. Mack*, 35 Or. 122, 57 Pac. 326.

tion.⁵¹ There are authorities which limit the presumption that the alteration was after execution to cases where the circumstances are suspicious.⁵² This rule, though not so harsh as the other, is much more difficult of application. Mitchell, J., in the well-known Minnesota case, says: "This furnishes no definite rule by which to determine when the burden is upon the holder to explain the alteration, and when it is not. Who is to determine, and by what test, whether the alteration is suspicious? . . . And it seems to us that the rule just referred to amounts to nothing more than saying that in some cases this intrinsic evidence may tend to prove that the alteration was made after delivery, and, therefore, throw the preponderance on that side, unless the holder of the instrument produces extrinsic rebutting evidence. Thus construed, we could find no special fault with the rule. But it is incorrect to call this a presumption of law; it is simply an inference of fact drawn from evidence in the case."⁵³ 4. In some states

⁵¹ Mitchell, J., in *Wilson v. Hayes*, 40 Minn. 531, 12 Am. St. Rep. 754, 4 L. R. A. 196, 42 N. W. 467.

⁵² *Alabama etc. Land Co. v. Thompson*, 104 Ala. 570, 53 Am. St. Rep. 80, 16 South. 440; *Powell v. Banks*, 146 Mo. 620, 48 S. W. 664; *Kelly v. Thuey*, 143 Mo. 422, 45 S. W. 300; *Tillou v. Clinton etc. Mut. Ins. Co.*, 7 Barb. (N. Y.) 564; *Collins v. Ball*, 82 Tex. 259, 27 Am. St. Rep. 877, 17 S. W. 614; *Bradley v. Dells Lumber Co.*, 105 Wis. 245, 81 N. W. 394; *Smith v. United States*, 69 U. S. 219, 17 L. Ed. 788. The doctrine of these cases is, in the language of *McCrary, J.*, in *Cox v. Palmer*, 1 *McCrary*, 431, 3 Fed. 16: "If the interlineation is in itself suspicious, as if it appears to be contrary to the probable meaning of the instrument as it stood before the insertion of the interlined words, or if it is in a

handwriting different from the body of the instrument, or appears to have been written with different ink—in all such cases, if the court considers the interlineation suspicious on its face, the presumption will be that it was an unauthorized alteration after execution, and the *onus* would rest with the party offering the instrument to explain it. On the other hand, if the interlineation appears in the same handwriting with the original instrument, and bears no evidence on its face of having been made subsequent to the execution of the instrument, and especially if it only makes clear what was the evident intention of the parties, the law will presume that it was made in good faith and before execution."

⁵³ *Wilson v. Hayes*, *supra*. For an interesting variation of this doctrine, see *Stoner v. Ellis*, 6 Ind. 152.

where the rule prevailing in England as to deeds is adopted, it is held, if nothing is shown to the contrary, that the alteration of a written instrument should be presumed to have been made before or at the time of its execution; and it has been argued that this rule is better adapted to this country where so many contracts are drawn by the parties without great care in regard to interlineations and alterations.⁵⁴ In accordance with this view the supreme court of Minnesota have thus stated the rule as held by

⁵⁴ *Ward v. Cheney*, 117 Ala. 238, 22 South. 996; *Portsmouth Sav. Bank v. Wilson*, 5 App. Cas. (D. C.) 8; *Orlando v. Gooding*, 34 Fla. 244, 15 South. 770; *Kendrick v. Latham*, 25 Fla. 819, 6 South. 871; *Insurance Co. v. Brim*, 111 Ind. 281, 12 N. E. 315; *Des Moines Nat. Bank v. Harding*, 86 Iowa, 153, 53 N. W. 99; *First Nat. Bank v. Franklin*, 20 Kan. 264; *Letcher v. Bates*, 6 J. J. Marsh. (Ky.) 524, 22 Am. Dec. 92; *Wickes v. Caulk*, 5 Har. & J. (Md.) 36; *Brand v. Johnrowe*, 60 Mich. 210, 26 N. W. 883; *Sirrine v. Briggs*, 31 Mich. 443; *Wilson v. Hayes*, 40 Minn. 531, 12 Am. St. Rep. 754, 4 L. R. A. 196, 42 N. W. 467; *Stillwell v. Patton*, 108 Mo. 352, 18 S. W. 1075; *Whitmer v. Frye*, 10 Mo. 348; *Dorsey v. Conrad*, 49 Neb. 443, 68 N. W. 645; *Hunt v. Gray*, 35 N. J. L. 227, 10 Am. Rep. 232; *Cass Co. v. Am. Exch. State Bank*, 9 N. D. 263, 83 N. W. 12; *Newman v. King*, 54 Ohio St. 273, 56 Am. St. Rep. 705, 35 L. R. A. 471, 43 N. E. 683; *Richardson v. Fellner*, 9 Okl. 513, 60 Pac. 270; *Wikoff's Appeal*, 15 Pa. 281, 53 Am. Dec. 597; *Wicker v. Pope*, 12 Rich. (S. C.) 387, 75 Am. Dec. 732; *Foley-Wadsworth etc. Co. v. Solomon*, 9 S. D. 511, 70 N. W. 639; *Smith v. Parker* (Tenn.), 49 S. W. 285; *Beaman v. Russell*, 20 Vt. 205, 49 Am. Dec. 775; *Kleebe v. Bard*, 12 Wash. 140, 40 Pac. 733;

Wolferman v. Bell, 6 Wash. 84, 36 Am. St. Rep. 126, and note, 32 Pac. 1017; *Maldaner v. Smith*, 102 Wis. 30, 78 N. W. 140; *Little v. Hernndon*, 10 Wall. 26, 19 L. Ed. 878; *Cox v. Palmer*, 1 McCrary, 431, 3 Fed. 16. See note to *Burgess v. Blake*, 86 Am. St. Rep. 128 et seq. In these cases, as in nearly all those which attempt to deal with the presumptions arising from apparent alteration, there is much loose language, and many cases might well be cited in support of two utterly inconsistent doctrines. Thus, while some, such as *First Nat. Bank v. Franklin*, 20 Kan. 264, would seem to distinguish between apparent alterations which are and those which are not suspicious, and impliedly to hold the rule applicable to the latter only, others, such as *Sirrine v. Briggs*, 31 Mich. 443, hold the rule applicable, even where the alteration is suspicious; and others, as *Whitmer v. Frye*, 10 Mo. 348, make no mention of the character of the alteration—whether suspicious or not. In Georgia, an apparent alteration is presumed to be made before execution, except when the execution of the instrument is expressly denied under oath: *Banks v. Lee*, 73 Ga. 25; *Thompson v. Gowen*, 79 Ga. 70, 3 S. E. 910; *Winkles v. Guenther*, 98 Ga. 472, 25 S. E. 527.

them: "We are therefore of opinion that the correct rule is that the burden is upon the maker to show that the alteration was made after delivery, or, perhaps, to state the proposition with more precision, the proof or admission of a signature of a party to an instrument is *prima facie* evidence that the instrument written over it is his act; and this *prima facie* evidence will stand as binding proof, unless the maker can rebut it by showing by evidence that the alteration was made after delivery; and that the question when, by whom and with what intent the alteration was made is one of fact to be submitted to the jury upon the whole evidence, intrinsic and extrinsic."⁵⁵ It is apparent that there is great confusion of the authorities upon this subject. But whatever conflict of opinion there may be as to the legal presumptions to be raised, there seems to be quite general concurrence in the view that when *suspicious circumstances*, tending to discredit the document, appear either upon its face or from extrinsic facts, the burden of removing such suspicion is upon the party seeking to use the instrument.^{55a} There is, however, an indefiniteness about the proper application of the word "suspicious" as applied to the appearance of the document. In some cases

⁵⁵ *Wilson v. Hayes*, 40 Minn. 531, 12 Am. St. Rep. 754, 4 L. R. A. 196, 42 N. W. 467. But if it is shown that an alteration has been made after execution and delivery, it will be presumed to be fraudulent: *Warder v. Willyard*, 46 Minn. 531, 24 Am. St. Rep. 250, 49 N. W. 300. See, also, the late cases: *Calhoun v. McKay*, 64 Fla. 226, 60 South. 182; *Tharp v. Jamison*, 154 Iowa, 77, 134 N. W. 583; *Pike County v. Sowards*, 147 Ky. 37, 143 S. W. 745; *Arnold v. Brechtel* (Mich.), 140 N. W. 610; *Hatch v. Bayless*, 164 Mo. App. 216, 146 S. W. 839; *Musser v. Musser*, 92 Neb. 387, 138 N. W. 599; *Wicker v. Jones*, 159 N. C. 102, 74 S. E. 801.

^{55a} *Henman v. Dickinson*, 5 Bing.

183, 130 Eng. Reprint, 1021; *Knight v. Clements*, 8 Ad. & E. 215, 112 Eng. Reprint, 819; *Glover v. Gentry*, 104 Ala. 222, 16 South. 38; *Newcomb v. Presbrey*, 8 Met. (Mass.) 406; *Dodge v. Haskell*, 69 Me. 429; *Huntington v. Finch*, 3 Ohio St. 445; *Jordan v. Stewart*, 23 Pa. 244; *Courcamp v. Weber*, 39 Neb. 533, 58 N. W. 187; *United States v. Linn*, 1 How. (U. S.) 111, 11 L. Ed. 64; *Smith v. United States*, 2 Wall. (U. S.) 219, 17 L. Ed. 788; *Catlin Coal Co. v. Lloyd*, 180 Ill. 398, 72 Am. St. Rep. 216, 54 N. E. 214. See *Wilson v. Hayes*, 40 Minn. 531, 12 Am. St. Rep. 754, 4 L. R. A. 196, 42 N. W. 467, cited to note 55,

supra.

the mere fact of the alteration is held to be suspicious.⁵⁶ But this is not supported by any volume of authority. The weight seems to be with those which do not regard the appearance of a change suspicious *per se*.⁵⁷

§ 565 (580). Question of alteration is for the jury.—There is also general concurrence in the view that the question whether an alteration has been made is a matter to be *determined by the jury*.⁵⁸ Where the instrument is submitted to them, either with or without explanation, the appearance of the document, the possible motive for or against the alteration, the advantage or disadvantage to the party claiming under the instrument which would be likely to follow from an alteration, are all circumstances from which the jury may determine the fact of alteration.⁵⁹ And when the person by whom,⁶⁰ the time when, or the in-

⁵⁶ Probably founded on 1 Greenl. Ev., § 564, that an alteration on a document detracts from its credit and renders it suspicious. See, also, *Pipes v. Hardesty*, 9 La. Ann. 152, 61 Am. Dec. 202.

⁵⁷ *Sedgwick v. Sedgwick*, 56 Cal. 213; *Wilde v. Armsby*, 6 Cush. (Mass.) 314; *Zimmerman v. Camp*, 155 Pa. 152, 25 Atl. 1086; *Rodriguez v. Haynes*, 76 Tex. 225, 13 S. W. 296; *Maldaner v. Smith*, 102 Wis. 30, 78 N. W. 140; *Cox v. Palmer*, 3 Fed. 16, 1 McCrary, 431.

⁵⁸ See cases collected in 1 Ency. of Ev. 822 et seq. See, also, note to *Burgess v. Blake*, 86 Am. St. Rep. 127, and note 59, *infra*. See § 560, *ante*. What constitutes ratification is for the court: *Dickson v. Bamberger*, 107 Ala. 293, 18 South. 290.

⁵⁹ *Bailey v. Taylor*, 11 Conn. 531, 29 Am. Dec. 321; *Heffelfinger v. Shutz*, 16 Serg. & R. (Pa.) 44; *Commissioners of Poor v. Hanion*, 1 Nott & McC. (S. C.) 554; *Ault v.*

Fleming, 7 Iowa, 143; *Commercial & R. Bank v. Lum*, 8 Miss. 414; *Maybee v. Sniffen*, 2 E. D. Smith (N. Y.), 1; *Schwarz v. Herrenkind*, 26 Ill. 208; *Stockton v. Graves*, 10 Ind. 294; *Reinhart v. Miller*, 22 Ga. 402, 68 Am. Dec. 506; *Dodge v. Haskell*, 69 Me. 429; *Cole v. Hills*, 44 N. H. 227; *Beaman v. Russell*, 20 Vt. 205, 49 Am. Dec. 775; *Matthews v. Coalter*, 9 Mo. 705; *Martin v. Klein*, 157 Pa. 473, 27 Atl. 753; *Pearson v. Hardin*, 95 Mich. 360, 54 N. W. 904; *Courcamp v. Weber*, 39 Neb. 533, 58 N. W. 187; *Goodin v. Plugge*, 47 Neb. 284, 66 N. W. 407.

⁶⁰ *Milliken v. Marlin*, 66 Ill. 13; *Wilson v. Hayes*, 40 Minn. 531, 12 Am. St. Rep. 754, 4 L. R. A. 196, 42 N. W. 467; *Artisans' Bank v. Backus*, 31 How. Pr. (N. Y.) 242; *Martin v. Kline*, 157 Pa. 473, 27 Atl. 753; *White v. Harris*, 69 S. C. 65, 104 Am. St. Rep. 791, 48 S. E. 41; *Ramsey v. McCue*, 21 Gratt. (Va.) 349.

tent⁶¹ with which, or the circumstance of consent to⁶² an admitted alteration was made is drawn into question, it is for the jury to say whether it was by a party to the instrument or by a stranger, whether before or after execution,⁶³ and whether with an honest or a fraudulent purpose. In various jurisdictions, as we have shown, different presumptions exist as to these questions of fact, dependent upon the appearance of the instrument when offered in evidence. But in all of these jurisdictions such presumptions are disputable only, and the question is in the end one for the jury.⁶⁴ While there are numerous cases in which it has been held that instruments in which the alteration was manifest from their face, as from difference in ink or handwriting, might be submitted to the jury without any explanation,⁶⁵ yet it is clearly the safer and better practice for the person relying on such an instrument to give evidence *explaining the same*, if possible; and in many cases this has been held indispensable.⁶⁶ When the maker

⁶¹ *Huston v. Plato*, 3 Colo. 402; *Wallace v. Wallace*, 8 Ill. App. 69; *Cole v. Hills*, 44 N. H. 227; *Boyd v. Brotherson*, 10 Wend. (N. Y.) 93.

⁶² *Cornell v. Nebeker*, 48 Ind. 463; *Holyfield v. Harrington*, 84 Kan. 760, 39 L. R. A., N. S., 131, 115 Pac. 546; *Wilson v. Henderson*, 9 Smedes & M. (Miss.) 375, 48 Am. Dec. 716; *Wilson v. Jamieson*, 7 Pa. 126; *North v. Henneberry*, 44 Wis. 306.

⁶³ *Burnett Cigar Co. v. Art Wall Paper Co.*, 164 Ala. 547, 51 South. 263; *Chapman v. Sargent*, 6 Colo. App. 438, 40 Pac. 849; *Hill v. Cole Bros. etc. Rod Co.*, 7 Ga. App. 64, 66 S. E. 280; *Berryman v. Manker*, 56 Iowa, 150, 9 N. W. 103; *Norwood v. Fairservice*, Quincy (Mass.), 189; *Wilson v. Henderson*, 9 Smedes & M. (Miss.) 375, 48 Am. Dec. 716; *German-American Bank v. Manning*, 133 Mo. App. 294, 113 S. W. 251; *Lamb v. Briggs*, 22 Neb. 138, 34

N. W. 217; *Mosher v. Davis*, 41 App. Div. 622, 58 N. Y. Supp. 529. See, also, the late case of *Wicker v. Jones*, 159 N. C. 102, 74 S. E. 801.

⁶⁴ See cases cited above and to § 560, *ante*.

⁶⁵ *Cole v. Hills*, 44 N. H. 227; *Wicker v. Pope*, 12 Rich. (S. C.) 387, 75 Am. Dec. 732; *Stayner v. Joyce*, 120 Ind. 99, 22 N. E. 89; *Hunt v. Gray*, 35 N. J. L. 227, 10 Am. Rep. 232.

⁶⁶ *Wilde v. Armsby*, 6 Cush. (Mass.) 314; *Davis v. Jenney*, 1 Met. (Mass.) 221; *Commercial & R. Bank v. Lum*, 8 Miss. 414; *Warren v. Layton*, 3 Harr. (Del.) 404; *Stoner v. Ellis*, 6 Ind. 152; *Fontaine v. Gunter*, 31 Ala. 258; *Jackson v. Osborn*, 2 Wend. (N. Y.) 555, 20 Am. Dec. 649; *Clark v. Eckstein*, 22 Pa. 507, 62 Am. Dec. 307; *Page v. Danaher*, 43 Wis. 221. See note to *Burgess v. Blake*, 86 Am. St. Rep. 129 et seq.

testifies that an alteration has been made, it is clearly a question for the jury.⁶⁷ When an alteration, after execution, is shown, it is incumbent on the person claiming under the instrument to prove consent.⁶⁸ It has been held that there is no burden on the party producing *ancient documents* which have been exposed to the inspection of numerous persons, who have thus had opportunity to make additions or annotations, provided such documents come from the proper repositories.⁶⁹ It is almost unnecessary to add that the alterations referred to as forming a question for the jury are, without exception, material alterations.

§ 566 (581). Fraudulent intent—Alteration of negotiable paper.—In most cases it is immaterial whether the alteration is made fraudulently or without actual fraudulent intent. If the alteration is material, the instrument is invalidated; and a material alteration, after delivery, if unexplained, is presumptively fraudulent.⁷⁰ We have seen, however, according to one line of decisions that if even an immaterial alteration is made with fraudulent purpose, the result is the same.⁷¹ In another case fraudulent intent may materially affect the rights of the parties. Thus, although no action can be maintained upon the contract materially altered, yet an *action may in some cases be brought upon the original debt* or consideration for which such contract was given, provided it is shown that the alter-

⁶⁷ Von Eherenkrook v. Webber, 100 Mich. 314, 58 N. W. 665, 60 N. W. 761. See, also, Martin v. Kline, 157 Pa. 473, 27 Atl. 753.

⁶⁸ Emerson v. Opp, 9 Ind. App. 581, 34 N. E. 840, 37 N. E. 24; Shroeder v. Webster, 88 Iowa, 627, 55 N. W. 569. See, also, Gleason v. Hamilton, 138 N. Y. 353, 21 L. R. A. 210, 34 N. E. 210, and cases there cited.

⁶⁹ Evans v. Rees, 10 Ad. & E. 151, 113 Eng. Reprint, 58; Little v.

Herndon, 10 Wall. 26, 29 L. Ed. 878; Stevens v. Martin, 18 Pa. 101; Walls v. McGee, 4 Harr. (Del.) 108.

⁷⁰ Russell v. Reed, 36 Minn. 376, 31 N. W. 452; Pew v. Laughlin, 3 Fed. 39; Osgood v. Stevenson, 143 Mass. 399, 9 N. E. 825; State v. Craig, 58 Iowa, 238, 12 N. W. 301; Hartley v. Corboy, 150 Pa. 23, 24 Atl. 295. As to intent generally, see note to Burgess v. Blake, 86 Am. St. Rep. 114 et seq.

⁷¹ See § 559, *ante*.

ation was made by mistake and without fraudulent intent.⁷² But in some courts this has been limited to those cases where the original indebtedness could be regarded as independent of the altered contract, and not discharged by or merged in it.⁷³ It is the object of the general rule under discussion to prevent the perpetration of fraud; and it is obvious that, if the guilty party may, when defeated on his contract, recover on the original debt, the salutary purpose of the rule would be defeated. A party should not be permitted to take the chances of gain by the commission of a fraud, without running the risk of loss in case of detection.⁷⁴ But this is to be distinguished from that class of cases in which there was no intent, fraudulent or otherwise, to alter the instrument, but merely to make a memorandum upon it, or to evidence another and a separate contract upon the same paper. In such case, the memorandum is not an alteration at all, and such an addition does not avoid the note or instrument. Whatever the motive, there must be an intent to alter—to change—the instrument. The test is whether or not the intent was to change the effect of it. If it was not, the addition is a

⁷² *Matteson v. Ellsworth*, 33 Wis. 488, 14 Am. Rep. 766; *Hunt v. Gray*, 35 N. J. L. 227, 10 Am. Rep. 232; *Clough v. Seay*, 49 Iowa, 111; *Clute v. Small*, 17 Wend. (N. Y.) 238; *Booth v. Powers*, 56 N. Y. 22; *Eckert v. Pickel*, 59 Iowa, 545, 13 N. W. 708; *State Sav. Bank v. Shaffer*, 9 Neb. 1, 31 Am. Rep. 394, 1 N. W. 980; *Merrick v. Boury*, 4 Ohio St. 60; *Coureamp v. Weber*, 39 Neb. 533, 58 N. W. 187.

⁷³ *Booth v. Powers*, 56 N. Y. 22. See, also, *Wheelock v. Freeman*, 13 Pick. (Mass.) 165, 23 Am. Dec. 674, and note.

⁷⁴ *Warder Co. v. Willyard*, 46 Minn. 531, 24 Am. St. Rep. 250, 49 N. W. 300. The few cases in this country which would seem to in-

cline to an opposite view will be found on closer examination to have the value of *dicta* only (nearly all being cases where the alteration was immaterial or by a stranger), or they will appear to be founded upon the peculiar doctrine of the Maine and Massachusetts courts, which refers to the addition of an attestation to a writing when there is no actual fraud: See *Barrett v. Thorndike*, 1 Me. 73; *Croswell v. Labree*, 81 Me. 44, 10 Am. St. Rep. 238, 16 Atl. 331; *Thornton v. Appleton*, 29 Me. 298; *Bridges v. Winters*, 42 Miss. 135, 97 Am. Dec. 443, 2 Am. Rep. 598; *Bowers v. Jewell*, 2 N. H. 543; *Clute v. Small*, 17 Wend. (N. Y.) 238; *Van Brunt v. Eoff*, 35 Barb. (N. Y.) 501.

mere memorandum and of no effect. If it was, no matter how honest it may have been, it becomes an alteration of the instrument, whether written in the body of the former writing or in a corner or on the back.⁷⁵ The same rule applies where a new contract is written upon an instrument which already contains one contract. If such added contract was intended to change the old, it is an alteration of the latter, and if material, will avoid it. Where, however, it is an independent collateral agreement, it is not an alteration of the old contract, and has no more effect upon it than if written on a separate piece of paper.⁷⁶ As respects the burden of proof, a somewhat *stricter rule* prevails in the case of *negotiable instruments* than in the case of other instruments. Although there is the same conflict of opinion on this subject, which has already been pointed out in respect to other instruments, and a weight of authority in which the distinction between deeds and other instruments is unacknowledged,⁷⁷ yet the tendency is to require the holder

⁷⁵ *Sanders v. Bagwell*, 32 S. C. 238, 7 L. E. A. 743, 10 S. E. 946.

If the additions are in red ink or in pencil, they were probably, of course, intended not as forming a part of the contract, but as mere memoranda: *Maness v. Henry*, 96 Ala. 454, 11 South. 410; *Carr v. Welch*, 46 Ill. 88; *Light v. Killinger*, 16 Ind. App. 102, 59 Am. St. Rep. 313, 44 N. E. 760; *Johnson v. Parker*, 86 Mo. App. 660; *Yost v. Watertown Steam Engine Co.* (Tex. Civ. App.) 24 S. W. 657; *First Nat. Bank v. Wolff*, 79 Cal. 69, 21 Pac. 551, 748; *Horton v. Horton*, 71 Iowa, 448, 32 N. W. 452; *Woodworth v. Bank of America*, 19 Johns. (N. Y.) 391, 10 Am. Dec. 239; *Littlefield v. Coombs*, 71 Me. 110; *Granite Ry. Co. v. Bacon*, 32 Mass. 239; *Oliver v. Hawley*, 5 Neb. 439; *Morrill v. Otis*, 12 N. H. 466; *Hubbard v. Williamson*, 27 N. C. 397; *Kinard*

v. Glenn, 29 S. C. 590, 8 S. E. 203.

⁷⁶ *Huff v. Cole*, 45 Ind. 300; *Cambridge Sav. Bank v. Hyde*, 131 Mass. 77, 41 Am. Rep. 193; *Burnham v. Gosnell*, 47 Mo. App. 637; *Moore v. Macon Sav. Bank*, 22 Mo. App. 684; *Hutches v. J. I. Case Threshing Machine Co.* (Tex.), 35 S. W. 60.

⁷⁷ *Neil v. Case*, 25 Kan. 510, 37 Am. Rep. 259; *Wilson v. Hayes*, 40 Minn. 531, 12 Am. St. Rep. 754, 4 L. R. A. 196, 42 N. W. 467; *Stillwell v. Patton*, 108 Mo. 352, 18 S. W. 1075; *Stough v. Ogden*, 49 Neb. 291, 68 N. W. 516; *Dow v. Jewell*, 18 N. H. 340, 45 Am. Dec. 371; *Hunt v. Gray*, 35 N. J. L. 227, 10 Am. Rep. 232; *Maybee v. Sniffen*, 2 E. D. Smith (N. Y.), 1; *Franklin v. Baker*, 48 Ohio St. 296, 29 Am. St. Rep. 547, 27 N. E. 550; *Beaman v. Russell*, 20 Vt. 205, 49 Am. Dec. 775.

of negotiable paper to explain alterations and erasures appearing on its face. It is urged that as notes and bills are intended for negotiation, and as payees do not receive them when clogged with impediments to their circulation, there is a presumption that such an instrument is fair and untarnished, until such presumption is repelled, and that the very fact that the holder received negotiable paper is presumptive evidence that it was unaltered at the time.⁷⁸ Gibson, C. J., said that the holder ought to explain why he took the note branded with marks of suspicion which might render it unfit for his purposes. "The maker of a note cannot be expected to account for what may have happened after it left his hands; but a payee or indorsee who takes it, condemned and discredited on the face of it, ought to be prepared to show what it was when he received it."⁷⁹

§ 566a. Same—Accidental alterations—To correct mistake or conform instrument to intent of parties.—There yet remain some other classes of alterations which call for notice. An alteration by accident is of no effect. This is not an exception to the general rule, there being no *intention to alter* present. The most frequent case is where a party, intending to sign in one part of the paper, accidentally signs in another, or where, intending to attest one signature only, he accidentally signs an attestation of more. In such a case there is no alteration of the instrument within the legal meaning of that term.⁸⁰ Another

⁷⁸ *Simpson v. Stackhouse*, 9 Pa. 186, 49 Am. Dec. 554; *Henman v. Dickinson*, 5 Bing. 183, 130 Eng. Reprint, 1031; *Hills v. Barnes*, 11 N. H. 395; *Humphreys v. Guillo*, 13 N. H. 385, 38 Am. Dec. 499; *Estate of Nagle* (Appeal of Hess), 134 Pa. 31, 19 Am. St. Rep. 669, and note, 19 Atl. 434; *McClintock v. State Bank*, 52 Neb. 130, 71 N. W. 978; *J. I. Case Threshing Mach. Co. v. Peterson*, 51 Kan. 713, 33 Pac. 470; *Dan. Neg. Inst.*, 5th ed., § 1417.

⁷⁹ *Simpson v. Stackhouse*, *supra*.
⁸⁰ *Lynch v. Hicks*, 80 Ga. 200, 4 S. E. 255; *Brett v. Marston*, 45 Me. 401; *Nelson v. Johnson*, 18 Ind. 329; *Cason v. Wallace*, 67 Ky. 388; *Hilton v. Houghton*, 35 Me. 143; *Rollins v. Bartlett*, 20 Me. 319; *Fisher v. King*, 153 Pa. 3, 25 Atl. 1029; *Gordon v. Third Nat. Bank*, 144 U. S. 97, 36 L. Ed. 360, 12 Sup. Ct. Rep. 657.

class of cases commonly placed by the courts under the head of accidental alterations are those in which an instrument has been mutilated by some irresponsible person, such as a lunatic, incompetent or a child. These cases, however, might, it seems, be placed upon the more solid ground that the act was the act of a stranger, and amounted to no more than a spoliation of the instrument.⁸¹ Upon the question, however, of an alteration made to correct a mistake, or to conform the instrument to the intention of the parties, the courts are fairly divided. One line of authorities holds that it is permissible for a party to an instrument to correct a mistake therein and so to alter the writing that it shall the more truly represent the agreement of the parties, upon the ground that the holder is impliedly authorized to make the alteration.⁸² As opposed to this view, there is another line of cases which would guard against the danger of permitting any tampering with a written instrument, and they deny the right of one party to a contract, without the consent of the others, to alter the instrument in what he believes to be a mistaken portion, or to conform it to what he believes the parties have intended. "If mistakes do arise in the preparation of written instruments," says Sherwood, J.,⁸³ "aside from the consent of all parties interested to the needed correction, the courts of the country alone can furnish adequate redress; and we will not give sanction or countenance to the attempts of an interested

⁸¹ *Frazer v. Boss*, 66 Ind. 1; *Rhoads v. Frederick*, 8 Watts (Pa.), 448.

⁸² *Sill v. Reese*, 47 Cal. 294; *Murray v. Klinzing*, 64 Conn. 78, 29 Atl. 244; *Hadden v. Larned*, 87 Ga. 634, 13 S. E. 806; *Ryan v. Springfield First Nat. Bank*, 148 Ill. 349, 35 N. E. 1120; *People's Gas Co. v. Fletcher*, 81 Kan. 76, 105 Pac. 34; *Mattingly v. Riley*, 20 Ky. Law Rep. 1621, 49 S. W. 799; *Outtoun v. Dulin*, 72 Md. 536, 20 Atl. 134; *Produce Exch. Trust Co. v. Bieberbach*, 176 Mass. 577, 58 N. E. 162;

Foote v. Hambrick, 70 Miss. 157, 35 Am. St. Rep. 631, 11 South. 567; *Blenkiron v. Rogers*, 87 Neb. 716, Ann. Cas. 1912A, 1043, 127 N. W. 1062; *Cole v. Hills*, 44 N. H. 227; *Clute v. Small*, 17 Wend. (N. Y.) 238; *Jessup v. Dennison*, 2 Disn. (Ohio) 150, 13 Ohio Dec. 93; *Wallace v. Tice*, 32 Or. 283, 51 Pac. 733; *Latshaw v. Hildebeitel*, 2 Penny. (Pa.) 257; *McClure v. Little*, 15 Utah, 379, 62 Am. St. Rep. 938, 49 Pac. 298; *Derby v. Thrall*, 44 Vt. 413, 8 Am. Rep. 389.

⁸³ *Evans v. Foreman*, 60 Mo. 449.

party to effect by his own hand the desired reformation, as an honest blunder of this sort, if upheld in one instance, might necessitate sanctioning an alteration having that appearance, but which, from the infirmity of human testimony, might be grossly otherwise.”⁸⁴ The learned judge’s views are well supported, and in our opinion are consistent with established principles.

§ 566b. Effect of alteration upon rights of parties—Duplicates—Ratification.—There are various questions connected with the effect of alterations of instruments which arise from peculiar states of facts, and to which the rule that the effect of an unauthorized and material alteration by a party will vitiate the instrument can give no satisfactory answer. Where an instrument is executed *in duplicate*, and one copy is intrusted to each of the parties to the contract, it is held that both instruments are originals, and that the alteration of one cannot destroy the validity or binding effect of the other, which still remains as the evidence of the contract of the parties.⁸⁵ Where, although there has been a material alteration of the instru-

⁸⁴ Kelly v. Trumble, 74 Ill. 428; Hayes v. Wagner, 89 Ill. App. 390; Ryan v. First Nat. Bank, 148 Ill. 349, 35 N. E. 1120; Murray v. Graham, 29 Iowa, 520; Chadwick v. Eastman, 53 Me. 12; Aldrich v. Smith, 37 Mich. 468, 26 Am. Rep. 536; First Nat. Bank v. Fricke, 75 Mo. 178, 42 Am. Rep. 397; Brown v. Straw, 6 Neb. 536, 29 Am. Rep. 369; Hunt v. Gray, 35 N. J. L. 227, 10 Am. Rep. 232; Newman v. King, 54 Ohio St. 273, 56 Am. St. Rep. 705, 35 L. R. A. 471, 43 N. E. 683; Clark v. Eckstein, 22 Pa. 507, 62 Am. Dec. 307; Taylor v. Taylor, 80 Tenn. 714; Otto v. Halff, 89 Tex. 384, 59 Am. St. Rep. 56, 34 S. W. 910; Dobyns v. Rawley, 76 Va. 537. But even in these states there are conflicting cases such as Chamber-

lin v. White, 79 Ill. 549; Hervey v. Harvey, 15 Me. 357; State v. Dean, 40 Mo. 464; Jessup v. Dennison, 2 Disn. (Ohio) 150, 13 Ohio Dec. 93.

⁸⁵ Lewis v. Rayn, 8 Cow. (N. Y.) 71, 18 Am. Dec. 427; Jones v. Hoard, 59 Ark. 42, 43 Am. St. Rep. 17, 26 S. W. 193. In the last-named case the alteration was apparently fraudulent, and yet it was held that the right of action on the other instrument was not thereby avoided. This is carrying the doctrine, it would seem, to an unwarranted extent (Hayes v. Wagner, 89 Ill. App. 390), for by the weight of authority the alteration, if fraudulent, destroys the right of action on the original consideration, and the duplicate would be useless as evidence.

ment, it was made without fraud, and the instrument has since been *restored* to its original condition, the authorities are in conflict. In all of the states in which it is held that an alteration made to correct a mistake or to conform the instrument to the intention of the parties is of no effect, the restoration of the instrument to its original condition will not avoid the liability of the parties on it. In some states a distinction is attempted between those cases in which the restoration is by the party who made the alteration and before the instrument leaves his hands, and those cases in which a restoration is attempted after the party who made the alteration has parted with the instrument.⁸⁶ This distinction is not, however, generally recognized, nor do the courts usually inquire by whom the restoration was attempted. "An obligation, once destroyed, cannot, in the nature of things, be resuscitated without the consent of the obligor. It must be done by a new contract to which the obligor is a party."⁸⁷ The weight of authority, however, seems opposed to this strict doctrine, and permits a recovery where the alteration was originally for no fraudulent purpose and the instrument has since been restored.⁸⁸ We have already discussed the facilitation of alteration through the negligence of the maker of the instrument, and merely refer to it here to emphasize the principle that no negligence can be considered the proximate cause of a result which it required a criminal act on the part of another person to effect. The preponderance of authority is to the effect that the alteration in negotiable paper after it has been signed and

⁸⁶ *Shepard v. Whetstone*, 51 Iowa, 457, 33 Am. Rep. 143, 1 N. W. 753.

⁸⁷ *Cotton v. Edwards*, 32 Ky. 106; *Warpole v. Ellison*, 4 Houst. (Del.) 322; *Waterman v. Vose*, 43 Mo. 504; *Martendale v. Follet*, 1 N. H. 95; *Smith, J.*, dissenting, in *McAlpin v. Clark*, 11 Ohio C. C. 524.

⁸⁸ *Rogers v. Shaw*, 59 Cal. 260; *Hayes v. Wagner*, 89 Ill. App. 390;

Shepard v. Whetstone, 51 Iowa, 457, 33 Am. Rep. 143, 1 N. W. 753; *Nickerson v. Swett*, 135 Mass. 514; *Russell v. Longmoor*, 29 Neb. 209, 45 N. W. 624; *Seymour v. Mickey*, 15 Ohio St. 515; *Wallace v. Tice*, 32 Or. 283, 51 Pac. 733; *Kountz v. Kennedy*, 63 Pa. 187, 3 Am. Rep. 541; *Skelton v. Tillman* (Tex.), 20 S. W. 71.

delivered as a complete legal instrument by increasing the amount for which it was made, by the insertion of words and figures in blank places left in the instrument in such a manner as to leave no mark or indication of alteration, avoids the paper as to the makers not consenting thereto, even in the hands of a *bona fide* holder for a valuable consideration. In this respect the *bona fides* of the holder does not affect the position.⁸⁹ We have also shown that a fraudulent alteration reaches not only the instrument, but the original consideration, and prevents recovery upon either, but that when the alteration is innocent, or rather nonfraudulent, the party is not precluded from recovering on the original consideration.⁹⁰ A material alteration of an instrument may be *ratified* by the party sought to be

⁸⁹ *Fordyce v. Kosminski*, 49 Ark. 40, 4 Am. St. Rep. 18, 3 S. W. 892; *Walsh v. Hunt*, 120 Cal. 46, 39 L. R. A. 697, 52 Pac. 115; *Knoxville Nat. Bank v. Clark*, 51 Iowa, 264, 33 Am. Rep. 129, 1 N. W. 491; *Burrows v. Klunk*, 70 Md. 451, 14 Am. St. Rep. 371, 3 L. R. A. 576, 17 Atl. 378; *Greenfield Sav. Bank v. Stowell*, 123 Mass. 196, 25 Am. Rep. 67; *Wait v. Pomeroy*, 20 Mich. 425, 4 Am. Rep. 395; *Holmes v. Trumper*, 22 Mich. 427, 7 Am. Rep. 661; *Simmons v. Atkinson etc. Co.*, 69 Miss. 862, 23 L. R. A. 599, 12 South. 263; *Goodman v. Eastman*, 4 N. H. 455; *Gerish v. Glines*, 56 N. H. 9; *Crawford v. West Side Bank*, 100 N. Y. 50, 53 Am. Rep. 152, 2 N. E. 881; *Washington Sav. Bank v. Ecky*, 51 Mo. 272; *Searles v. Seipp*, 6 S. D. 472, 61 N. W. 804. In *Stephens v. Davis*, 85 Tenn. 271, 2 S. W. 382, the separation of a note from a stub on which was written a condition avoided the note, the court saying that the stub could be easily separated from the note could make no difference, as no rule of law required the maker to anticipate that

the payee would commit a felony by the alteration.

⁹⁰ § 566, *ante*. As to effect upon mortgage of alterations of note, see *Vogle v. Ripper*, 34 Ill. 100, 85 Am. Dec. 298; *Clough v. Seay*, 49 Iowa, 111; *Cheek v. Nall*, 112 N. C. 370, 17 S. E. 80; *Smith v. Smith*, 27 S. C. 166, 13 Am. St. Rep. 633, 3 S. E. 78. As to the recovery of money paid upon an altered instrument, see *Fraker v. Little*, 24 Kan. 598, 36 Am. Rep. 262; *National Bank of Commerce v. National Mechanics' Banking Assn.*, 55 N. Y. 211, 14 Am. Rep. 232; *First Nat. Bank of Decorah v. Laughlin*, 4 N. D. 391, 61 N. W. 473. A bank paying a bill of its own, in ignorance of the fact that its amount has been raised, cannot recover the amount so paid from a *bona fide* holder: *United States Bank v. Bank of Georgia*, 10 Wheat. (U. S.) 333, 6 L. Ed. 334. A drawee is bound to know his drawer's signature, and cannot recover from a *bona fide* holder money paid in ignorance of the fact that the drawer's signature was forged: *Redington v. Woods*, 45

charged upon the instrument. In such case the effect upon the rights of the parties is the same as though the alteration had originally been authorized.⁹¹

Cal. 406, 13 Am. Rep. 190; First Nat. Bank v. State Bank, 22 Neb. 769, 3 Am. St. Rep. 294, 36 N. W. 289; Star etc. Ins. Co. v. New Hampshire Nat. Bank, 60 N. H. 442; National Park Bank v. Ninth Nat. Bank, 46 N. Y. 77, 7 Am. Rep. 310. See, generally, on this subject, the note to People's Bank v. Franklin Bank, 17 Am. St. Rep. 884. As to effect of alteration upon *executory covenants*, see Hollingsworth v. Holbrook, 80 Iowa, 151, 20 Am. St. Rep. 411, 45 N. W. 561; Bacon v. Hooker, 177 Mass. 335, 83 Am. St. Rep. 279, 58 N. E. 1078; Lewis v. Payn, 8 Cow. (N. Y.) 71, 18 Am. Dec. 427; Chesley v. Frost, 1 N. H. 145; Bliss v. McIntyre, 18 Vt. 466, 46 Am. Dec. 165.

⁹¹ Dickson v. Bamberger, 107 Ala. 293, 18 South. 290; Black v. Bowman, 15 Ill. App. 166; Bell v. Mahin, 69 Iowa, 408, 29 N. W. 331; Perkins Windmill etc. Co. v. Tillman, 55

Neb. 652, 75 N. W. 1098; Humphreys v. Guillow, 13 N. H. 385, 38 Am. Dec. 499; Booth v. Powers, 56 N. Y. 22; Boalt v. Brown, 13 Ohio St. 364; Chezum v. McBride, 21 Wash. 558, 58 Pac. 1067; Piercy v. Piercy, 5 W. Va. 199; Davis v. Shafer, 50 Fed. 764. As to what constitutes a sufficient ratification, see Dickson v. Bamberger, 107 Ala. 293, 18 South. 290; Montgomery v. Crossthwait, 90 Ala. 553, 24 Am. St. Rep. 832, 12 L. R. A. 140, 8 South. 498; Humphreys v. Guillow, 13 N. H. 385, 38 Am. Dec. 499; Prouty v. Wilson, 123 Mass. 297; Hagler v. State, 31 Neb. 144, 28 Am. St. Rep. 514, 47 N. W. 692; Perkins v. Windmill etc. Co. v. Tillman, 55 Neb. 652, 75 N. W. 1098; German Bank v. Dunn, 62 Mo. 79; Wilson v. Hayes, 40 Minn. 531, 12 Am. St. Rep. 754, 4 L. R. A. 196, 42 N. W. 467.

CHAPTER 17.

DOCUMENTARY EVIDENCE (CONTINUED).

- § 567. Books of Account as Evidence.
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- § 605. Same, Continued.
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- § 608. Same, Continued.
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- § 630. Same—Seal.
- § 631. Returns of Officers—Not Evidence of Collateral Facts.
- § 632. As Between Parties, the Return cannot be Collaterally Attacked.
- § 633. Same—How Far Conclusive upon the Officer—As to Strangers.

§ 567 (582). **Books of account as evidence.**—The “shop-book” rule is that by which shop-books and tradesmen’s books of account, regularly and fairly kept as books of original entries, supported by oath, are admitted as *prima facie* evidence of the pertinent entries therein contained. The rule in regard to the admission of books of original entries, supported by the oath of the party to prove the transactions therein contained, is a very old one in this country, and existed in England as an ancient rule of the common law. It was adopted by courts as a rule of necessity, as in many cases without it the administration of justice would have been at fault. It was recognized as a rule of convenience that facilitated the ordinary transaction

of business, and has found a secure place in the jurisprudence of this country, whether as a doctrine of the common law of evidence or as an enactment of the statute law.¹ Without going into the history of the admission of such books as evidence, it may be noted that the origin of the shop-book rule as it is generally understood and administered in this country was it seems, borrowed not from the English law, but from the law of Holland.² Their admission in this country was grudgingly granted. In an early New York case³ we find the following comments: "Books of account are received in evidence, only upon the presumption that no other proof exists. They are justly regarded as the weakest and most suspicious kind of evidence. The admission of them at all is a violation of one of the first principles of the law of evidence, which is, that a party shall not himself make evidence in his own favor. . . . At the very best, it is but presumptive evidence, and that, too, of the lowest grade. It should always be received with extreme caution, and be subjected to the strictest scrutiny. . . . Notwithstanding what I have said, I admit the necessity which receives this species of evidence. In a country like ours, where the artisan and the tradesman are compelled, by the usages which have obtained, to give credits to their customers, and yet, in very many instances, cannot afford to keep clerks, the customary entries, made in the usual course of business, must, to prevent greater injustice, and when free from all suspicion of dishonesty and unfairness, be received as evidence of the transactions to which they relate. All I claim is, that the true character of the evidence should be appreciated." The discussion in another portion of this work shows that it has long been the settled common-law rule that entries made in

¹ *Reyburn v. Queen City etc. Co.*, 171 Fed. 609, 96 C. C. A. 373. The rule is so generally adopted and known that citation of state authorities is unnecessary.

² See *Conklin v. Stamler*, 17 How.

Pr. (N. Y.) 399, and the excellent sketch of the origin of the rule in the note to *Sheridan Coal Co. v. C. W. Hull Co.*, 138 Am. St. Rep. 441.

³ *Larue v. Rowland*, 7 Barb. (N. Y.) 107.

the regular course of business in shop-books by the clerk or agent of a person are, with proper restrictions, admissible in evidence after the death of such clerk on proof of his handwriting.⁴ It has also been shown that the American cases extended this principle so as to include entries made by such hired clerk or agent when authenticated by his oath, although he is not able to remember the fact so recorded; in other words, the entries may be admissible during the life of the one who made them.⁵ Such entries are admitted, not on the principle that they were declarations against interest, or the declarations of persons since deceased, but on the ground that they were a part of the acts they purported to record; in other words, part of the *res gestae*; and it was but another step to admit entries in books made in the regular course of business which were kept by the party himself. This rule before the enactment of statutes was founded upon a supposed necessity and was intended for small traders who kept no clerks.⁶ Accordingly, it has long been the practice in

⁴ As to the general subject of this and the succeeding sections, see notes to *Union Bank v. Knapp*, 15 Am. Dec. 191-198; *Merrill v. Ithaca etc. R. Co.*, 30 Am. Dec. 142; *Smith v. Smith*, 52 L. R. A. 545-610; *Hall v. Chambersburg Woolen Co.*, 52 L. R. A. 689-723; *State Bank of Pike v. Brown*, 53 L. R. A. 513-544; also extended discussion of the authorities in 1 *Smith's Lead. Cas.* 567-614. The reasons upon which this rule rests strongly support the admission in evidence of the book entries of those engaged in banking, or whose principal business is in money and cash transactions, whether as individuals or as corporations. The same necessity and the same convenience commend the rule in the one case as in the other: *Reyburn v. Queen City etc. Co.*, 171 Fed. 609, 96 C. C. A. 373. See §§ 319, 518, *ante*.

⁵ See § 320 et seq., *ante*.

⁶ *Faxon v. Hollis*, 13 Mass. 427; *Smith v. Rentz*, 131 N. Y. 169, 15 L. R. A. 138, 30 N. E. 54; *Pratt v. White*, 132 Mass. 477. Contemporaneous original entries in books of account have in some instances been admitted in evidence, on the theory of being part of the *res gestae* of the indebtedness or transaction, where they form a link in the chain of evidence: *Louisville etc. R. Co. v. McGuire*, 79 Ala. 395; *Sill v. Reese*, 47 Cal. 294; *Reviere v. Powell*, 61 Ga. 30, 34 Am. Rep. 94; *Dreiske v. Jones & Adams Co.*, 133 Ill. App. 572; *Oelrichs v. Ford*, 21 Md. 489; *Gubernator v. Rettalack*, 86 Mo. App. 184; *Moore v. Meacham*, 10 N. Y. 207. But, of course, the entries must cover the transactions which constitute the main issue in the case: *Sypher v. Savery*, 39 Iowa, 258; *McKeen v. Providence County Sav. Bank*, 24 R. I. 542, 54 Atl. 49.

most of the states to admit as evidence entries made by the parties themselves, as well as those made by clerks, to prove the sale, delivery and price of goods and the performance of work and labor. The change of the old rule, prohibiting parties from testifying in their own behalf, operated to give much more latitude to testimony of this character. In many of the states statutes have been enacted which furnish rules for the admission of entries in books of account made in the regular course of business. Most of these statutes permit *parties* to testify to and verify their books, although a few still confine the entries to those made by deceased persons, and in a few states the party is not permitted to authenticate the books except on proof that the clerk who made the entries is absent or deceased or that he had no clerk. Although in some of the decisions the courts would seem to indicate that the fact that under the common law the parties to an action were not allowed to testify was one of the reasons for allowing the books of account to be introduced in evidence, nevertheless the removal of the disqualification by the statute permitting the litigants to testify does not have the effect of depriving them of the right to introduce their books of account in evidence.⁷ The fact that books of account may be introduced will not preclude oral evidence as to the transactions recited in them, since the books are not the only competent evidence.⁸ We purpose now to discuss the effect of statutory provisions relating to the admissibility

⁷ *Reviere v. Powell*, 61 Ga. 30, 34 Am. Rep. 94; *Robinson v. Smith*, 111 Mo. 205, 33 Am. St. Rep. 510, 20 S. W. 29; *Swain v. Cheney*, 41 N. H. 232; *Tomlinson v. Borst*, 30 Barb. (N. Y.) 42; *Smith v. Smith*, 163 N. Y. 168, 52 L. R. A. 545, 57 N. E. 300. But in several cases it has been said that such books are not admissible where the transaction from its nature admits of more satisfactory evidence, and that the courts should take great care not

to enlarge the rule under which such books are admitted: *Kerns v. McKean*, 76 Cal. 87, 18 Pac. 122; *Corr v. Sellers*, 100 Pa. 169, 45 Am. Rep. 370. See, also, *In re Bresler's Estate*, 155 Mich. 567, 119 N. W. 1104.

⁸ *Godbold v. Blair*, 27 Ala. 592; *Bush v. Fourcher*, 3 Ga. App. 43, 59 S. E. 459; *Christman v. Pearson*, 100 Iowa, 634, 69 N. W. 1055; *Town of Concord v. Concord Bank*, 16 N. H. 26.

of such books, the general requisites to such admissibility and the various purposes for which books of account may be introduced in evidence.

§ 568 (583). **Same — Statutes — Of what transactions books are evidence.**—It would be impracticable here to discuss the many variations in the rule of admissibility of books of account caused by the variant statutes of different states. But there are certain rules which, although by no means of universal application, will be found to prevail quite generally. Although there is considerable diversity in the statutes of the several states, yet they contain such points of similarity that the decisions in one state are frequently useful in construing the statutes of another; and it will be found that in some of the states where no statute exists, and in which the practice has grown up as a part of the common law, the rules adopted by the courts are quite similar to the regulations prescribed in the statutes of other states.⁹ It will, of course, be borne in mind that the general view of the subject here taken is liable to be controlled by the statutes or decisions of the jurisdiction. Generally, these entries relate to *articles sold* or to *services rendered* in the regular course of business, without reference to their value or the number of items.¹⁰ In some states books are not admissible to prove *cash items*, such as the loan of money. Goods are generally sold in the regular course of business and under circumstances of some publicity. Services are generally performed under such circumstances that third persons may have some knowledge of the subject. But the payment of money occurs as frequently in private as in public, and it has been deemed unsafe, as a rule, to allow mere book entries as evidence of such transactions.¹¹ In some states entries in account-

⁹ Schettler v. Jones, 20 Wis. 412.

¹⁰ Leach v. Shepard, 5 Vt. 363; Levine v. Lancashire Ins. Co., 66 Minn. 138, 68 N. W. 855. A note or collection register kept by a banker

is not a book of account: Labaree v. Klosterman, 33 Neb. 150, 49 N. W. 1102.

¹¹ Townsend v. Townsend, 5 Harr. (Del.) 125; Harrold v. Smith, 107

books are not evidence of items of money exceeding certain specified amounts.¹² Although the loan or payment of money is not ordinarily such a subject of charge in book accounts as to be proved thereby, yet it has been held that books of account may be books of evidence to prove the payment of money, when it appears that the party offering the books is engaged in a business that justifies the charges, such as *banking or receiving money on deposit* and paying it out for others.¹³ It has also been held that, although

Ga. 849, 33 S. E. 640; Ruggles v. Gatton, 50 Ill. 412; Rothschild v. Sessee, 103 Ill. App. 274; Veiths v. Hagge, 8 Iowa, 163; Shaffer v. McCrackin, 90 Iowa, 578, 48 Am. St. Rep. 465, 58 N. W. 910; Brannin v. Foree, 12 B. Mon. (Ky.) 506; Prince v. Smith, 4 Mass. 455; Maine v. Harper, 86 Mass. 115; Cooley v. Collins, 186 Mass. 507, 71 N. E. 979; Richards v. Burroughs, 62 Mich. 117, 28 N. W. 755; Gregory v. Jones, 101 Mo. App. 270, 73 S. W. 899; Richardson v. Emery, 23 N. H. 220; Wilson v. Wilson, 6 N. J. L. 95; Hauser v. Leviness, 62 N. J. L. 518, 41 Atl. 724; Irvine v. Wortendyke, 2 E. D. Smith (N. Y.), 374; Low v. Payne, 4 N. Y. 247; Brown v. Bronson, 93 App. Div. 312, 87 N. Y. Supp. 872; Smith v. Renz, 131 N. Y. 169, 15 L. R. A. 138, 30 N. E. 54; Juniata Bank v. Brown, 5 Serg. & R. (Pa.) 226; Williams v. Gregg, 2 Strob. Eq. (S. C.) 297; Callaway v. McMillan, 11 Heisk. (Tenn.) 557; Cole v. Dial, 8 Tex. 347; Mings v. Griggsby Construction Co. (Tex. Civ. App.), 106 S. W. 192; Parris v. Bellows, 52 Vt. 351.

¹² Kelton v. Hill, 58 Me. 114; Winner v. Bauman, 28 Wis. 563; Union Bank v. Knapp, 3 Pick. (Mass.) 96, 15 Am. Dec. 181; Bassett v. Spofford, 11 N. H. 167; Waldron v. Priest, 96 Me. 36, 51 Atl. 235;

Brown v. Warner, 116 Wis. 358, 93 N. W. 17; nor for *large sums of money*: Petit v. Teal, 57 Ga. 145; Winner v. Bauman, 28 Wis. 563; nor for *immoral purposes*: Frank v. Penne, 117 Cal. 254, 49 Pac. 208. See the statutes of the jurisdiction.

¹³ Le Franc v. Hewitt, 7 Cal. 186; Clark v. Savage, 20 Conn. 258; Beall v. Rust, 68 Ga. 774; Lehmann v. Rothbarth, 111 Ill. 185; Culver v. Marks, 122 Ind. 554, 17 Am. St. Rep. 377, 7 L. R. A. 489, 23 N. E. 1086; Orcutt v. Hanson, 70 Iowa, 604, 31 N. W. 950; Veiths v. Hagge, 8 Iowa, 163; Lyman v. Bechtel, 55 Iowa, 437, 7 N. W. 673; Smith v. Rentz, 131 N. Y. 169, 15 L. R. A. 138, 30 N. E. 54; Cram v. Spear, 8 Ohio, 494; Cargill v. Atwood, 18 R. I. 303, 27 Atl. 214; Union School Furniture Co. v. Mason, 3 S. D. 147, 52 N. W. 671; Tucker v. Bradley, 33 Vt. 324; Gleason v. Kinney, 65 Vt. 560, 27 Atl. 208. They may afford some evidence of nonpayment, when properly kept, if no credit appears: Union School Furniture Co. v. Mason, 3 S. D. 147, 52 N. W. 671. It has, however, been stated in a general way that books of account are admissible only as affirmative evidence, and not for the purpose of establishing a negative proposition: Kerns v. McKean, 76 Cal. 87, 18 Pac. 122; Kerns v. Dean, 77 Cal. 555,

entries may not be competent to prove the facts recorded, they may be used as *memoranda* for *refreshing the memory of the witness*.¹⁴ Such a special course of dealing may exist between parties as to render entries admissible which would otherwise be incompetent, in other words, the *usage and conduct* of the parties may have been such as to create an implied contract that their dealings may be proven in such mode.¹⁵ In some cases, the practice has been so far extended as to receive in evidence memoranda which contain other items than charges for goods sold or services rendered, when such entries are shown to have been correctly made and in the regular course of business.¹⁶ Per-

19 Pac. 817; *Lawhorn v. Carter*, 11 Bush (Ky.), 7; *Schwarze v. Roessler*, 40 Ill. App. 474; *Riley v. Boehm*, 167 Mass. 183, 45 N. E. 84; *Boor v. Moschell*, 55 Hun, 604, 8 N. Y. Supp. 583; *Keim v. Rush*, 5 Watts & S. (Pa.) 377; *Winner v. Bauman*, 28 Wis. 563. See, also, *Lewis v. England*, 14 Wyo. 128, 2 L. R. A., N. S., 401, and note, 82 Pac. 869.

¹⁴ Books of account may be used by a witness who has made them, to refresh his memory in the same manner as other memoranda, and he may, after so refreshing his memory, testify to the facts recited in the book as of his own knowledge. Under such circumstances the books of account are merely memoranda made contemporaneous with the transactions in controversy: *Moynahan v. Perkins*, 36 Colo. 481, 10 Ann. Cas. 1061, 85 Pac. 1132; *Johnson v. State*, 125 Ga. 243, 54 S. E. 184; *Wilber v. Scherer*, 13 Ind. App. 428, 41 N. E. 837; *Mayberry v. Holbrook*, 182 Mass. 463, 65 N. E. 849; *Lester v. Thompson*, 91 Mich. 245, 51 N. W. 893; *St. Paul etc. Ins. Co. v. Gott-helf*, 35 Neb. 351, 53 N. W. 137; *Friendly v. Lee*, 20 Or. 202, 25 Pac. 396; *Winner v. Bauman*, 28 Wis. 563; *Schettler v. Jones*, 20 Wis. 412.

Where a witness who made the entries is not able to recollect the facts of the transaction after having his mind refreshed, still if he can testify that he knew the facts at the time of making the entries and made them in the book at or near the time of the transaction, they may be received as evidence of facts therein stated, in connection with other testimony: *Costello v. Crowell*, 133 Mass. 352; *Rathborne v. Hatch*, 80 App. Div. 115, 80 N. Y. Supp. 341; *Jackson v. State*, 49 Tex. Cr. 248, 91 S. W. 574. In Missouri, books could only be used to refresh the memory: *Robertson v. Reed*, 38 Mo. App. 32.

¹⁵ *Case v. Berry*, 3 Vt. 332; *Monroe v. Snow*, 131 Ill. 126, 23 N. E. 401; *Beach v. Mills*, 5 Conn. 493; *Snodgrass v. Caldwell*, 90 Ala. 319, 7 South. 834; *Swing v. Sparks*, 7 N. J. L. 59; *Goff v. Stoughton Bank*, 84 Wis. 369, 54 N. W. 732; *Spear v. Peck*, 15 Vt. 566.

¹⁶ *Mayor of New York v. Second Ave. Ry. Co.*, 102 N. Y. 572, 55 Am. Rep. 839, 7 N. E. 905; *Cobb v. Wells*, 124 N. Y. 77, 26 N. E. 284; *West v. Van Tuyl*, 119 N. Y. 620, 33 N. E. 450; *Blumhardt v. Rohr*, 70 Md. 328, 17 Atl. 266; *Goff v. Stoughton Bank*, 84 Wis. 369, 54 N. W. 732.

haps the greatest change effected by the modern statutes affecting this subject is in respect to extending the range of admissibility, regardless of whether the party seeking to introduce the books in evidence is a merchant or not.¹⁷ So, also, under the statutes in some states the party offering the books in evidence is allowed to prove his own books, whether kept by himself or a clerk.¹⁸ Ordinarily, however, such statutes are merely supplementary to the general rule relative to the subject.¹⁹ They do not abrogate the common-law rule, but simply enlarge it.²⁰ The general removal in this country of the disqualification to testify in his own behalf of a party to a suit had the effect of allowing the introduction in evidence of his books kept by himself on the same ground on which those kept for him by his clerk were admitted. That proved to be open to serious objections. Such, then, having been the state of the law, statutes in some states provided that the admission of such books should be subject to conditions such as that the party kept no clerk, or if he kept one the clerk was inaccessible, that the book was one of original entry, that customers would testify to the general accuracy of his bookkeeping, and inspection by the court for itself. For one who would produce books of account, kept in the regular course of his business by a clerk who was present to testify to the entries he had made, the law remained as it was; but, if he offers in evidence merely the books without the testimony of a clerk who kept them, he must conform to the conditions prescribed by the statute.²¹ Entries setting forth the terms of a special agreement are not admissible in evidence for the purpose of proving such agreement. When the subject admits of better evidence, such evidence must be resorted to.²² It is improper to permit a party to intro-

¹⁷ *Dunbar v. Wright*, 20 Fla. 446;
Coleman v. Retail Lumberman's Ins.
Assn., 77 Minn. 31, 79 N. W. 588.

¹⁸ *House v. Beak*, 141 Ill. 290, 33
Am. St. Rep. 307, 30 N. E. 1065;
Perry State Bank v. Elledge, 99 Ill.
App. 307.

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¹⁹ *McKenzie v. King*, 14 N. M.
375, 93 Pac. 703.

²⁰ *Perry State Bank v. Elledge*,
supra.

²¹ *McKenzie v. King*, *supra*.

²² *Jeffries v. Castleman*, 68 Ala.
432; *Ward v. Powell*, 3 Harr. (Del.)

duce in evidence an entry in his books showing his version of a parol contract.²³ An entry by an attorney in his account-book, "agreed fee to be one-half," is not admissible, since it is a mere memorandum of a special contract, and has no proper place in an account-book.²⁴ A book of accounts is not competent to prove demands which are based on a written lease.²⁵ It needs no authority that entries in a party's books of account are admissible against him as admissions against interest.²⁶ Where the entries are made by a person, who, so far from having any interest to make them, has an interest the other way, such entries against the interest of the party making them are clearly evidence of the fact stated.²⁷

§ 569 (584). **Books should be those of original entry.**—We have already referred to the admissibility of entries made in the regular course of business under such circumstances as to import trustworthiness.²⁸ In addition to the requirement that the entries in the book of account be made in the regular course of business, it is equally essential that

379; *Lyman v. Bechtel*, 55 Iowa, 437, 7 N. W. 673; *Hyne v. Campbell*, 6 T. B. Mon. (Ky.) 286; *Danser v. Boyle*, 16 N. J. L. 395; *Griesheimer v. Tanenbaum*, 124 N. Y. 650, 26 N. E. 957; *Fifth Mut. Bldg. Soc. v. Holt*, 184 Pa. 572, 39 Atl. 293; *Pritchard v. McOwen*, 1 Nott & McC. (S. C.) 131, note.

²³ *Collins v. Shaw*, 124 Mich. 474, 83 N. W. 146.

²⁴ *Batcheller v. Whittier*, 12 Cal. App. 262, 107 Pac. 141.

²⁵ *Wait v. Krewson*, 59 N. J. L. 71, 35 Atl. 742.

²⁶ *Knapp v. St. Louis Trust Co.*, 199 Mo. 640, 98 S. W. 70, contains reference to the leading authorities. See, also, the late case of *Adair v. H. G. Adair Printg. Co.*, 162 Ill. App. 511.

²⁷ *Higham v. Ridgway*, 10 East, 109, 103 Eng. Reprint, 717.

²⁸ § 319 et seq., *ante*. The entries should be made in the ordinary course of business and as a part of the party's system of keeping his accounts: *Armstrong v. Landers*, 1 Penne. (Del.) 449, 42 Atl. 617; *Kibbe v. Bancroft*, 77 Ill. 18; *Gibson v. Seney*, 138 Iowa, 383, 116 N. W. 325; *Riley v. Boehm*, 167 Mass. 183, 45 N. E. 84; *Martin v. Nichols*, 54 Mo. App. 594; *Roberts v. Rice*, 69 N. H. 472, 45 Atl. 237; *Corkran v. Taylor*, 77 N. J. L. 195, 71 Atl. 124; *Eberhardt v. Schuster*, 10 Abb. N. C. (N. Y.) 374; *Walter v. Bollman*, 8 Watts (Pa.), 544; *Toomer v. Gadsden*, 4 Strob. (S. C.) 193; *Cascade Lumber Co. v. Aetna Indemnity Co.*, 56 Wash. 503, 106 Pac. 158; *United States v. Greene*, 146 Fed. 793.

they constitute the party's *original entries* or first permanent records of the transactions in question, in order to be admissible in evidence.²⁹ Thus, if the entries are made in a day-book or journal, and transferred thence to a ledger, the entries in the ledger are not competent.³⁰ But it is no objection to the book, if otherwise regular, that the entries which they contain were *first made temporarily*.³¹ In Pennsylvania, it has been intimated that the entries should be transcribed not later than the next day after that on which they were first made.³² But other decisions in that

²⁹ *Stone v. San Francisco Brick Co.*, 13 Cal. App. 203, 109 Pac. 103; *Hooker v. Johnson*, 6 Fla. 730; *McDavid v. Ellis*, 78 Ill. App. 381; *Frick v. Kabaker*, 116 Iowa, 494, 90 N. W. 498; *Lawhorn v. Carter*, 11 Bush (Ky.), 7; *Witherell v. Swan*, 32 Me. 247; *Hoogewerff v. Flack*, 101 Md. 371, 61 Atl. 184; *Gould v. Hartley*, 187 Mass. 561, 73 N. E. 656; *Avery v. Tucker*, 137 Mo. App. 428, 118 S. W. 672; *Pollard v. Turner*, 22 Neb. 366, 35 N. W. 192; *Winne v. Hills*, 91 Hun (N. Y.), 89, 36 N. Y. Supp. 683; *Breinig v. Meitzler*, 23 Pa. 156; *Bouldin v. Atlantic Rice-mills Co. (Tex. Civ. App.)*, 86 S. W. 795; *Drumm-flato Commission Co. v. Edmisson*, 208 U. S. 534, 52 L. Ed. 606, 28 Sup. Ct. Rep. 367.

³⁰ *Woodbury v. Woodbury*, 50 Vt. 152; *Wall v. Dovey*, 60 Pa. 212; *Stetson v. Wolcott*, 15 Gray (Mass.), 545; *In re Huston's Estate*, 167 Pa. 217, 31 Atl. 553; *Kerns v. Dean*, 77 Cal. 555, 19 Pac. 817. See, also, *Woolsey v. Bohn*, 41 Minn. 235, 42 N. W. 1022. See note to *Union Bank v. Knapp*, 15 Am. Dec. 196. See next section. On necessity that book of accounts offered in evidence be books of original entry, see note to *State v. Stephenson*, 2 Ann. Cas. 842.

³¹ As upon a slate: *Hall v. Glid-*

den, 39 Me. 445; *Faxon v. Hollis*, 13 Mass. 427; *Barker v. Haskell*, 9 Cush. (Mass.) 218; *McGoldrick v. Traphagen*, 88 N. Y. 334; *Landis v. Turner*, 14 Cal. 573; *Nichols v. Vinson*, 9 Houst. (Del.) 274, 32 Atl. 225; on slips of paper or other memoranda: *Paine v. Sherwood*, 21 Minn. 225; *Davison v. Powell*, 16 How. Pr. (N. Y.) 467; *Taylor v. Davis*, 82 Wis. 455, 52 N. W. 756; *Robinson v. Mulder*, 81 Mich. 75, 45 N. W. 505; *Way v. Cross*, 95 Iowa, 258, 63 N. W. 691; *Plummer v. Struby-Estabrooke Mercantile Co.*, 23 Colo. 190, 47 Pac. 294; *Levine v. Lancashire Ins. Co.*, 66 Minn. 138, 68 N. W. 855; on a blotter: *Montague v. Dougan*, 68 Mich. 98, 35 N. W. 840; on notched sticks, shingles or boards: *Davison v. Powell*, 16 How. Pr. (N. Y.) 467; *Rowland v. Burton*, 2 Harr. (Del.) 288; *Paine v. Sherwood*, 21 Minn. 225; *Smith v. Sanford*, 12 Pick. (Mass.) 139, 22 Am. Dec. 415. Even if not made for a period of from two to four weeks: *Hall v. Glidden*, 39 Me. 445. But if the entries do not itemize the transactions recorded but comprise the details of several transactions, the book is not admissible: *Putnam v. Grant*, 101 Me. 240, 63 Atl. 816.

³² *Forsythe v. Norcross*, 5 Watts (Pa.), 432, 30 Am. Dec. 334.

state seem to adopt a more liberal rule.³³ The former strict idea of what constituted original entries has been modified to fit the necessities of new business conditions. Inasmuch as under the modern methods of extensive business houses the information relative to the transactions constituting the accounts must pass through various hands before being permanently recorded, some system of temporary memoranda preparatory to the permanent records is necessary to insure convenience as well as accuracy. It would be impracticable to preserve for any great length of time the tags, slips or tokens constituting such original memoranda, and impossible, in view of the changing of employees, to obtain the testimony of the person who made the temporary memoranda or conducted the transaction. Hence, following the rule of necessity, the courts do not regard such temporary memoranda as the originals, but look to the permanent records as such original entries when properly verified by a suppletory oath.³⁴ In this particular, every case must be made to depend very much upon its own peculiar circumstances, having regard to the situa-

³³ *Jones v. Long*, 3 Watts (Pa.), 325; *Yearsley's Appeal*, 48 Pa. 531; *Hartley v. Brookes*, 6 Whart. (Pa.) 189. See 1 *Smith's Lead. Cas.*, 8th ed., 599.

³⁴ *Landis v. Turner*, 14 Cal. 573; *Smith v. Law*, 47 Conn. 431; *Remington Mach. Co. v. Wilmington Candy Co.*, 6 Penne. (Del.) 288, 66 Atl. 465; *Grady v. Thigpin*, 6 Fla. 668; *Taylor v. Tucker*, 1 Ga. 231; *Redlich v. Bauerlee*, 98 Ill. 134, 38 Am. Rep. 87; *Place v. Baugher*, 159 Ind. 232, 64 N. E. 852; *State v. Stephenson*, 69 Kan. 405, 105 Am. St. Rep. 171, 2 Ann. Cas. 841, 76 Pac. 905; *Hall v. Glidden*, 39 Me. 445; *Smith v. Sanford*, 12 Pick. (Mass.) 139, 22 Am. Dec. 415; *Miller v. Shay*, 145 Mass. 162, 1 Am. St. Rep. 449, 13 N. E. 468; *Jackson v. Evans*, 8 Mich. 476; *Afflick v. Streeter*, 136

Mo. App. 712, 119 S. W. 28; *State v. Shinborn*, 46 N. H. 497, 88 Am. Dec. 224; *Corkran v. Taylor*, 77 N. J. L. 195, 71 Atl. 124; *McGoldrick v. Traphagen*, 88 N. Y. 334; *Ingraham v. Bockins*, 9 Serg. & R. (Pa.) 285, 11 Am. Dec. 730; *Seaboard Air Line Ry. v. Railroad Commrs.*, 86 S. C. 91, 138 Am. St. Rep. 1028, 67 S. E. 1069; *Barelay v. Deyerle*, 53 Tex. Civ. App. 236, 116 S. W. 123. See, also, the late cases: *State v. Central States Bridge Co.* (Ind. App.), 97 N. E. 803; *Indianapolis Outfitting Co. v. Cheyne El. Co.* (Ind. App.), 100 N. E. 468; *Galway & Co. v. Prignano*, 134 N. Y. Supp. 571; *Standard Talk. Mach. Co. v. D. O. Matthews Supply Co.* (Ala. App.), 60 South. 481; *B. Presley Co. v. Illinois etc. R. Co.* (Minn.), 139 N. W. 609.

tion of the parties, the kind of business, the mode of conducting it and the time and manner of making entries. Upon questions of this sort, much must be left to the discretion of the judge who presides at the trial, because, having the books before him, and understanding all the circumstances of the case, he is best able to decide upon all questions involving the fairness and regularity of the entries sought to be proved.³⁵ The transfer must be shown to have been made within a *reasonable time* under all the circumstances, so that it may appear to have taken place while the memory of the facts was recent, or the source from which the knowledge of the matter was acquired was unimpaired. The authorities do not establish any precise length of time within which such entries should be transcribed. In one case the memoranda were made by an employee on a double slate kept for that purpose. No one but that one employee kept the slate. Once a month this slate was delivered to the principal in the business, who would take it home, copy the entries into his book and the following day compare the book and the slate with the employee. The employee verified this and the book was admitted.³⁶ In another case³⁷ we find: "It would be a practical denial of justice to require the plaintiff to produce all the way-bills, tickets, reports, and other innumerable memoranda made by its multitude of employees. The entries made of the aggregations of these on the plaintiff's books of original entry, kept in good faith for the purpose of showing the course of its business and its profits and losses, are admissible as evidence of such transactions." And in another: "Mere temporary memorandum-books used by the salesmen, and transferred nightly from penciled entries of theirs to the permanent ink book of the daily sales, are not the books of original entries so as to exclude such permanent book, but the latter is the book

³⁵ Barker v. Haskell, 9 Cush. (Mass.) 218.

³⁶ Redlich v. Bauerlee, 98 Ill. 134, 38 Am. Rep. 87.

³⁷ Seaboard Air Line Ry. v. Railroad Commrs., 86 S. C. 91, 138 Am. St. Rep. 1028, 67 S. E. 1069.

contemplated by the statute.”³⁸ The fact that a book containing original entries also contains some entries which are not original will not affect its admissibility in respect to transactions concerning which it contains original entries.³⁹

§ 570 (585). Form of books of account.—No particular form of books of accounts is generally prescribed, although books are far more satisfactory when kept in the form of daily entries of debits and credits in a day-book or journal. The question of competency must be determined by the appearance and character of the book; regard being had to the degree of education of the party, the nature of his business, the manner of his charges against other people, and all other surrounding circumstances.⁴⁰ Parker, C. J., laid down some general rules which are of value. The book of the party, said the learned chief justice, should “be kept in such a mode as to show, of itself, a charge against the adverse party, and the nature of that charge, so that the book, in connection with the party’s oath that the book is his original book of entries, that the charges are in his handwriting, that they were made at the time they purport to have been made, and at or near the times of delivery, of the articles, or the performances of the services, will show the nature of the claim, without further evidence from the party to interpret the meaning of arbitrary characters, the signification of which is known only to himself. It may be in such characters as are in use by persons of a particular trade or profession, and which would not be readily understood by persons not conversant with the subject matter; and in such case, evidence of other persons

³⁸ Bracken v. Dillon, 64 Ga. 243, 37 Am. Rep. 70.

³⁹ Armstrong v. Landers, 1 Penno. (Del.) 449, 42 Atl. 617; Chisholm v. Beaman Mach. Co., 160 Ill. 101, 43 N. E. 796; Wollenweber v. Ketterlinus, 17 Pa. 389.

⁴⁰ Bush v. Fourcher, 3 Ga. App. 43, 59 S. E. 459; Holden v. Spier, 65 Kan. 412, 70 Pac. 348; Cather v. Damerell, 5 Neb. (Unof.) 490, 99 N. W. 35; Lewis v. England, 14 Wyo. 128, 2 L. R. A., N. S., 401, and note containing useful illustrations, 82 Pac. 869.

may be admitted to explain the meaning usually attached to characters of that description. But in ordinary cases, the suppletory evidence of the party, in support of his book, goes no further than to the particulars above specified."⁴¹ They may be kept in the form of a ledger, if this is the general mode in which the party keeps his books, provided the entries are original entries.⁴² The entries may be made in pencil,⁴³ or in the form of a time-book, and be used as proof, not only of the labor of the plaintiff, but of his apprentice as well.⁴⁴ Although regularly *prices* ought to be specified, yet the book is not necessarily inadmissible, even if measure, weight, price and quantity are not given in connection with the items charged,⁴⁵ though, of course, the book in such case furnishes no evidence as to matters omitted.⁴⁶ But the book should be such a *regular* and *usual account-book* as explains itself and as appears on its face to create a liability in an account with the party against whom it is offered, and not to be a mere memorandum for some other purpose.⁴⁷ Hence, mere loose sheets of paper

⁴¹ Cummings v. Nichols, 13 N. H. 420, 38 Am. Dec. 501. Accounts for the lighting of a theater, made up from newspaper reports of when the theater was used, are not sufficient: Union Electric Co. v. Seattle Theater Co., 18 Wash. 213, 51 Pac. 367.

⁴² Faxon v. Hollis, 13 Mass. 427; Gibson v. Bailey, 13 Met. (Mass.) 537; Wells v. Hatch, 43 N. H. 246; Cogswell v. Dolliver, 2 Mass. 217, 3 Am. Dec. 45; Gifford v. Thomas' Estate, 62 Vt. 34, 19 Atl. 1088. Where a book kept in ledger form contains merely transfers from a blotter or day-book, and the entries made therein are not such as can be classed as original entries, it is not admissible as a book of account: Armour Packing Co. v. Vietch-Young Produce Co. (Ala.), 39 South. 680; San Francisco Teaming Co. v. Gray, 11 Cal. App. 314, 104 Pac. 999;

Jones v. Henshall, 3 Colo. App. 448, 34 Pac. 254; Bell Tel. Co. v. Geary, 143 Ill. App. 311; Way v. Cross, 95 Iowa, 258, 63 N. W. 691; Estes v. Jackson, 21 Ky. Law Rep. 859, 53 S. W. 271; Hoogewerff v. Flack, 101 Md. 371, 61 Atl. 184; Durkheimer v. Heilner, 24 Or. 270, 33 Pac. 401, 34 Pac. 475; In re Huston's Estate, 167 Pa. 217, 31 Atl. 553; Holloway v. White-Dunham Shoe Co., 151 Fed. 216, 10 L. R. A., N. S., 704, 80 C. C. A. 568.

⁴³ Gibson v. Bailey, 13 Met. (Mass.) 537.

⁴⁴ Mathes v. Robinson, 8 Met. (Mass.) 269, 41 Am. Dec. 505.

⁴⁵ Pratt v. White, 132 Mass. 477.

⁴⁶ Hagaman v. Case, 4 N. J. L. 370.

⁴⁷ Wilson v. Goodin, Wright (Ohio), 219 (check-book); Cooper v. Morrel, 4 Yeates (Pa.), 341;

are not admissible;⁴⁸ and a single entry does not constitute an account-book.⁴⁹ Charges may be so isolated and separated from others as to indicate that they were not made in the regular course of business, in which case they should be rejected.⁵⁰ When books are proved to be the "only books" of the party, they are books of original entry.⁵¹ So where the entries were by stipulation transferred to a new set of books, made by experts for the purpose of making the entries intelligible, it was held that the new set of books, prepared in this way, were properly admitted in evidence.⁵² Where it appears from a day-book that the entries therein have been transferred to a ledger, the latter book should be produced in connection with the day-book.⁵³ Account-books called journals which were kept by transcribing the *data* from the stubs of checks, several days after the issuance of the checks, are not admissible.⁵⁴ Cash-books in

Thomson v. McKelvey, 13 Serg. & R. (Pa.) 126 (scraps of paper); Van Every v. Fitzgerald, 21 Neb. 36, 59 Am. Rep. 835, 31 N. W. 264; Pollard v. Turner, 22 Neb. 366, 35 N. W. 192; Gleason v. Kinney, 65 Vt. 560, 27 Atl. 208; In re Diggins' Estate, 68 Vt. 198, 34 Atl. 696; Hay v. Peterson, 6 Wyo. 419, 34 L. R. A. 581, 45 Pac. 1073. *Rejected*: Thompson v. Oreña, 134 Cal. 26, 66 Pac. 24; Barber's Appeal, 63 Conn. 393, 22 L. R. A. 90, 27 Atl. 973; Costello v. Crowell, 139 Mass. 588, 2 N. E. 698; Riley v. Boehm, 167 Mass. 183, 45 N. E. 84; Countryman v. Bunker, 101 Mich. 218, 59 N. W. 422; Fulton's Estate, 178 Pa. 78, 35 L. R. A. 133, 35 Atl. 880.

⁴⁸ Richardson v. Emery, 23 N. H. 220; Jones v. Jones, 21 N. H. 219; Thomson v. McKelvey, 13 Serg. & R. (Pa.) 126; Hough v. Doyle, 4 Rawle (Pa.), 291.

⁴⁹ Kibbe v. Bancroft, 77 Ill. 18; Fitzgerald v. McCarty, 55 Iowa, 702, 8 N. W. 646.

⁵⁰ Prince v. Smith, 4 Mass. 455; Lynch v. McHugo, 1 Bay (S. C.), 33; Swing v. Sparks, 7 N. J. L. 59.

⁵¹ Patrick v. Jack, 82 Ill. 81.

⁵² Roberts v. Eldred, 73 Cal. 394, 15 Pac. 16.

⁵³ Prince v. Swett, 2 Mass. 569; Bonnell v. Mawha, 37 N. J. L. 198.

⁵⁴ Such a case is distinguishable from one where entries have been made daily and in the usual course of business from slips of paper or upon slates kept for temporary purposes only: Woolsey v. Bohn, 41 Minn. 235, 42 N. W. 1022. Where the entries in a journal do not purport to be copies of original memoranda, but merely the results of computations by the bookkeeper from figures afforded by scale bills and receipts which are in existence, they are not admissible: Putnam v. Grant, 101 Me. 240, 63 Atl. 816. In the following cases the books or records were denied admission: A *blank check book*: Carter v. Fischer, 127 Ala. 52, 28 South. 376; Simons

which the entries were made at the time of the transactions evidenced by them are admissible in evidence. The statutes do not generally prescribe the form in which books should be kept, nor the degree of definiteness to be observed in making entries. They have been so framed as to have a very general application. The account-books of an illiterate laborer, as well as those of a tradesman or a banker are admissible in evidence, if within the statutory conditions, the purposes of which are to secure authenticity and credibility in respect to the evidence, rather than to prescribe the form of it. Whatever may be its form, it is only evidence *prima facie* of what is shown by it. Suppletory proof may often be required to make such evidence relevant to a particular case.⁵⁵

v. Steele, 82 App. Div. 202, 81 N. Y. Supp. 737; Watts v. Shewell, 31 Ohio St. 331. But such a book has been allowed in evidence to show payment through a check: Fulker-son v. Long, 63 Mo. App. 268. *Collection and note registers* are not ordinarily regarded as within the rule of admissibility: Larabee v. Klosterman, 33 Neb. 150, 49 N. W. 1102; Martin v. Scott, 12 Neb. 42, 10 N. W. 532; Baines v. Coos Bay etc. Nav. Co., 49 Or. 192, 89 Pac. 371. But a note discount register has been allowed in evidence, upon testimony by the bookkeeper that he had the note before him when he made the entry: Wallabout Bank v. Peyton, 123 App. Div. 727, 108 N. Y. Supp. 42. In San Francisco Teaming Co. v. Gray, 11 Cal. App. 314, 104 Pac. 999, the court refused to admit in evidence entries in a *work-book*, wherein the entries were based solely on oral statements of teamsters to the bookkeeper, who had no personal knowledge of the work done or of the facts entered. See Idol v. San Francisco Const.

Co., 1 Cal. App. 92, 81 Pac. 665. *Diaries and small memorandum-books* do not generally belong to the class of books which are admissible as books of original entry: Hart v. Livingston, 29 Iowa, 217; Costello v. Crowell, 139 Mass. 588, 2 N. E. 698; Fish v. Adams, 37 Mich. 598; Richards v. Emery, 23 N. H. 220; In re Diggins' Estate, 68 Vt. 198, 34 Atl. 696. For the majority of the illustrations, we are indebted to the excellent note already referred to in Sheridan Coal Co. v. C. W. Hull Co., 138 Am. St. Rep. 441. As to stubs of check-books and order slips, see the late cases: Ricker v. Davis (Iowa), 139 N. W. 1110; Sonnenfeld v. Rosenthal, 247 Mo. 238; Leask v. Hoagland, 205 N. Y. 171, 98 N. E. 395; Mason v. Melhase (Or.), 130 Pac. 1134; United Grocery Co. v. J. M. Dannelly & Son (S. C.), 77 S. E. 706; Wells v. Hays (S. C.), 76 S. E. 195; Ogden Packing etc. Co. v. Tooele Meat etc. Co. (Utah), 124 Pac. 333.

⁵⁵ Woolsey v. Bohn, 41 Minn. 235, 42 N. W. 1022.

§ 571 (586). **Books are to be those used in the course of business—Mode of making the entries.**—From what has already been stated, it may be implied that books are not admissible, unless they are those used in the regular course of business, and kept by the party as books of account.⁵⁶ The rule of admissibility generally applies to every business or occupation in which the keeping of books of account is necessary in order to keep a record of the items or transactions which form the basis for the charge.⁵⁷ Such entries are by no means confined to mercantile transactions, but may relate to the accounts of persons, generally made in the regular course of business, where goods, services or materials are furnished.⁵⁸ It makes little differ-

⁵⁶ *Costello v. Crowell*, 139 Mass. 588, 2 N. E. 698; *Walter v. Bollman*, 8 Watts (Pa.), 544; *Curren v. Crawford*, 4 Serg. & R. (Pa.) 3; *Stuckslager v. Neel*, 123 Pa. 53, 16 Atl. 94; *Plummer v. Struby-Estabrooke Mercantile Co.*, 23 Colo. 190, 47 Pac. 294.

⁵⁷ There are a few old cases where books of account were refused admission: *Jeter v. Martin*, 2 Brev. (S. C.) 156 (farmer or planter); *Schall v. Eisner*, 58 Ga. 190 (journeyman shoemaker); *Thayer v. Deen*, 2 Hill (S. C.), 677.

⁵⁸ As accounts of carpenters and other mechanics and laborers: *Slade v. Teasdale*, 2 Bay (S. C.), 172; *Tomlinson v. Borst*, 30 Barb. (N. Y.) 42; *Petrie v. Lynch*, 1 Nott & McC. (S. C.) 130; *Burleson v. Goodman*, 32 Tex. 229; of merchants: *Bass v. Goibert*, 113 Ga. 262, 38 S. E. 834; *Foster v. Sinkler*, 1 Bay (S. C.), 40; of printers: *Thomas v. Dyott*, 1 Nott & McC. (S. C.) 186; of the keepers of saw and grist mills: *Exum v. Davis*, 10 Rich. (S. C.) 357; *Gordan v. Arnold*, 1 McCord (S. C.), 517; ferryman: *Frazier v. Drayton*, 2 Nott & McC. (S. C.) 471; of farmers: *Holden v. Spier*, 65 Kan. 412, 70

Pac. 348; of manufacturers: *Cobb v. Wells*, 124 N. Y. 77, 26 N. E. 284; of publishers: *Ward v. Powell*, 3 Harr. (Del.) 379; of physicians, attorneys and those in other professions: *Lynch v. McHugo*, 1 Bay (S. C.), 33; *Thayer v. Deen*, 2 Hill (S. C.), 677; *Murphey v. Gates*, 81 Wis. 370, 51 N. W. 573; *Weaver v. Morgan*, 49 Ala. 142; *Simmons v. Means*, 8 Smedes & M. (Miss.) 397; *Clarke v. Smith*, 46 Barb. (N. Y.) 30; *McBride v. Watts*, 1 McCord (S. C.), 384; *Waterhouse v. Fogg*, 38 Me. 425; *Rexford v. Comstock*, 3 N. Y. Supp. 876; *Charlton v. Lawry*, 1 N. C. 30, 1 Mart. 26; though not where the book is a mere pocket docket in which the attorney entered the name and the case in which he acted as counsel: *Briggs v. Town of Georgia*, 15 Vt. 61. See, also, the late cases: *Reid v. Warren Imp. Co.*, 17 Cal. App. 746, 121 Pac. 694; *Levi v. Levi* (Iowa), 136 N. W. 696; *Swan-Day Lumber Co. v. Boling*, 148 Ky. 432, 146 S. W. 746; *Thompson v. Cole* (Ala. App.), 60 South. 556; *Pacific etc. Ins. Co. v. O'Neil* (Okl.), 130 Pac. 270.

ence in what capacity the services are rendered, provided they are in the regular course of business,⁵⁹ and that they have been performed.⁶⁰ Charges have been rejected when the articles sold or furnished were *outside* the line of *the party's general business*.⁶¹ But it may be suggested that, in respect to charges of this character, much would depend upon the nature and amount of business carried on by the party, in other words, whether the transaction should appear to be in the regular course of his business. The entries in the books of account should relate to the business or occupation of the person whose books they are, and not to transactions of such person having no relation to his regular business or occupation.⁶² But the admissibility of the book in respect to proper items will not be lost because of the fact that the book contains some entries not connected with the regular business of the party.⁶³ The charges in the book must be *specific* and *particular*, and should itemize the transactions recorded. Such entries have frequently been rejected when they consisted of *charges in gross* for continued services.⁶⁴ But in a charge

⁵⁹ Howell v. Barden, 3 Dev. (N. C.) 442; Bell v. McLeran, 3 Vt. 185; Minor v. Erving, Kirby (Conn.), 158.

⁶⁰ Howell v. Barden, 3 Dev. (N. C.) 442.

⁶¹ As a charge for a sale of a horse by a dry-goods merchant: Shoemaker v. Kellog, 11 Pa. 310.

⁶² Avery v. Avery, 49 Ala. 193; Petit v. Teal, 57 Ga. 145; Horine v. New York Life Ins. Co., 27 Ky. Law Rep. 893, 87 S. W. 274; Fulton's Estate, 178 Pa. 78, 35 L. R. A. 133, 35 Atl. 880; Charlestown Institution v. Farmers' etc. Bank, 73 S. C. 545, 54 S. E. 216; Baldridge v. Penland, 68 Tex. 441, 4 S. W. 565. See Rogers v. O'Barr (Tex. Civ. App.), 81 S. W. 750, as to items by way of charge for coupon-books.

⁶³ Yick Wo v. Underhill, 5 Cal. App. 519, 90 Pac. 967.

⁶⁴ As a charge for three months' labor, made in one item: Henshaw v. Davis, 5 Cush. (Mass.) 145; a charge, for the erection of a building: Sloan v. Grimshaw, 4 Houst. (Del.) 326; a charge "four months' work, \$300": Karr v. Stivers, 34 Iowa, 123; a charge for labor extending through the period of a year made in a single item, entered when the work was done: Earle v. Sawyer, 6 Cush. (Mass.) 142; a charge for "repairing brick machine, \$1,932.76": Corr v. Sellers, 100 Pa. 169, 45 Am. Rep. 370; a charge of "seven gold American lever watches": Bustin v. Rogers, 11 Cush. (Mass.) 346; a charge in a single item of labor and materials for \$636: White v. St. Philip's Church, 2 McMul. (S. C.) 306, 39 Am. Dec. 125. See, also, Williams v. Abercrombie, Dud. (Ga.)

for work and *labor continuing* from day to day for several days, it is not necessary to set down a charge for each day itself. This is a matter which must rest very largely in the discretion of the judge according to the nature of the subject and its susceptibility of being precisely charged.⁶⁵ It has been held sufficient if the month be affixed to the charge, even though the exact date be not, if it is regular in other respects.⁶⁶ It was held in an early case that the fact that an account fails to show the date of the transaction is not fatal to its admissibility, as the date may be established by other evidence.⁶⁷ The fact that the dates are not in order will not render the books inadmissible where there is a showing by the keeper of the books that the items not in order were dates of credit. The want of chronological order would, however, go to the weight which should attach to the entries.⁶⁸ The fact that a book is kept in Chinese characters is no objection to its admissibility.⁶⁹ That the small book in which the plaintiff, who was unable to write, entered by marks the loads of sand delivered, does not affect its admissibility, where the book was supported by his oath and was not otherwise objectionable.⁷⁰ It is no objection to a book of original entries that the entries therein are written in lead pencil.⁷¹ The fact that a book is kept in a tabular form does not militate against its admissibility in evidence.⁷² In general it may be said that

252; *Earle v. Sawyer*, 6 Cush. (Mass.) 142; *Corr v. Sellers*, 100 Pa. 169, 45 Am. Rep. 370; *McKnight v. Newell*, 207 Pa. 562, 57 Atl. 39; *Cargill v. Atwood*, 18 R. I. 303, 27 Atl. 214; *Lance v. McKenzie*, 2 Bail. (S. C.) 449; *Petrie v. Lynch*, 1 Nott & McC. (S. C.) 130.

⁶⁵ *Cummings v. Nichols*, 13 N. H. 420, 38 Am. Dec. 501; *Bay v. Cook*, 22 N. J. L. 343.

⁶⁶ *Cummings v. Nichols*, 13 N. H. 420, 38 Am. Dec. 501. In another case entries in a pocket memorandum-book which were not dated, and nothing appearing in the book which

would show when they were made, were rejected: *Little v. Berry* (Ky.), 113 S. W. 902.

⁶⁷ *Doster v. Brown*, 25 Ga. 24, 71 Am. Dec. 153.

⁶⁸ *Moore v. Morris*, 1 Penne. (Del.) 412, 41 Atl. 889.

⁶⁹ *Yick Wo v. Underhill*, 5 Cal. App. 519, 90 Pac. 967.

⁷⁰ *Miller v. Shay*, 145 Mass. 162, 1 Am. St. Rep. 449, 13 N. E. 468.

⁷¹ *Gibson v. Bailey*, 54 Mass. 537; *True v. Bryant*, 32 N. H. 241; *Hill v. Scott*, 12 Pac. 168.

⁷² *Mathes v. Robinson*, 49 Mass. 269, 41 Am. Rep. 505.

it is essential to the admission of books of account in evidence that the charges should be in such a state that they may be presumed to be the minutes of the daily business of the party.⁷³

§ 572 (587). **Time of making the entries.**—We have already discussed the time which should elapse between the making and the transcription of memoranda so that the writing in the book should have the force of an original entry. It is another requisite that the entry should be made at or *about the time of the transactions*. The entries should not be a recital of past transactions, but an account of transactions as they occur. It is very clear that there is no principle on which shop-books should be received as evidence, where the entries are not made at or about the time of the transaction. If not so made, the entries are no part of the register. They are mere independent declarations of the party in his own favor.⁷⁴ In some of the states, *the statutes* prescribe that the entries shall be contemporaneous with the transaction. But it is believed that the same rule generally prevails in the states where no such statute exists.⁷⁵ A reasonable construction will be given to the requirement; and it is not indispensable that the entries should be made immediately or upon the same day.⁷⁶

⁷³ *Prince v. Smith*, 4 Mass. 455. See, also, *Labaree v. Klosterman*, 33 Neb. 150, 49 N. W. 1102.

⁷⁴ *Bentley v. Ward*, 116 Mass. 333; *Griesheimer v. Tanebaum*, 124 N. Y. 650, 26 N. E. 957. See cases cited below.

⁷⁵ Wis. Rev. Stats., § 4186; Iowa Code, § 4623; Minn. Rev. Laws 1905, § 4719.

⁷⁶ *Morris v. Briggs*, 3 Cush. (Mass.) 342. Entries made the day after the transaction have been held made contemporaneously: *Ingraham v. Bockius*, 9 Serg. & R. (Pa.) 285, 11 Am. Dec. 730; so, also, if made on the second day after: *Hartley v.*

Brookes, 6 Whart. (Pa.) 189; and even when made three days after: *Landis v. Turner*, 14 Cal. 573; *Bay v. Cook*, 22 N. J. L. 343. And in one case a delay of a month in making the entries was held insufficient to render the book inadmissible: *Redlich v. Bauerlee*, 98 Ill. 134, 38 Am. Rep. 87. Although in another case a delay of two weeks was held fatal: *Kessler v. McConachy*, 1 Rawle (Pa.), 435; and in another five days was held too long after to render the books admissible: *Forsythe v. Norcross*, 5 Watts (Pa.), 432, 30 Am. Dec. 334; where the entries are made several months after

The learned American editors of Smith's Leading Cases quote and approve the rule as declared by the courts of Pennsylvania: "The law fixes no *precise instant when the entries should be made*. It is not to be a register of past transactions, but of transactions as they occur."⁷⁷ It is evident that much must depend upon the nature of the transactions and the general mode of carrying on the business. Although the entries are *not strictly contemporaneous*, the circumstances and nature of the business may be such as to satisfy the court that the delay was not unreasonable or inconsistent with the due course of business.⁷⁸ The authorities already cited as to the transfer of temporary entries seem to sanction this principle.⁷⁹ The precise day of the month need not be affixed to the charge in all cases.⁸⁰ Where entries are made in the books whenever reported as paid or received, it is a substantial compliance with the rule that they should be made at the time of the transaction.⁸¹ The reason for requiring the entries to be

the transaction, the book is not admissible: *Wells v. Hobson*, 91 Mo. App. 379.

⁷⁷ 1 Smith's Lead. Cas., 8th ed., 598; *Jones v. Long*, 3 Watts (Pa.) 325; *National Ulster Co. Bank v. Madden*, 114 N. Y. 280, 11 Am. St. Rep. 633, 21 N. E. 408.

⁷⁸ *Murray v. Dickens*, 149 Ala. 240, 42 South. 1031; *Watrous v. Cunningham*, 71 Cal. 30, 11 Pac. 811; *Mahoney v. Hartford Inv. Corp.*, 82 Conn. 280, 73 Atl. 766; *Hooker v. Johnson*, 6 Fla. 730; *Petit v. Teal*, 57 Ga. 145; *Farner v. Turner*, 1 Iowa, 53; *Dwinel v. Pottle*, 31 Me. 167; *Davis v. Sanford*, 9 Allen (Mass.), 216; *Bader v. Schult & Co.*, 118 Mo. App. 22, 94 S. W. 834; *Cummings v. Nichols*, 13 N. H. 420, 38 Am. Dec. 501; *Bay v. Cook*, 22 N. J. L. 343; *Griesheimer v. Tancnbaum*, 124 N. Y. 650, 26 N. E. 957; *Drumm-Flato Com. Co. v. Edmisson*,

17 Okl. 344, 87 Pac. 311; *Walter v. Bolman*, 8 Watts (Pa.), 544; *Toomer v. Gadsden*, 4 Strob. (S. C.) 193; *Baldrige v. Penland*, 68 Tex. 441, 4 S. W. 565; *Bouldin v. Atlantic Ricemills Co.* (Tex. Civ. App.), 86 S. W. 795; *Rowan v. Chenoweth*, 49 W. Va. 287, 87 Am. St. Rep. 796, 38 S. E. 544; *Kamm v. Rees*, 177 Fed. 14, 100 C. C. A. 432.

⁷⁹ See § 569, *ante*.

⁸⁰ As where no day of the month was specified when it was regular in other respects: *Cummings v. Nichols*, 13 N. H. 420, 38 Am. Dec. 501; or where a book had no date, as the date of the account might be proved by other evidence: *Doster v. Brown*, 25 Ga. 24, 71 Am. Dec. 153. See, also, cases cited to previous section as to manner of making entries.

⁸¹ *Lemma v. Blanding*, 139 Wis. 156, 120 N. W. 842.

made at or near the time of the transaction is for the purpose of raising a presumption that they were honestly and fairly kept.⁸² On the other hand, the entry should not be made in the book of account *before* the sale is completed,⁸³ although the entry will not be deemed prematurely made if made at the time of delivering the goods to a carrier to be transported.⁸⁴

§ 573 (588). Suppletory oath.—It is well recognized that the mere production of books of accounts without identification is not sufficient to entitle them to admission. One of the requisites required, at least by the older decisions, was that the books be supported by the suppletory oath of the party in order to be admissible in evidence.⁸⁵ In most jurisdictions it is necessary that testimony should be given *authenticating* the book of account and showing it to be the book of original entries kept for that purpose; also that the entries were true and correct, and contemporaneous with the transactions. It is obvious that the statutes on this subject must be complied with in order to render the book admissible.⁸⁶ The books must be identified as the account-books of the party whose books they purport to

⁸² *Lewis v. England*, 14 Wyo. 128, 2 L. R. A., N. S., 401, 82 Pac. 869.

⁸³ *Laird v. Campbell*, 100 Pa. 159.

⁸⁴ *Keim v. Rush*, 5 Watts & S. (Pa.) 377.

⁸⁵ *Kirby v. Watt*, 19 Ill. 393; *In re Shingle & Lumber Co.*, 118 La. 242, 42 South. 789; *Dwinel v. Pottle*, 31 Me. 167; *Missouri etc. R. Co. v. Davis*, 24 Okl. 677, 24 L. R. A., N. S., 866, 104 Pac. 34; *Seaboard Air Line Ry. v. Railroad Commrs.*, 86 S. C. 91, 138 Am. St. Rep. 1028, 67 S. E. 1069; *Forsee v. Matlock*, 7 Heisk. (Tenn.) 421; *Townsend v. Coleman*, 18 Tex. 418, 20 Tex. 817; *Reyburn v. Queen City etc. Trust Co.*, 171 Fed. 609, 96 C. C. A. 373. But the necessity for the supple-

tory oath was obviated under certain circumstances by proof of the handwriting of the person who kept the books: *Leighton v. Manson*, 14 Me. 208; *Odell v. Culbert*, 9 Watts & S. (Pa.) 66, 42 Am. Dec. 317. This exception to the rule is applied where the books of a deceased person are offered in evidence: *Pratt v. White*, 132 Mass. 477; *Sheehan v. Hennessey*, 65 N. H. 101, 18 Atl. 652. Or where the person who made the entries has since become insane: *Holbrook v. Gay*, 6 Cush. (Mass.) 215.

⁸⁶ *Security Co. v. Graybeal*, 85 Iowa, 543, 39 Am. St. Rep. 311, 52 N. W. 497; *Watrous v. Cunningham*, 71 Cal. 30, 11 Pac. 811. See *Hurst*

be.⁸⁷ Under the old rules it was necessary to show by other customers or parties who had dealt with the owner of the books that he kept fair and honest books of account, but under the later decisions the correctness of the entries may be proved by the person who made them, or by anyone who is able of his own knowledge to testify to it.⁸⁸ This testimony should be given by the party, if the entries are in his handwriting,⁸⁹ or by a clerk, if the entries are in his handwriting, unless he is dead or out of the state,⁹⁰ in which case, the books are admissible upon proof of the handwriting.⁹¹ In some states statutes dispense with the

v. Webster Mfg. Co., 128 Wis. 342, 107 N. W. 666. See cases cited below. See, also, the late case of *S. E. Stewart & Bros. v. Harris & Co.* (Ala. App.), 60 South. 445.

⁸⁷ *Smith v. Smith*, 163 N. Y. 168, 52 L. R. A. 545, 57 N. E. 300.

⁸⁸ *Johnson Coal Co. v. Forcade*, 136 Ill. App. 21; *In re Receivership of Dugdamonia Shingle & Lumber Co.*, 118 La. 242, 42 South. 789; *Countryman v. Bunker*, 101 Mich. 218, 59 N. W. 422; *Missouri etc. Ry. Co. v. Davis*, 24 Okl. 677, 24 L. R. A., N. S., 866, 104 Pac. 34; *Jones v. De Muth*, 137 Wis. 120, 118 N. W. 542; *Taplin v. Marcy*, 81 Vt. 428, 71 Atl. 72.

⁸⁹ *Van Swearingen v. Harris*, 1 Watts & S. (Pa.) 356; *Alter v. Berghaus*, 8 Watts (Pa.), 77; *Hoover v. Gehr*, 62 Pa. 136; *Foster v. Sinkler*, 1 Bay (S. C.), 40; *Hooper v. Taylor*, 3 Me. 224; *Marsh v. Case*, 30 Wis. 531; *Merrill v. Ithaca & O. R. Co.*, 16 Wend. (N. Y.) 586, 30 Am. Dec. 130; *McDonald v. Carnes*, 90 Ala. 147, 7 South. 919; *Ford v. Cunningham*, 87 Cal. 209, 25 Pac. 403. It is not necessary to call other persons who have settled accounts by the books: *Seventh Day Assn. v. Fisher*, 95 Mich. 274, 54 S. W. 759.

⁹⁰ *Powell v. State*, 84 Ala. 444, 4

South. 719; *St. Louis etc. Ry. Co. v. White etc. Machine Co.*, 78 Ark. 1, 8 Ann. Cas. 208, 93 S. W. 58; *Kerns v. McKean*, 76 Cal. 87, 18 Pac. 122; *Farrington v. Tucker*, 6 Colo. 557; *Union Bank of Florida v. Call*, 5 Fla. 409; *Bracken v. Dillon*, 64 Ga. 243, 37 Am. Rep. 70; *Barnes v. Simmons*, 27 Ill. 512, 81 Am. Dec. 248; *Ford v. St. Louis etc. R. Co.*, 54 Iowa, 723, 7 N. W. 126; *Hastie v. Burrage*, 69 Kan. 560, 77 Pac. 268; *Owings v. Low*, 5 Gill & J. (Md.) 134; *Browning v. Flanagan*, 22 N. J. L. 567; *Ocean Nat. Bank v. Carll*, 55 N. Y. 440; *Sloan v. McDowell*, 75 N. C. 29; *Arnold v. Penn*, 11 Tex. Civ. 325, 32 S. W. 353; *Burnham v. Adams*, 5 Vt. 313; *Courtney v. Commonwealth*, 5 Rand. (Va.) 666; *Vinal v. Gilman*, 21 W. Va. 301, 45 Am. Rep. 562; *Marsh v. Case*, 30 Wis. 531; *Chaffee v. United States*, 18 Wall. (U. S.) 516, 21 L. Ed. 908; *Reyburn v. Queen City etc. Trust Co.*, 171 Fed. 609, 91 C. C. A. 373.

⁹¹ *Sterrett v. Bull*, 1 Binn. (Pa.) 234; *Merrill v. Ithaca & O. R. Co.*, 16 Wend. (N. Y.) 586, 30 Am. Dec. 130; *Holland v. Commercial Bank*, 22 Neb. 571, 36 N. W. 113; *Cobb v. Wells*, 124 N. Y. 77, 26 N. E. 284. See the late cases: *Davie v. Roland*, 3 Ala. App. 567, 57 South. 1034; *St.*

calling of the party or the clerk who made the entries, if sufficient reason is shown therefor.⁹² If the *party is deceased*, his handwriting may be shown and the books verified by the oath of his administrator or executor, showing that the books have come into his possession in such capacity and his belief that the entries are correct, and that they were made contemporaneously with the transactions.⁹³ When a *wife* keeps her husband's accounts, she may testify to that fact, and also that they were made under his direction; and the husband may testify that the charges are just and true.⁹⁴ When the entries are made by two *partners*, one should not be allowed to testify to entries made by the other, unless he knows that the sales were actually made.⁹⁵ Where temporary entries are made by one person who delivers the goods and transferred by another, both should be witnesses to render the book admissible.⁹⁶ The person making the entries should have *personal knowledge* of the facts recorded, or his testimony should be supported by that of some person who has such knowledge.⁹⁷

Louis etc. R. Co. v. Thirwell, 88 Kan. 275, 128 Pac. 199; Goodyear Tire etc. Co. v. Bacon, 91 Neb. 62, 135 N. W. 217; Levinson v. Katz, 75 Misc. Rep. 465, 133 N. Y. Supp. 439.

⁹² Volker v. First National Bank, 26 Neb. 602, 42 N. W. 732.

⁹³ McLellan v. Crofton, 6 Me. 307; Prince v. Smith, 4 Mass. 455; Bentley v. Hollenbeck, Wright (Ohio), 168. See, also, Dicken v. Winters, 169 Pa. 126, 32 Atl. 289. On admissibility in evidence of books of account of deceased party, see note to Davie v. Lloyd, 12 Ann. Cas. 77.

⁹⁴ Littlefield v. Rice, 10 Met. (Mass.) 287; Smith v. Smith, 163 N. Y. 168, 52 L. R. A. 545, 57 N. E. 300.

⁹⁵ Horton v. Miller, 84 Ala. 537, 4 South. 370. But see Webb v. Michener, 32 Minn. 48, 19 N. W. 82.

⁹⁶ Kent v. Garvin, 1 Gray (Mass.),

148; Smith v. Sanford, 12 Pick. (Mass.) 139, 22 Am. Dec. 415; Barker v. Haskell, 9 Cush. (Mass.) 218; Harwood v. Mulry, 8 Gray (Mass.), 250; State v. Shinborn, 46 N. H. 497, 88 Am. Dec. 224.

⁹⁷ Hart v. Kendall, 82 Ala. 144, 3 South. 41; Trainor v. German-American S. L. & B. Assn., 204 Ill. 616, 68 N. E. 650; Smith v. Smith, 163 N. Y. 168, 52 L. R. A. 545, 57 N. E. 300; Taylor v. Davis, 82 Wis. 455, 52 N. W. 756. *More liberal rulings*: Mathes v. Robinson, 8 Met. (Mass.) 269, 41 Am. Dec. 505; Anchor Milling Co. v. Walsh, 108 Mo. 284, 32 Am. St. Rep. 300, 18 S. W. 904; Diamant v. Colloty, 66 N. J. L. 295, 49 Atl. 445, 808. Where a book contained entries of goods sold which were copied from the delivery-book of the drayman, it was held inadmissible, without the testimony of the

If the witness who verifies the books can swear positively that the entries were made according to the truth, and that the fact stated actually existed, that is sufficient, although he has *no present recollection* about such facts.⁹⁸ While it is true that the expression is found in the authorities that the person making the entry must have knowledge of the correctness of the item, yet it will be found that in those cases there was no proof by anyone else of the fact, and it would seem, in reason, that if one party testifies that he knew of the correctness of the item and gave it correctly to the other, and the other testifies that he entered it as it was given to him, that would amount to the same thing as if the party who made the entry should swear that he knew of the correctness of the item. Hence the rule that entries are admissible when they have been made by the party from memoranda which an employee has made in the routine of his employment, for the purpose not only of their ultimate record by his employer but because he was not likely to retain them in his memory otherwise. This rule seems to be just, as well to the employer as to the customer. When the facts are testified to by both employer and employee, the entries are admissible.⁹⁹ The fact that books of account contain some errors will not, in the absence of evidence, that they have been fraudulently falsified, render

drayman or some other evidence showing that at the time the charges were made some articles were delivered by the plaintiff to the defendant: *Kent v. Garvin*, 1 Gray (Mass.), 148. See, also, *Price v. Earl of Torrington*, Salk. 285, 91 Eng. Reprint, 252; 1 Smith's Lead. Cas. 344, and extended note.

⁹⁸ *Briggs v. Rafferty*, 14 Gray (Mass.), 525; *Curran v. Witter*, 68 Wis. 16, 60 Am. Rep. 827, 31 N. W. 705; *Merrill v. Ithaca & O. R. Co.*, 16 Wend. (N. Y.) 586, 30 Am. Dec. 130; *State v. Shinborn*, 46 N. H. 497, 88 Am. Dec. 224.

⁹⁹ *Murray v. Dickens*, 149 Ala. 240, 42 South. 1031; *Miller v. Shay*, 145 Mass. 162, 1 Am. St. Rep. 449, 13 N. E. 468; *Smith v. Law*, 47 Conn. 431; *Harwood v. Mulry*, 8 Gray (Mass.), 250; *Barker v. Haskell*, 9 Cush. (Mass.) 218; *Morris v. Briggs*, 3 Cush. (Mass.) 342; *Smith v. Sanford*, 12 Pick. (Mass.) 139, 22 Am. Dec. 415; *Hoover v. Gehr*, 62 Pa. 136; *Post v. Kenerson*, 72 Vt. 341, 82 Am. St. Rep. 948, 52 L. R. A. 552, note, 47 Atl. 1072; *Curtis v. Bradley*, 65 Conn. 99, 48 Am. St. Rep. 177, 28 L. R. A. 143, 31 Atl. 591; *Bay v. Cook*, 22 N. J. L. 343.

them inadmissible.¹⁰⁰ What is sufficient proof of the verity of books is a question almost entirely for the discretion of the trial court.¹ Their correctness may be shown by the fact that the opposite party had on several occasions inspected them, and had accepted statements of receipts and disbursements made up from the books.² In a few states the *suppletory oath* of the party or clerk may be *dispensed with*, if a sufficient reason is shown why such verification is not made.³ Where the statute permits a party to testify to the correctness of his own book, such *statute enlarges*, but does not repeal, the *common law* making such books admissible when their correctness is testified to by the clerk who kept them.⁴

§ 574 (589). Account-books not evidence of collateral facts.—The proper use of book accounts is to show contemporaneous charges for goods or materials furnished or services rendered in a course of dealing between the parties, and also to serve as evidence of such facts, and of the promise implied by law to pay therefor. “If offered to prove any *collateral matter*, as that a third party assumed to pay; or that a certain person was a partner in a house charged, or to prove any agency, and show that goods were delivered or received to sell on commission, or to prove a delivery of goods in performance of a special contract; for any such purpose, books are not competent evidence.”⁵ In an action

¹⁰⁰ *Levine v. Lancashire Ins. Co.*, 66 Minn. 138, 68 N. W. 855.

¹ *Seaboard Air Line Ry. v. Railroad Commrs.*, 86 S. C. 91, 138 Am. St. Rep. 1028, 67 S. E. 1069.

² *McGrath v. Stein*, 148 Ala. 370, 42 South. 454.

³ *Iowa Code*, § 4623; *Minn. Rev. Laws*, 1905, § 4720.

⁴ *House v. Beak*, 141 Ill. 290, 33 Am. St. Rep. 307, 30 N. E. 1065.

⁵ 1 *Smith's Lead. Cas.*, 8th ed., 595; *Juniata Bank v. Brown*, 5 Serg. & R. (Pa.) 226; *Eshleman v. Har-*

nish, 76 Pa. 97; *Lyman v. Bechtel*, 55 Iowa, 437, 7 N. W. 673; *Collins v. Shaw*, 124 Mich. 474, 83 N. W. 146; *Hazer v. Streich*, 92 Wis. 505, 66 N. W. 720. See notes to *Hall v. Chambersburg Woolen Co.*, 52 L. R. A. 710, and *State Bank of Pike v. Brown*, 53 L. R. A. 513-544; *Davis v. Tarver*, 65 Ala. 98; *Batcheller v. Whittier*, 12 Cal. App. 262, 107 Pac. 141; *Bracken v. Dillon*, 64 Ga. 243, 37 Am. Rep. 70; *Palmer v. Goldsmith*, 15 Ill. App. 544; *Somers v. Wright*, 114 Mass. 171; *Moody v.*

for the price of goods sold, where the only issue was whether the delivery of the goods to a third person was on the credit of the defendant, it was held error for the judge to instruct the jury that the entry in the book might be regarded as a memorandum made at the time by the plaintiff, and, as such, entitled to some weight in confirma-

Roberts, 41 Miss. 74; Bailey v. Harvey, 60 N. H. 152; Murphy v. Cress, 2 Whart. (Pa.) 33; Gage v. McIlwain, 1 Strob. (S. C.) 135; Bouldin v. Atlantic Rice Mills Co. (Tex. Civ. App.), 86 S. W. 795. Account-books are not competent to prove a *promise of payment*: Somers v. Wright, 114 Mass. 171; nor are they admissible in actions between *strangers to the transaction*: Minton v. Underwood Lumber Co., 79 Wis. 646, 48 N. W. 857; Martin Brown Co. v. Perrill, 77 Tex. 199, 13 S. W. 975; nor is the defendant's book of credits, containing a statement of the number of days the plaintiff worked for him, evidence that the plaintiff *did not work* for him certain days: Morse v. Potter, 4 Gray (Mass.), 292; nor is a book evidence that the other party *did not purchase* goods, not credited: Winner v. Bauman, 28 Wis. 563; Shaffer v. McCracken, 90 Iowa, 578, 48 Am. St. Rep. 465, 58 N. W. 910; Riley v. Boehm, 167 Mass. 183, 45 N. E. 84; Scott v. Bailey, 73 Vt. 49, 50 Atl. 557; nor that a *sale was conditional*: Rogers v. Severson, 2 Gill (Md.), 385; nor that goods were left to be *sold on commission*: Kerr v. Love, 1 Wash. (Va.) 172; Baisch v. Hoff, 1 Yeates (Pa.), 198; Richards v. Burroughs, 62 Mich. 117, 28 N. W. 755; nor that *credit* was given solely to a third person: Peck v. Von Keller, 76 N. Y. 604; Field v. Thompson, 119 Mass. 151; Walker v. Richards, 41 N. H. 388; Kaiser v. Alex-

ander, 144 Mass. 71, 12 N. E. 209; nor the entries of an attorney to show for whom the service was rendered: Murphey v. Gates, 81 Wis. 370, 51 N. W. 573; nor is a book evidence that there is an agreement to answer for the *debt of another*: Farrand v. Gage, 3 Vt. 326; nor to show that stock had been shipped on account of a third person: Mulhall v. Keenan, 18 Wall. (U. S.) 342, 21 L. Ed. 808; nor in a suit to recover from the defendant as bailee of a package left with him: Palmer v. Goldsmith, 15 Ill. App. 544; nor in an action on a note given in settlement of accounts where the defendant claimed a setoff by way of a charge paid on a certain date, which he contended should have been credited him but was omitted through mistake. The plaintiff contended that the charge in question had been once credited to the defendant on his day-book as of the date claimed by the defendant, but proposed to prove that in posting from the day-book to the ledger the date was changed by mistake; but it was held that the plaintiff could not rebut the defendant's setoff by showing by his books, verified by his oath, that the account was erroneous: Little v. Wyatt, 14 N. H. 23. See the late cases: Porter v. Madrid State Bank (Iowa), 136 N. W. 666; Ridenour v. Wilcox Mines Co., 164 Mo. App. 576, 147 S. W. 852; Wilmer v. Placide (Md.), 86 Atl. 43.

tion of the recollection and evidence of the plaintiff.⁶ The book, to be admissible, must be a *record of things actually done*, and not of orders, executory contracts and things to be done subsequently to the entry.⁷ If other facts aside from the sale and delivery of the articles, or the performance of the work and labor, are necessary to make out the plaintiff's case, these facts cannot be established by the book or affidavit of the party, but must be made out by independent testimony.⁸ In an action on a promise by defendant to pay the plaintiff for articles delivered to a third person, wherein the defendant has offered evidence that such third person was not indebted to the plaintiff, the plaintiff's book of accounts is not admissible to show thereby that such third person was indebted to him.⁹ So, an employer's books of account, containing his account of daily business transactions, are not competent to prove, by entries made therein by himself, that an employee, whom he is suing to recover damages for an alleged dereliction of duty, was absent from his employment at the time of the injury for which he seeks recovery, to rebut the employee's evidence showing that he was on duty at that time, and doing what he might to prevent the injury.¹⁰ And the books of a mill owner sued for flowing land, who justifies the flowing on an alleged license from the land owner, and who, to prove the license, shows that the land owner had been seen at work on the dam which caused

⁶ Field v. Thompson, 119 Mass. 151. See, also, Soper v. Veazie, 32 Me. 122; Webster v. Clark, 30 N. H. 245; Churchill v. Hebden, 32 R. I. 34, 78 Atl. 337; Murphey v. Gates, 81 Wis. 370, 51 N. W. 573. In Coleman v. Retail etc. Assn., 77 Minn. 31, 79 N. W. 588, it was held that where accounts between a party to the action and third parties are material evidence, his books containing such accounts are admissible in evidence when proved by such party in the manner pro-

vided by section 5738, General Statutes of 1894.

⁷ Hart v. Livingston, 29 Iowa, 217; Whisler v. Drake, 35 Iowa, 103; J. Snow Hardware Co. v. Loveman, 131 Ala. 221, 31 South. 19; Hazer v. Streich, 92 Wis. 505, 66 N. W. 720.

⁸ Forsee v. Matlock, 7 Heisk. (Tenn.) 421.

⁹ Woodes v. Dennett, 12 N. H. 510.

¹⁰ Woods v. Allen, 18 N. H. 28.

the flowage, are not competent to prove, by an entry crediting the land owner with work on the dam, the fact that the work was done and when it was done.¹¹ In a case on hearing before an auditor, where the party is a witness in chief for himself, he may use his book of accounts as a memorandum if he can testify to the facts from recollection. This was an action for money advanced, labor performed, and materials furnished in rebuilding a factory, in which it appeared that the work was done for, and materials furnished to, a third person, and the question was whether the credit was given to the defendant through such third person as his agent, or to such third person himself. The defendant, to support his contention that the third person was not his agent, but that he had merely agreed to advance money for the purpose mentioned, and that he had paid the money and when, was allowed by the auditor to authenticate his cash-book in the usual way and read therefrom the items making up the sums said to have been advanced. And the court said, as above stated, that, had the case been on trial before a jury, the book certainly would not have been competent to prove the fact of the agency, and, indeed, held that even on the hearing before the auditor it was not competent for that purpose, but that, inasmuch as it was not the book that was to prove the agency, but the party's own testimony, the book being merely a memorandum of the items, the book was admissible.^{11a} The general rule is that a person's books of account cannot be used as evidence upon issues between third persons; that entries in such books as to such third persons are *res inter alios acta*, and cannot be used against persons not parties to them, unless a foundation is laid for their admission on special grounds.¹² But, having estab-

¹¹ Batchelder v. Sanborn, 22 N. H. 325.

^{11a} Putnam v. Goodall, 31 N. H. 419.

¹² Boyd v. Yerkes, 25 Ill. App. 527; Schwartz v. Southerland, 51 Ill.

App. 175; Harrison v. Lagow, 1 Blackf. (Ind.) 307; Ridgeley v. Johnson, 11 Barb. (N. Y.) 527; Sloan v. McDowell, 75 N. C. 29; Powers v. Hazleton & L. Ry. Co., 33 Ohio St. 429. See, also, note on the

lished the order from the defendant to deliver goods to a third person, the delivery thereof may be proved by the books and suppletory oath of the plaintiff, whenever a delivery to the defendant himself could be thus proved.¹³

§ 575 (590). Degree of credit to be given to books of account.—The courts have frequently expressed the opinion that evidence of this character is quite unsatisfactory, and that it should be subjected to close *scrutiny*. It has been said that books of account are received in evidence only upon the presumption that no other proof exists. They are justly regarded as the weakest and most suspicious kind of evidence. The admission of them at all is a violation of one of the first principles of the law of evidence, which is, that a party shall not himself make evidence in his own favor. The practice of admitting such evidence is, however, universally adopted. It is said that it had its origin in a kind of “moral necessity,” and that “such is the general course of business that no proof could be furnished of the frequent small transactions between men without resorting to the entries which they themselves have made in this form of accounts. The practice can only be justified upon the ground that, without such evidence, there would, in many cases, be a total failure of proof. It may be added that it has been often doubted, by those, too, who have had the best opportunities for observing the facilities for frauds which this loose species of evidence affords, and the abuses which, in inferior courts, have been perpetrated under it, whether it would not have been more wise to have excluded such evidence altogether. In countries where the civil law prevails, books of account are generally received in evidence, in connection with the oath of the party. But to make them evidence at all, the books must have been kept in a manner so cautious as, in a great degree, to furnish a guaranty against abuse. In many, perhaps

“Use of Books of Account upon Issues Between Other Parties,” to State Bank v. Brown, 53 L. R. A. 512, and

Eureka etc. Min. Co. v. Bullion etc. Min. Co., 125 Am. St. Rep. 841.

¹³ Mitchell v. Belknap, 23 Me. 475.

most, of the United States, what is called the suppletory oath of the party is required. In this state (New York) that practice has not obtained; and I agree with Justice Cowen¹⁴ that frail as such proofs must be, the law can hardly be censured for thinking they would be but little fortified by the suppletory oath of an interested and excited party."¹⁵ It is doubtless in view of considerations of this kind, as well as of the opportunity afforded to interested and unscrupulous parties to manufacture testimony in their own behalf, that the courts have sometimes refused to receive book entries in evidence, so long as more satisfactory evidence could be produced.¹⁶ But it will be seen from the cases already cited that this evidence is generally treated as *original* and *not secondary evidence*; and when the statutory requirements as to verification are complied with, it is admissible. Although other evidence might be produced of a more convincing character, its *weight is for the jury*. Books of account of either party, in which charges and entries have been originally made, are admissible in evidence, their credibility to be judged by the jury; but before such books are admissible in evidence, they are to be submitted to the inspection of the trial judge, accompanied with proof that the entries therein were made by the party contemporaneous with the transactions therein recorded, in due course of business; and if they exhibit a fair register of the daily business of the party, and appear to have been honestly and regularly kept, they should be submitted in evidence to be considered by the jury.¹⁷ In New York and Michigan, where the use of account-books as evidence was not the result of statutory regulations, but

¹⁴ See *Sickles v. Mather*, 20 Wend. (N. Y.) 72, 32 Am. Dec. 521; Cowen & Hill's Notes, 682.

¹⁵ *Larne v. Rowland*, 7 Barb. (N. Y.) 107; *Mathes v. Robinson*, 8 Met. (Mass.) 269, 41 Am. Dec. 505; *Weamer v. Juart*, 29 Pa. 257, 72 Am. Dec. 627; *Pratt v. White*, 132 Mass. 477.

¹⁶ *Eastman v. Moulton*, 3 N. H. 156; *Thomas v. Dyott*, 1 Nott & McC. (S. C.) 186; *Slade v. Nelson*, 20 Ga. 365; *Bracken v. Dillon*, 64 Ga. 243, 37 Am. Rep. 70.

¹⁷ *Lewis v. Meginniss*, 30 Fla. 419, 12 South. 19. See, also, cases already cited.

of usage sanctioned by the courts, the rule was declared that such evidence could not be received, unless the party had no clerk. This was on the theory that in such case only did it appear that there was no better evidence.¹⁸ In these states it is also necessary to prove, before books of account are admissible, that some of the articles charged have been delivered, and that the books are the account-books of the party. It should also be proved by those who have dealt with the party that he keeps fair and honest accounts.¹⁹ In most states by force of statutes or decisions of the courts, books of account, when kept in compliance with the rules above given, and properly verified, are *prima facie* evidence of the facts *therein* stated. The admissibility is, of course, for the court; the weight of the evidence for the jury. It is for them to place the value of the books as evidence according to the appearance of the entries, the manner of the bookkeeping, the general correctness of the charges, and the innumerable and varying circumstances called into existence by the character of the entry and the particular business transaction submitted to them.²⁰

§ 576 (591). Same—Defects in books as affecting admissibility and weight.—As we have stated, the question of *admissibility* or competency is *for the determination of the court*, upon the preliminary proof required by the statute or other law of the forum, while the *degree of credit* to

¹⁸ *Vosburgh v. Thayer*, 12 Johns. (N. Y.) 461; *Sickles v. Mather*, 20 Wend. (N. Y.) 72, 32 Am. Dec. 521; *McGoldrick v. Traphagen*, 88 N. Y. 334; *Jackson v. Evans*, 8 Mich. 476; *Smith v. Smith*, 163 N. Y. 168, 52 L. R. A. 545, 57 N. E. 300.

¹⁹ *Vosburgh v. Thayer*, 12 Johns. (N. Y.) 461; *Jackson v. Evans*, 8 Mich. 476; *Smith v. Smith*, 163 N. Y. 168, 52 L. R. A. 545, 57 N. E. 300. This is practically abrogated by statute in Michigan: *Seventh-Day*

Adv. Pub. Assn. v. Fisher, 95 Mich. 274, 54 N. W. 759.

²⁰ The opinions of Parker, C. J., in *Cummings v. Nichols*, 13 N. H. 420, 38 Am. Dec. 501, and Church, C. J., in *Butler v. Cornwall Iron Co.*, 22 Conn. 335, afford a good general sketch of the function of the jury in this regard. See, also, *Smith v. Law*, 47 Conn. 431; *Taylor v. Tucker*, 1 Ga. 231; *Hunter v. Kittredge*, 41 Vt. 359.

be given is *for the jury*.²¹ If the book is not found to be a book of original entries, or if for other reasons it fails to conform to the rules regulating its admission, the court will reject the evidence as incompetent. But if this is left in doubt, the book may be submitted to the jury with the instruction that it should be disregarded, if they find against it.²² Book entries are not necessarily excluded because there may be *alterations or erasures*²³ or *mistakes*, such as those in the name of the party.²⁴ These are matters which may be explained to the satisfaction of the court.²⁵ But if the entries show that they were all made at the same time, though relating to separate transactions,²⁶ or if by reason of alterations or erasures or other cause they have a suspicious and *fraudulent appearance*, and are not explained, they should be rejected,²⁷ although in some cases it has been held that books of this character should be submitted to the jury under proper instructions.²⁸ The book

²¹ Cogswell v. Dolliver, 2 Mass. 217, 3 Am. Dec. 45; Moody v. Roberts, 41 Miss. 74; Eyre v. Cook, 9 Iowa, 185; Maverick v. Maury, 79 Tex. 435, 15 S. W. 686; Webster v. San Pedro L. Co., 101 Cal. 326, 35 Pac. 871. See, also, § 575, *ante*.

²² Curren v. Crawford, 4 Serg. & R. (Pa.) 3; Churchman v. Smith, 6 Whart. (Pa.) 146, 36 Am. Dec. 211.

²³ Churchman v. Smith, 6 Whart. (Pa.) 146, 36 Am. Dec. 211; Kline v. Gundrum, 11 Pa. 242; Webster v. San Pedro L. Co., 101 Cal. 326, 35 Pac. 871; Gutherless v. Ripley, 98 Iowa, 290, 67 N. W. 109.

²⁴ Schettler v. Jones, 20 Wis. 412. See, also, Levine v. Lancashire Ins. Co., 66 Minn. 138, 68 N. W. 855.

²⁵ Caldwell v. McDermit, 17 Cal. 464; Doster v. Brown, 25 Ga. 24, 71 Am. Dec. 153; Cogswell v. Dolliver, 2 Mass. 217, 3 Am. Dec. 45; Pratt v. White, 132 Mass. 477; Campbell v. Holland, 22 Neb. 587, 35 N. W. 871; Churchman v. Smith, 6 Whart. (Pa.)

146, 36 Am. Dec. 211; McNulty's Appeal, 135 Pa. 210, 19 Atl. 936; Baldridge v. Penland, 68 Tex. 441, 4 S. W. 565; Bartlett v. Morgan, 4 Wash. 723, 31 Pac. 22. But where the interlineations are in respect to a matter which is not material, it will not militate against the admissibility of the books: Martin v. Victor etc. Mining Co., 18 Nev. 303, 3 Pac. 488.

²⁶ Davis v. Sanford, 9 Allen (Mass.), 216.

²⁷ Lovelock v. Gregg, 14 Colo. 53, 23 Pac. 86; Churchman v. Smith, 6 Whart. (Pa.) 146, 36 Am. Dec. 211; Cogswell v. Dolliver, 2 Mass. 217, 3 Am. Dec. 45; Cole v. Anderson, 8 N. J. L. 68; Thomas v. Dyott, 1 Nott & McC. (S. C.) 186; Caldwell v. McDermit, 17 Cal. 464; Cheever v. Brown, 30 Ga. 904; Davis v. Sanford, 9 Allen (Mass.), 216; Harrold v. Smith, 107 Ga. 849, 33 S. E. 640.

²⁸ Gosewich v. Zebbley, 5 Harr. (Del.) 124; Sargeant v. Pettibone, 1

may be admitted as to entries which are proved to be original, although other entries in the same book are not original,²⁹ unless the two classes of entries cannot be distinguished.³⁰ Irregularities in account-books sufficient to justify their exclusion must be gross and palpable.³¹ Books of account must, however, appear to embrace all of the items of account between the parties which are proper subjects of entry.³² The account-book must be introduced in evidence in its entirety.³³ Loose leaves or sheets or unconnected scraps of paper containing entries of the account cannot, ordinarily, be introduced in evidence.³⁴ Books of account in which some of the leaves have been cut or torn out are not competent evidence to prove an account;³⁵ though such books have been allowed in evidence, leaving

Aiken (Vt.), 355. While a fair book may strongly corroborate the testimony of a party, an unfair one may discredit his testimony: Walron v. Evans, 1 Dak. 11 (10), 46 N. W. 607.

²⁹ Ives v. Niles, 5 Watts (Pa.), 323; Wollenweber v. Ketterlinus, 17 Pa. 389. See, also, the late case of Di Palma v. Weinman, 16 N. M. 302, 121 Pac. 38.

³⁰ Vance v. Fearless, 1 Yeates (Pa.), 321; Kessler v. McConachy, 1 Rawle (Pa.), 435; Venning v. Hacker, 2 Hill (S. C.), 584.

³¹ Bush v. Fourcher, 3 Ga. App. 43, 59 S. E. 459.

³² Countryman v. Bunker, 101 Mich. 218, 59 N. W. 422; Dugan v. Longstaff, 52 Misc. Rep. 288, 102 N. Y. Supp. 1120.

³³ Mulloy v. Mulloy, 131 Mo. App. 654, 111 S. W. 843.

³⁴ Donaldson v. Donaldson, 237 Ill. 318, 86 N. E. 604; Carter v. Catchings (Miss.), 48 South. 515; Jones v. Jones, 21 N. H. 219; Lindenthal v. Hatch, 61 N. J. L. 29, 39 Atl. 662; Thomson v. McKelvey, 13 Serg. & R. (Pa.) 126; Queen City etc. Trust Co.

v. Reyburn, 163 Fed. 597. Yet in several instances separate sheets of paper containing accounts have been admitted in evidence: Taylor v. Tucker, 1 Ga. 231. The fly-leaf of a Bible containing only one account was held a sufficient book of account under a Missouri statute: Stephan v. Metzger, 95 Mo. App. 609, 69 S. W. 625. As to books of *old partnership* in connection with new, see Clark v. Gridley, 49 Cal. 105; as to one book only being kept which contained other memoranda, see Handy v. Smith, 77 Conn. 165, 58 Atl. 694. As to inadmissibility of book containing charges against one person over number of years without intervening charges, see Swing v. Sparks, 7 N. J. L. 59.

³⁵ Lovelock v. Gregg, 14 Colo. 53, 23 Pac. 86; Harrold v. Smith, 107 Ga. 849, 33 S. E. 640; Hartwell v. Rice, 67 Mass. 587; Robinson v. Hoyt, 39 Mich. 405; State v. Grant, 74 Mo. 33; Hough v. Doyle, 4 Rawle (Pa.), 291; Johnson v. Fry, 88 Va. 695, 12 S. E. 973, 14 S. E. 183.

the question of their credibility with the jury.³⁶ But the fact that a book is merely shop-worn and the covers and some outside leaves lost, there being nothing to indicate any fraud or purpose of destroying any of the entries, is not sufficient to exclude it. In an Illinois case³⁷ the court said: "The objection to their admission in this case was based upon the fact that said books were in a dilapidated condition. They had originally only paper covers, and the entries were mostly made in pencil. They had been shop-worn, had been used and handled in several lawsuits, and the outside covers and some outside pages had been lost, and a few interior leaves were gone. The threads binding the leaves together had in some cases become loosened, and plaintiff's daughter testified she had fastened some leaves together with pins in the exact position where they belonged in the book. Plaintiff produced his ledgers posted from said books, so that defendant might have the advantage of all credits, if any there were, upon the lost leaves. There was nothing to indicate there had been any fraud or any purpose to destroy entries, but only the natural results of hard usage upon books which were originally cheaply made. The reason for sustaining the objection seems to have been the possibility that there were credits to defendant upon such missing leaves, of which their loss would deprive her. We are of opinion that the possible loss of credits to defendant under the circumstances stated was not a sufficient reason for rejecting the entries so testified to

³⁶ Jones v. De Kay, 3 N. J. L. 955; McCluskey v. Falke, 4 Rob. (N. Y. Sup. Ct.) 87. In Jones v. De Kay, *supra*, the account-book offered was of a suspicious cast, and some leaves had been cut out. It was held it was admissible in evidence, and that the credit due it was for the determination of the jury, mainly on the ground that if an arbitrary doctrine of absolute exclusion were sustained, the acci-

dental loss of a single leaf from a book of original entries would absolutely destroy the value of the entire book as evidence, no matter how strongly the remaining parts of the book might be supported by the testimony of those who made the entries and sold and delivered the goods.

³⁷ Weigle v. Brautigam, 74 Ill. App. 285.

by plaintiff; that any objection based upon such possibility of the existence of credits on said leaves was sufficiently overcome by the production of the ledgers for the benefit of the defendant, and that plaintiff was not bound to preserve her credits upon his day-book. If any charges against defendant were upon such missing leaves, it is plaintiff, not defendant, who will be the loser. We are of opinion the condition of said books was not a justification for the exclusion of the entries so proved, but only a matter going to their weight and credibility with the jury. In a New Jersey case^{37a} the account-book offered was of a suspicious cast, and some leaves had been cut out. It was held it was admissible in evidence, and that the credit due it was for the determination of the jury. If the doctrine here contended for by appellee were sustained, the accidental loss of a single leaf from a book of original entries would absolutely destroy the value of the entire book as evidence, no matter how strongly the remaining parts of the book might be supported by the testimony of those who made the entries and sold and delivered the goods." The fact that some parol testimony is necessary in order to fully explain an account will not make it insufficient to be put in evidence.³⁸

§ 577 (592). Impeachment of books of account.—They must be produced in court.—It has sometimes been held that, where the statute provides that account-books, properly verified, are *prima facie* evidence of their contents, evidence cannot be received to impeach the general reputation of the party verifying them. This is on the theory that such testimony lessens the credibility which the statute gives to the books.³⁹ But in Pennsylvania, it has been held

^{37a} Jones v. De Kay, 3 N. J. L. 955.

³⁸ McMillan v. Insurance Co. of North America, 78 S. C. 433, 58 S. E. 1020, 1135.

³⁹ Wine v. Nickerson, 1 Wis. 1; Nickerson v. Morin, 3 Wis. 243. It was held in Tomlinson v. Borst, 30

Barb. (N. Y.) 42, that testimony of general immoral character was not competent to impeach books of account; as that a man was given to intemperance or licentiousness—conduct in no wise connected with his character as a business man.

that such testimony is admissible; that evidence may be received to the effect that the books of the party are notoriously unworthy of confidence, and that for the purpose of showing this fact *particular acts of irregularity* in keeping them may be shown.⁴⁰ In New York it has been held that it was competent for the court to hear anything proved which will show that the books are unworthy of credit; and if the proof sustains the objection, to reject them altogether, and leave the party to his common-law proof.⁴¹ In Mississippi, the rule is that the evidence to impeach books of accounts must be germane to the issue.⁴² And in other states, evidence of a general reputation for inaccuracy in his bookkeeping is not admissible against the party producing them.⁴³ In Texas it has been held permissible, when money had been paid and not credited, to give evidence as to the intemperateness of the defendant's bookkeeper to support an impeachment of the books.⁴⁴ The rule that makes shop-books evidence is founded in the necessities of justice. They are evidence manufactured by the shopkeeper himself, for his own purposes, and without any chance of supervision by his customer. In their best estate, therefore, it is proper to subject them, when offered in evidence, to severe scrutiny. But when they have acquired a general reputation for inaccuracy, when the shopkeeper has through fraud or carelessness made false entries or omitted true ones, so frequently as to destroy the confidence of his customers both in himself and his books, there can be no reason for insisting that a jury shall trust them. "How can private entries which a whole community have learned to discredit promote the ends of justice? They are no more worthy of

⁴⁰ Crouse v. Miller, 10 Serg. & R. (Pa.) 155; Barber v. Bull, 7 Watts & S. (Pa.) 391.

⁴¹ Larue v. Rowland, 7 Barb. (N. Y.) 107.

⁴² Hunter v. Wilkinson, 44 Miss. 721.

⁴³ Roberts v. Ellsworth, 11 Conn. 290; Hitt v. Slocum, 37 Vt. 524.

⁴⁴ Seiber v. Johnson Mercantile Co., 40 Tex. Civ. App. 600, 90 S. W. 516.

the confidence of a court and jury than a witness whose reputation for truth and veracity is impeached.”⁴⁵ The books must be *produced in court*, ready for the inspection of the adverse party in open court, so that their credibility may be tested by their appearance or by the cross-examination of the party.⁴⁶ When the book of original entries contains marks showing that items have been transferred to the ledger, the *ledger* must be *produced*, so that the other party may have the advantage of any items entered therein to his credit.⁴⁷ There is no necessity for the production of books of account, if the party can furnish *any other competent evidence*,⁴⁸ although under some circumstances the nonproduction of such evidence might lead to an unfavorable presumption.⁴⁹ In a Virginia case^{49a} the court said: “It is conceded that the admission of such evidence is in derogation of the ordinary rules governing the admissibility of evidence, and rests, as it has been said, upon ‘moral necessity,’ and the operation of the exception is limited to the character of the dealing to which the law has ascribed *prima facie* a destitution of the ordinary means of proof, viz., the daily sale and barter of merchandise and other commodities, the performance of services and letting articles for hire, and probably the payment from time to time of money placed on deposit—circumstances so frequent in occurrence and so trivial in their individual amount that the procurement of formal proof could not be expected, and would not compensate for the time neces-

⁴⁵ Weamer v. Juart, 29 Pa. 257, 72 Am. Dec. 627; Barnes v. Barnes, 106 Va. 319, 56 S. E. 172.

⁴⁶ Furman v. Peay, 2 Bail. (S. C.) 394; Nicholson v. Withers, 2 McCord (S. C.), 428, 13 Am. Dec. 739; Bugbee v. Allen, 56 Conn. 167, 14 Atl. 778.

⁴⁷ Prince v. Swett, 2 Mass. 569; Wisconsin Rev. Stats., § 4188. But except the day-book discloses reference or transference marks, there is no necessity to produce more

books than suffice, except under notice to produce: Tindall v. McIntyre, 24 N. J. L. 147.

⁴⁸ Cambioso v. Maffett, 2 Wash. C. C. 98, Fed. Cas. No. 2330; Nicholson v. Withers, 2 McCord (S. C.), 428, 13 Am. Dec. 739; Leavensworth v. Phelps, Kirby (Conn.), 71; Palmer v. Green, 6 Conn. 14; Whiting v. Corwin, 5 Vt. 451.

⁴⁹ Palmer v. Green, 6 Conn. 14.

^{49a} Barley v. Byrd, 95 Va. 316, 28 S. E. 329.

sary for the purpose.” We have already dealt with the books of corporations,⁵⁰ but a slight distinction drawn in a recent California case⁵¹ calls for record. In that case the books of a corporation had been admitted over objection, and the court, after dealing with the conditions under which the ordinary business man could avail himself of the “shop-book” rule, said: “We think, however, that a different rule should be applied to the books here under consideration from that which is applied to the books of a party to the litigation producing them to serve his own purposes and aid his own claim. The exhibits here admitted are the records of the business transactions of a corporation required by law to be kept by all corporations for profit.⁵² They constitute the ‘memory’ of the transactions of the corporation. Having been produced as the regularly kept and original books of the corporation, identified as such by their proper custodians, they are admissible in evidence.⁵³ The exhibits were, therefore, entitled to be admitted upon the preliminary proof given.” In the one case the books are kept for convenience; in the other by compulsion of law. In the one case the trader need not keep books unless he chooses if he can prove his claim in any other way—in the case of the corporation the books are kept in compliance with the law of the country.

§ 578 (593, 594). **Scientific books.**—According to the clear weight of authority, scientific books and treatises cannot be received as evidence of the matters or opinions which they contain.⁵⁴ Among other objections which have

⁵⁰ §§ 516–518, *ante*.

⁵¹ Hurwitz v. Gross, 5 Cal. App. 614, 91 Pac. 109.

⁵² Civ. Code, § 377.

⁵³ City Sav. Bank v. Enos, 135 Cal. 167, 67 Pac. 52.

⁵⁴ Lilley v. Parkinson, 91 Cal. 655, 27 Pac. 1091; People v. Golden-son, 76 Cal. 328, 19 Pac. 161; Gallagher v. Market St. Ry. Co., 67 Cal.

13, 56 Am. Rep. 713, 6 Pac. 869; Cook v. Coffey, 103 Ga. 384, 30 S. E. 27; Weyh v. Chicago City R. Co., 148 Ill. App. 165; Bloomington v. Shrock, 110 Ill. 219, 51 Am. Rep. 679; Epps v. State, 102 Ind. 539, 1 N. E. 491; Bixby v. Omaha etc. Bridge Co., 105 Iowa, 293, 67 Am. St. Rep. 299, 43 L. R. A. 533, 75 N. W. 182; State v. Baldwin, 36 Kan.

led the courts to reject books of this character as evidence is the fact that opinions on many of the questions of philosophy and science are so constantly undergoing change that it would be impossible to know whether the author still entertains the same views. Even a second edition of the work of the same author is so changed by the subsequent

1, 12 Pac. 318; *Harper v. Weikel*, 28 Ky. Law Rep. 650, 89 S. W. 1125; *Ware v. Ware*, 8 Me. 42; *Davis v. State*, 38 Md. 15; *Commonwealth v. Marzynski*, 149 Mass. 68, 21 N. E. 228; *Commonwealth v. Brown*, 121 Mass. 69; *Hall v. Murdock*, 114 Mich. 233, 72 N. W. 150; *People v. Hall*, 48 Mich. 482, 42 Am. Rep. 477; 12 N. W. 665; *Tucker v. Donald*, 60 Miss. 460, 45 Am. Rep. 416; *Macdonald v. Metropolitan St. R. Co.*, 219 Mo. 468, 16 Ann. Cas. 810, 118 S. W. 78; *Van Skike v. Potter*, 53 Neb. 28, 73 N. W. 295; *Burnham v. Stillings*, 76 N. H. 122, 79 Atl. 987; *Ordway v. Haynes*, 50 N. H. 159; *Pahl v. Troy City R. Co.*, 81 App. Div. 308, 81 N. Y. Supp. 46; *Huffman v. Click*, 77 N. C. 55; *Scott v. Astoria R. Co.*, 43 Or. 26, 99 Am. St. Rep. 710, 62 L. R. A. 543, 72 Pac. 594; *State v. O'Brien*, 7 R. I. 336; *State v. Coleman*, 20 S. C. 441; *Brady v. Shirley*, 14 S. D. 447, 85 N. W. 1002; *Missouri etc. R. Co. v. Graves*, 57 Tex. Civ. App. 395, 122 S. W. 458; *Kreuziger v. Chicago etc. R. Co.*, 73 Wis. 158, 40 N. W. 657; *Stilling v. Town of Thorp*, 54 Wis. 528, 41 Am. Rep. 60, 11 N. W. 906; *Collier v. Simpson*, 5 Car. & P. 73; *Union Pac. R. Co. v. Yates*, 79 Fed. 584, 40 L. R. A. 553, 25 C. C. A. 103. See notes to *Ashworth v. Kittridge*, 59 Am. Dec. 180-187; *Union Central Ins. Co. v. Cheever*, 38 Am. Rep. 578; *Stilling v. Town of Thorp*, 41 Am. Rep. 61; and *Union Pac. Ry. v. Yates*, 40 L.

R. A. 553-575; *Rex v. Taylor*, 13 Cox C. C. 77. This rule has been applied to *cyclopedias*: *Whitton v. Albany Ins. Co.*, 109 Mass. 24; *scientific books* on minerals and ores: *New Jersey Zinc & I. Co. v. Lehigh Zinc & I. Co.*, 59 N. J. L. 189, 35 Atl. 915; *engravings in medical works*: *Ordway v. Haynes*, 50 N. H. 159; books known as *bank note detectors*: *Payson v. Everett*, 12 Minn. 216; books on *agriculture*: *Darby v. Ouseley*, 1 Hurl. & N. 12, 15 L. J. Ex. 227, 2 Jur., N. S., 497; books on veterinary science: *Brady v. Shirley*, 14 S. D. 447, 85 N. W. 1002; and it has been held that *medical works* are not admissible as evidence on questions of insanity: *Commonwealth v. Wilson*, 1 Gray (Mass.), 337; *malpractice*: *Collier v. Simpson*, 5 Car. & P. 73; or *homicide*: *Boyle v. State*, 57 Wis. 472, 46 Am. Rep. 41, 15 N. W. 827; or for the purpose of determining whether certain stains are blood stains: *Commonwealth v. Sturtivant*, 117 Mass. 122, 19 Am. Rep. 401; or on questions on nervous or spinal diseases: *Union Pac. Ry. Co. v. Yates*, 79 Fed. 584, 40 L. R. A. 553, 25 C. C. A. 103; or as to treatment of fractured bones: *Van Skike v. Potter*, 53 Neb. 28, 73 N. W. 295. See *Cranfill v. Hayden*, 22 Tex. Civ. App. 656, 55 S. W. 805 (parliamentary authors); *Spalding v. Hedges*, 2 Pa. 240 (gazetteer extracted from "Universal Gazetteer.") On "Medical Books as Evidence," see note to *Etzkorn v. Oelwein*, 19 Ann. Cas. 1002.

discovery and grouping together of new facts, that what appeared to be a logical deduction in the first edition becomes an unsound one in the next. So that the same author at one period may be cited against himself at another. The authors of such works do not write under oath; the books themselves are therefore often speculative—sometimes mere compilations, the lowest form of secondary evidence; and as the authors cannot be examined under oath, the authorities on which they rely cannot be investigated, nor their process of reasoning be tested by cross-examination, such writings are nothing more nor less than hearsay proof of that which living witnesses could be produced to prove.⁵⁵ Perhaps the most serious objection is that they are statements wanting the sanction of an oath; and the statement thus proposed is made by one not present and not liable to cross-examination. If the same author were cross-examined, and called to state the grounds of his opinion, he might himself alter or modify it, and it would be tested by a comparison with the opinions of others. Medical authors, like writers in other departments of science, have their various and conflicting theories, and often sustain and defend them with ingenuity. But as the whole range of medical literature is not open to persons of common experience, a passage may be found in one book favorable to a particular opinion, when perhaps the same opinion may have been vigorously contested, and perhaps triumphantly overthrown, by other medical authors, but authors whose works would not be likely to be known to counsel or client, or to court or jury. Besides, medical science has its own nomenclature, its technical terms and words of art, and also common words used in a peculiar manner, distinct from their received meaning in the general use of the language. From these and other causes, a person not versed in medical literature, though having a good knowledge of the general use of the English language,

⁵⁵ *Huffman v. Chick, supra*. See, also, to the same effect, *Lawson Exp. Ev.* 170.

would be in danger, without an interpreter, of misapprehending the true meaning of the author. Whereas a medical witness would not only give the fact of his opinion, and the grounds on which it is formed, with the sanction of his oath, but would also state and explain it in language intelligible to men of common experience.⁵⁶ In a well-known Michigan case^{56a} Campbell, J., says: "Scientific or expert testimony must be given by living witnesses, who can be cross-examined concerning their means of knowledge, and can explain, in language open to general comprehension, what is necessary for the jury to know. The only legal reason for allowing the evidence of opinions is found in the presumption that an ordinary jurymen or other person without special knowledge could not understand the bearing of facts that need interpretation. Medical books are not addressed to common readers, but require particular knowledge to understand them. Everyone knows the inability of ordinary persons to understand or discriminate between symptoms and groups of symptoms, which can always be described to those who have not seen them, and which, with slight changes and combinations, mean something very different from what they mean in other cases. The cases must be very rare in which any but an educated physician could understand detached passages at all, or know how much credit was due to either the author in general or to particular parts of his book. If jurors could be safely trusted with the interpretation of such books, it is hard to see upon what principle living witnesses would be required. Scientific men are supposed to be able, from their study and experience, to give the general results accepted by the scientific world, and the extent of their knowledge is tested by their personal examination. But the continued changes of view brought about by new dis-

⁵⁶ Shaw, C. J., in *Ashworth v. Kittridge*, 12 Cush. (Mass.) 193, 59 Am. Dec. 178, and note. See, also, *Fowler v. Lewis*, 25 Tex. Supp. 380;

Mutual Life Ins. Co. v. Bratt, 55 Md. 200.

^{56a} *People v. Hall*, 48 Mich. 482, 42 Am. Rep. 577.

coveries in most matters of science, and the necessary assumption by scientific writers of such technical knowledge in their readers, render the use of such works before juries, especially in detached portions and selected passages, not only misleading, but dangerous. The weight of authority, as of reason, is against the reception." The reasons on which testimony of this character is excluded have far less weight where the inquiry relates to the *exact sciences*; and in numerous instances the rule has been relaxed in such cases. To this class belong *tables* of logarithms, of astronomical calculations, of weights and measures and of interest.⁵⁷ The rule is the same as to annuity tables;⁵⁸ the Carlisle and Northampton tables, properly authenticated, are often received as evidence of the probable duration of human life.⁵⁹ But they are not necessarily binding upon the court, especially if their

⁵⁷ *Shover v. Myrick*, 4 Ind. App. 7, 30 N. E. 207; *Tucker v. Donald*, 60 Miss. 460, 45 Am. Rep. 416.

⁵⁸ *Vicksburg Ry. Co. v. Putnam*, 118 U. S. 545, 30 L. Ed. 257, 7 Sup. Ct. Rep. 1; *McKeigue v. Janesville*, 68 Wis. 50, 31 N. W. 298; *Arkansas M. R. Co. v. Griffith*, 63 Ark. 491, 39 S. W. 550; *Keast v. Santa Ysabel G. M. Co.*, 136 Cal. 256, 68 Pac. 771; *Joliet v. Blower*, 155 Ill. 414, 40 N. E. 619; *Campbell v. York*, 172 Pa. 205, 33 Atl. 879; *Crouse v. Railway Co.*, 102 Wis. 196, 78 N. W. 446; *Reynolds v. Narragansett El. L. Co.*, 26 R. I. 457, 59 Atl. 393; tables in *cyclopedias*: *Gorman v. Minneapolis Ry. Co.*, 78 Iowa, 509, 43 N. W. 303; in other accepted authorities: *Pearl v. Railway Co.*, 115 Iowa, 536, 88 N. W. 1078.

⁵⁹ *Schell v. Plumb*, 55 N. Y. 592; *People v. Security Life Ins. etc. Co.*, 78 N. Y. 114, 34 Am. Rep. 522; *Central R. R. v. Richards*, 62 Ga. 306; *Gorman v. Minneapolis &*

St. L. Ry. Co., 78 Iowa, 509, 43 N. W. 303; *Worden v. Humeston & S. Ry. Co.*, 76 Iowa, 310, 14 N. W. 26; *City of Lincoln v. Smith*, 28 Neb. 762, 45 N. W. 41; *Birmingham M. R. Co. v. Wilmer*, 97 Ala. 165, 11 South. 886; *Western & A. R. Co. v. Cox*, 115 Ga. 715, 42 S. E. 74; *Friend v. Ingersoll*, 39 Neb. 717, 58 N. W. 281; *Camden & A. R. Co. v. Williams*, 61 N. J. L. 646, 40 Atl. 634; *Atlanta Ry. & Power Co. v. Monk*, 118 Ga. 449, 45 S. E. 494. See notes to *Union Pac. Ry. v. Yates*, 40 L. R. A. 553, and *Notto v. Atlantic City R. Co.*, 17 L. R. A., N. S., 1138. See note on "Admissibility, in Action for Death by Wrongful Act, of Mortality Tables to Show Probable Duration of Life," to *Calvert v. Springfield Electric Light etc. Co.*, 12 Ann. Cas. 425. See, also, the late case of *Rio Grande etc. R. Co. v. Nichols*, 52 Colo. 300, 123 Pac. 318.

adoption would work manifest injustice;⁶⁰ and in an action for personal injury, where the person injured is living, they are not competent.⁶¹ On the same principle *almanacs* have been admitted to prove at what hour the sun or moon rose at a given time.⁶² Although, since this is a fact of which the court will take judicial notice, the evidence may be unnecessary,⁶³ or it may be deemed as used for the purpose of refreshing the memory of the court and jury.⁶⁴ In Alabama the rule differs from that obtaining in other jurisdictions, and it is held there that the standard medical books are competent proof of the statements therein contained, when relevant and material to the issue.⁶⁵ In the face of the distinction so made in that state, the following extract from the opinion in one of the cases cited^{65a} will be of interest: "We think that medical authors, whose

⁶⁰ Shippen's Appeal, 2 Wkly. N. Cas. (Pa.) 468.

⁶¹ Nelson v. Chicago, R. I. & P. R. Co., 38 Iowa, 564; Chicago, B. & Q. R. Co. v. Johnson, 36 Ill. App. 564. Admitted: Arkansas M. R. Co. v. Griffith, 63 Ark. 491, 39 S. W. 550; Campbell v. York, 172 Pa. 205, 33 Atl. 879; Western & A. R. Co. v. Cox, 115 Ga. 715, 42 S. E. 74; Friend v. Ingersoll, 39 Neb. 717, 58 N. W. 281. *Dictionaries* are often made use of: Dantzler v. D. C. & I. Co., 101 Ala. 309, 22 L. R. A. 361, 14 South. 10; State v. Main, 69 Conn. 123, 62 Am. St. Rep. 30, 36 L. R. A. 623, 37 Atl. 80; Parker v. Orr, 158 Ill. 609, 30 L. R. A. 227, 41 N. E. 1002; Koechl v. United States, 84 Fed. 448, 28 C. C. A. 458; Kimball v. Carter, 95 Va. 77, 38 L. R. A. 570, 27 S. E. 823. Admissibility of dictionaries in evidence, see note to State v. Wilhite, 11 Ann. Cas. 182.

⁶² State v. Morris, 47 Conn. 179; Munshower v. State, 55 Md. 11, 39 Am. Rep. 414; Mobile Ry. Co. v. Ladd, 92 Ala. 287, 9 South. 169;

Wilson v. Van Leer, 127 Pa. 371, 14 Am. St. Rep. 854, 17 Atl. 1097. See note to Union Pac. R. Co. v. Yates, 40 L. R. A. 553.

⁶³ De Armond v. Neasmith, 32 Mich. 231; People v. Chee Kee, 61 Cal. 404.

⁶⁴ State v. Morris, 47 Conn. 179. These matters are discussed in the chapter on "Judicial Notice," §§ 105-134, *ante*.

⁶⁵ Stoudenmeier v. Williamson, 29 Ala. 558; Merkle v. State, 37 Ala. 139; Bales v. State, 63 Ala. 30; Oakley v. State, 135 Ala. 29, 33 South. 693; Birmingham R. etc. Co. v. Moore, 148 Ala. 115, 42 South. 1024. See, also, Timothy v. State, 130 Ala. 68, 30 South. 339, in which a medical work offered to prove the distance at which pistol shots leave powder-marks was held inadmissible on the plain ground that such facts did not pertain to the science of medicine or surgery.

^{65a} Stoudenmeier v. Williamson, *supra*.

books are admitted or proven to be standard works with that profession, ought to be received in evidence. Should such works be obscure to the uninitiated, or should they contain technicalities, or phrases not understood by the common public, proper explanation should be offered, lest the jury be thereby misled. That was done in this case. The opinions of physicians, as experts, touching disease and the science of medicine, are, under all the authorities, admissible in evidence. If we lay down a rule which will exclude from the jury all evidence on questions of science and art, except to the extent that the witness has himself discovered or demonstrated the correctness of what he testifies to, we certainly restrict the inquiry to very narrow limits. The brief period of human life will not allow one man, from actual observation and experience, to acquire a complete knowledge of the human system, and its diseases. Professional knowledge is, in a great degree, derived from the books of the particular profession. In every step the practitioner takes he is, perhaps, somewhat guided by the opinions of his predecessors. His own scientific knowledge is, from the necessities of the case, materially formed and molded by the experience and learning of others. Indeed, much of the knowledge we have upon all subjects, except objects of sense, is derived from books and our associations with men."

§ 579 (595). Use of scientific books in the examination of experts.—It is generally conceded, however, that where experts are examined as to questions of science, they may give their opinions and the ground and reason therefor, although they state that such opinions are in some degree founded upon treatises on the subject.⁶⁶ But it has been held inadmissible for such a witness to read to the jury

⁶⁶ Collier v. Simpson, 5 Car. & P. 73; Carter v. State, 2 Ind. 617; State v. Baldwin, 36 Kan. 1, 12 Pac. 318; State v. Wood, 53 N. H. 484;

Beck's Med. Jur. 918, 919. As to cross-examination of experts, see § 391, *ante*.

from books, although he concurs in the views expressed,⁶⁷ or even to state the contents of such books,⁶⁸ though he may refer to them to refresh his memory.⁶⁹ On the examination of an expert, counsel may use the statements of a physician of high standing in a medical journal for the purpose of framing questions to be asked the witness as to his own opinions.⁷⁰ And a technical medical question asked an expert witness, in which the language of a standard medical authority is substantially repeated, is not thereby rendered objectionable.⁷¹ A scientific witness may refresh his recollection by reference to standard authorities prepared by persons of acknowledged ability. But the opinion which he gives must be his own, independent of those of the author of the work used.⁷² And when an expert has given an opinion and cited a treatise as his authority, the book cited may be offered in evidence by the adverse party as impeaching testimony.⁷³ But unless the book is referred to on *cross-examination*, it cannot be used for this purpose.⁷⁴ It would be a mere evasion of the general rule

⁶⁷ Commonwealth v. Sturtivant, 117 Mass. 122, 19 Am. Rep. 401.

⁶⁸ Boyle v. State, 57 Wis. 472, 46 Am. Rep. 41, 15 N. W. 827.

⁶⁹ Sussex Peerage Case, 11 Clark & F. 114, 8 Eng. Reprint, 1034; People v. Wheeler, 60 Cal. 581, 44 Am. Rep. 70; State v. Baldwin, 36 Kan. 1, 12 Pac. 318.

⁷⁰ State v. Coleman, 20 S. C. 441.

⁷¹ Tompkins v. West, 56 Conn. 478, 16 Atl. 237.

⁷² State v. Baldwin, 36 Kan. 1, 12 Pac. 318; Huffman v. Click, 77 N. C. 55. For further illustrations see the valuable note to Union Pac. R. Co. v. Yates, 40 L. R. A. 553, from which we have made extracts. On the use of scientific books in connection with examination of expert witness, see note to Macdonald v.

Metropolitan St. Ry. Co., 16 Ann. Cas. 818.

⁷³ Pinney v. Cahill, 48 Mich. 584, 12 N. W. 862; Ripon v. Bittel, 30 Wis. 614; Connecticut Mut. Life Ins. Co. v. Ellis, 89 Ill. 516; People v. Goldenson, 76 Cal. 328, 19 Pac. 161; Hess v. Lowery, 122 Ind. 225, 17 Am. St. Rep. 355, 7 L. R. A. 90, 23 N. E. 156; Byers v. Nashville etc. R. Co., 94 Tenn. 345, 29 S. W. 128; Davis v. State, 38 Md. 15; State v. O'Brien, 7 R. I. 336. An expert witness may state that his opinion is derived from standard works, but if he fails to remember what particular books he has read or culled his authority from, there is no way to contradict the assertion he makes: People v. Vanderhoof, 71 Mich. 158, 39 N. W. 28.

⁷⁴ Knoll v. State, 55 Wis. 249, 42 Am. Rep. 704, 12 N. W. 369.

under discussion if counsel were allowed on cross-examination to read to the witness portions of such works, and to ask if he concurred in or differed from the opinions there expressed; hence this is not allowed.⁷⁵ We have already alluded to the Alabama rule, and in Iowa, Greene, J.,⁷⁶ adduces a persuasive argument in favor of allowing the books to be read. He says: "An appeal to medical authorities has been disallowed by some of the courts in this country; though physicians, when testifying, are permitted to refer to medical authors, and to quote their opinions from memory. Being permitted to refer to and quote authors, we can see no good reason why they may not read the views and opinions of distinguished authors. The opinions of an author, as contained in his works, we regard as better evidence than the mere statement of those opinions by a witness, who testifies as to his recollection of them from former reading. Is not the latter *secondary* to the former? On the whole, we think it the safest rule to admit standard medical books as evidence of the author's opinions upon questions of medical skill or practice, involved in a trial. This rule appears to us the most accordant with well-established principles of evidence." This suggested innovation has, however, not found support.⁷⁷ In a few states, *statutes*

⁷⁵ *Marshall v. Brown*, 50 Mich. 148, 15 N. W. 55; *People v. Millard*, 53 Mich. 63, 18 N. W. 562; *Bloomington v. Shrock*, 110 Ill. 219, 51 Am. Rep. 679; *State v. Winter*, 72 Iowa, 627, 34 N. W. 475.

⁷⁶ *Bowman v. Woods*, 1 G. Greene (Iowa), 441. In the case of *Collier v. Simpson*, 5 Car. & P. 73, it was decided that medical books are not admissible in evidence, though professional witnesses may be asked the grounds of their judgment and opinion, which might in some degree be founded on these books, as a part of their general knowledge. Greene, J., in *Bowman v. Woods*, *supra*, said that Judge Abbott, on the trial of one

accused of poisoning, refused an appeal to the works of Thénard, and said: "We cannot take the fact from any publication; we cannot take the fact as related by any stranger." But in the trial of Spencer Cooper, the court permitted authorities to be read: Gay's *Forensic Medicine*, 11. Dr. Beck, in 2 *Medical Jurisprudence*, page 666, states that in this country no objection has ever been made to the introduction of authority, or the observation of others, as testimony by medical men. In this, however, as Greene, J., says, the learned doctor is mistaken.

⁷⁷ See § 580, *post*.

have been enacted extending the common-law rule on this subject. But they have been strictly construed, and in a California case where it was claimed that, under the statute making historical works and books of science and art *prima facie* evidence of facts of general notoriety and interest, a certain medical work should be received, the court held that the statutes did not apply to works of this character, but to those within the range of exact sciences.⁷⁸ Scientific books which are not admissible in evidence on direct examination cannot be admitted *on cross-examination*, where their introduction is not for the purpose of the direct contradiction of something asserted by the witness, but simply to prove a contrary theory.⁷⁹ And a physician, who stated on direct examination that he derived his knowledge of a particular subject from reading medical authors, may be cross-examined as to his general reading, not by putting the books in evidence, but by inquiries whether he had not found particular theories laid down in them conflicting with the theory he had advanced as the result of his reading.⁸⁰ Where the expert does not base his opinion upon a particular authority, the weight of authority is in favor of allowing the opposite party to read an excerpt from a scientific authority and ask the expert on cross-examination as to his views concerning such excerpt, for the purpose of testing the knowledge of the expert and determining the weight to

⁷⁸ *Gallagher v. Market St. Ry. Co.*, 67 Cal. 13, 56 Am. Rep. 713, 6 Pac. 869; *Stoudenmeier v. Williamson*, 29 Ala. 558; *Bowman v. Woods*, 1 G. Greene (Iowa), 441; *Quackenbush v. Chicago Ry. Co.*, 73 Iowa, 458, 35 N. W. 523; *Burg v. Railway Co.*, 90 Iowa, 106, 48 Am. St. Rep. 419, 57 N. W. 680; *Bixby v. Omaha etc. Bridge Co.*, 105 Iowa, 293, 67 Am. St. Rep. 299, 43 L. R. A. 533, 75 N. W. 182; *State v. Peterson*, 110 Iowa, 647, 82 N. W. 329.

⁷⁹ *Bloomington v. Shrock*, 110

Ill. 219, 51 Am. Rep. 679. But reference to books of approved authority upon the subject under investigation is proper on cross-examination in order to test the learning of the witness: *Hess v. Lowrey*, 122 Ind. 225, 17 Am. St. Rep. 355, 7 L. R. A. 90, 23 N. E. 156; *State v. Winter*, 72 Iowa, 627, 34 N. W. 475.

⁸⁰ *State v. Wood*, 53 N. H. 484; *Hutchinson v. State*, 19 Neb. 262, 27 N. W. 113; *State v. Winter*, 72 Iowa, 627, 34 N. W. 475; *Connecticut Mut. Life Ins. Co. v. Ellis*, 89 Ill. 516.

be given to his testimony.⁸¹ It is perfectly proper to ask him whether or not the opinion he has expressed agrees with the opinion of other people who are conceded to be learned upon the same subject, because, if an expert witness admitted that the opinion which he expressed was contrary to the opinion which was held upon the same subject by other men who were acquainted with the same science, it might, unless the reasons which he gave for his opinion were satisfactory, tend strongly to detract from the weight which that opinion would otherwise receive. For the same reason, if the witness admitted that text-writers of acknowledged authority had expressed opinions contrary to that one which he gave in regard to the matter under examination, that might go to detract from the weight to be given to such testimony.⁸² As was well said in a Kentucky case:^{82a} "We think such must be the sound view, otherwise an ignoramus in a profession might, by an assertion of learning, declare the most absurd theories to be the teachings of the science of which he was the professed expert, and, when pressed upon cross-examination as to either his own experience or the basis of his learning, would be enabled to hide behind the formidable name of some standard author, and thus foist upon the jury a most hurtful falsehood as a scientific deduction, asserted by the most eminent in the profession, solemnly declared and promulgated by him for the guidance of his brethren and the service of

⁸¹ *Fisher v. Southern Pac. R. Co.*, 89 Cal. 399, 26 Pac. 894; *People v. Bowers*, 1 Cal. App. 501, 82 Pac. 553; *Hess v. Lowrey*, 122 Ind. 225, 17 Am. St. Rep. 355, 7 L. R. A. 90, 23 N. E. 156; *Louisville etc. R. Co. v. Howell*, 147 Ind. 266, 45 N. E. 584; *Williams v. Nally (Ky.)*, 45 S. W. 874; *Egan v. Dry Dock etc. R. Co.*, 12 App. Div. 556, 42 N. Y. Supp. 188; *McEvoy v. Lommel*, 78 App. Div. 324, 80 N. Y. Supp. 71; *Byers v. Nashville etc. R. Co.*, 94 Tenn. 345, 29 S. W. 128; *Sale v. Eichberg*,

105 Tenn. 333, 52 L. R. A. 894, 59 S. W. 1020; *Gulf etc. R. Co. v. Farmer*, 102 Tex. 235, 115 S. W. 260; *Galveston etc. R. Co. v. Hanway (Tex. Civ. App.)*, 57 S. W. 695; *Clukey v. Seattle Electric Co.*, 27 Wash. 70, 67 Pac. 379; *Davis v. United States*, 165 U. S. 373, 41 L. Ed. 750, 17 Sup. Ct. Rep. 360.

⁸² *Egan v. Dry Dock etc. R. Co.*, 12 App. Div. 556, 42 N. Y. Supp. 188.

^{82a} *Clark v. Commonwealth*, 111 Ky. 443, 63 S. W. 740.

mankind. Therefore, in a case where such a witness makes such an attempt, it is just and reasonable that the opposite side should be permitted to test the truthfulness of his statement, and expose his ignorance or mendacity by either compelling him to admit upon an inspection of the authority that it does not sustain his views, or by reading the authority to the jury to prove that it does not, and that the witness, either through ignorance or base motive, has falsely deposed." There is a marked difference between reading what is in a book as evidence to a jury, and testing a witness when examining him by reading to him from the same book. In the one case, you are reading as evidence what, after all, is only the opinion of a scholar, however learned he may be, without an opportunity to cross-examine him. In the latter, you are testing the opinion of one expert by the writings of another, admitted to be of high authority. It may be that the author's views are placed before the jury as effectually in one way as in the other: one way is objectionable, and the other is not.⁸³ In several jurisdictions, however, it is held to be improper, when an expert has not based his opinion upon a particular authority, for the cross-examining counsel to read from a scientific work and ask the witness his views concerning the passage read,⁸⁴ or to ask a witness as to the opinions of

⁸³ Tuck, J., in *Brownell v. Black*, 31 N. Brunsw. 594, cited more fully in the note to *MacDonald v. Metropolitan St. R. Co.*, 16 Ann. Cas. 818, on the use of scientific books in connection with the examination of expert witnesses.

⁸⁴ *Bloomington v. Shrock*, 110 Ill. 219, 51 Am. Rep. 679; *Forest City Ins. Co. v. Morgan*, 22 Ill. App. 198; *Marshall v. Brown*, 50 Mich. 148, 15 N. W. 55; *People v. Millard*, 53 Mich. 63, 18 N. W. 562; *Hall v. Murdock*, 114 Mich. 233, 72 N. W. 150; *Foley v. Grand Rapids etc. R. Co.*, 157 Mich. 67, 121 N. W. 257; *Butler v. South Carolina etc. R. Ex-*

tension Co., 130 N. C. 15, 40 S. E. 770; *Mitchell v. Leech*, 69 S. C. 413, 104 Am. St. Rep. 811, 66 L. R. A. 723, 48 S. E. 290. In *Bloomington v. Shrock* the court said: "Where a witness says a thing or a theory is so because a book says so, and the book, on being produced, is discovered to say directly to the contrary, there is a direct contradiction which anybody can understand. But where a witness simply gives his opinion as to the proper treatment of a given disease or injury, and a book is produced recommending a different treatment, at most the repugnance is not of fact, but of the-

other experts contained in books, for the reason that if it is incompetent to use the books, it is much less competent to prove the contents of such books by witnesses testifying from memory.⁸⁵ Questions put to a medical expert on cross-examination, as to extracts from works which he claims to have read, however, should be strictly limited to the one purpose of testing his competency as an expert, and the value of his opinion.⁸⁶ Great care should be taken by the court to confine it within reasonable limits, and see that the quotations read to the witnesses are so fairly selected as to present the author's views on the subject of the examination.⁸⁷

§ 580 (596). Reading from scientific books in argument to the jury.—We have dealt in the preceding sections with the use of scientific books to aid in the examination or cross-examination of witnesses and of the general inadmissibility of such books as evidence. We have now to consider their use in the argument of counsel and in their addresses to the jury. Although it is the general rule that books of the character under discussion cannot be read in evidence, it is a practice in some states, and one sustained by very respectable authority, to allow attorneys during their argument to

ory; and any number of additional books expressing different theories would obviously be quite as competent as the first. But since the books are not admissible as original evidence in such cases, it must follow that they are not admissible on cross-examination, where their introduction is not for the direct contradiction of something asserted by the witness, but simply to prove a contrary theory."

⁸⁵ *Chicago City R. Co. v. Douglas*, 104 Ill. App. 41; *State v. Blackburn*, 136 Iowa, 743, 114 N. W. 531. See, also, *Vaughan's Seed Store v. Stringfellow*, 56 Fla. 708 48 South. 410; *State v. Porter*, 34 Iowa, 131;

Cronk v. Wabash R. Co., 123 Iowa, 349, 98 N. W. 884; *State v. Blackburn* (Iowa), 110 N. W. 275.

⁸⁶ *Fisher v. Southern Pac. R. Co.*, 89 Cal. 399, 26 Pac. 894.

⁸⁷ *Connecticut Mut. Life Ins. Co. v. Ellis*, 89 Ill. 516. The following, in addition to the case last cited, will be found to contain excellent illustrations of the method of cross-examination: *Bloomington v. Shroek*, 110 Ill. 219, 51 Am. Rep. 679; *Fisher v. Southern Pac. R. Co.*, 89 Cal. 399, 26 Pac. 894; *Davis v. State*, 38 Md. 15; *Fox v. Peninsular etc. Works*, 84 Mich. 676, 48 N. W. 203.

the jury to read from books which have been proved to be standard works upon the subject.⁸⁸ When books of science or general literature are thus used during the argument of counsel, they are merely adopted as the argument of counsel. They are used by way of *illustration*, and cannot be used for the purpose of proving facts.⁸⁹ It is a qualification of the rule in those jurisdictions where the practice is allowed that the court may determine in its discretion whether the matter proposed to be read by way of argument is pertinent to the subject under discussion.⁹⁰ In a Texas case⁹¹ it was said that the privilege of counsel in their address to the jury to read from legal authors or from works of general science extracts pertinent to the case in support of their argument is a valuable one, though susceptible of abuse, and ought not to be abridged. In some jurisdictions the practice of permitting counsel, while addressing the jury, to read extracts from law books and from scientific works as a part of their argument, is regarded as a matter which rests entirely in the sound discretion of the trial judge.⁹² It is undoubtedly a very serious objection to this practice that, by it, the same result

⁸⁸ *Reg. v. Courvosier*, 9 Car. & P. 362; *Cory v. Silcox*, 6 Ind. 39; *Harvey v. State*, 40 Ind. 516; *State v. Hoyt*, 46 Conn. 330; *State v. O'Neil*, 51 Kan. 651, 24 L. R. A. 555, 33 Pac. 287; *Legg v. Drake*, 1 Ohio St. 286; *Union Central Life Ins. Co. v. Cheever*, 36 Ohio St. 201, 38 Am. Rep. 573; *Merkle v. State*, 37 Ala. 139; *Cavanah v. State*, 56 Miss. 299. For numerous illustrations see *Lawson*, Ex. Ev. 179.

⁸⁹ *Darby v. Ousley*, 1 Hurl. & N. 12, 25 L. J. Ex. 227, 2 Jur., N. S., 497; *Reg. v. Courvosier*, 9 Car. & P. 362; *Cory v. Silcox* 6 Ind. 39; *Union Central Life Ins. Co. v. Cheever*, 36 Ohio St. 201, 38 Am. Rep. 573; *Boyle v. State*, 57 Wis. 472, 46 Am. Rep. 41, 15 N. W. 827;

Wilson v. Van Leer, 127 Pa. 371, 14 Am. St. Rep. 854, 17 Atl. 1097 (almanac used).

⁹⁰ *Union Central Life Ins. Co. v. Cheever*, 36 Ohio St. 201, 38 Am. Rep. 573; *Legg v. Drake*, 1 Ohio St. 286.

⁹¹ *Wade v. De Witt*, 20 Tex. 398. In a Mississippi case (*Cavanah v. State*, 56 Miss. 299), it was carried the length of allowing counsel in a case of homicide to read to the jury an essay of his own on dueling and extracts from a book on the same subject.

⁹² *Thayer, J.*, in *Union Pacific R. Co. v. Yates*, 79 Fed. 584, 40 L. R. A. 553, 25 C. C. A. 103; *Reg. v. Courvosier*, *supra*; *State v. Hoyt*, *supra*.

is accomplished indirectly as if the book were read to the jury as substantive evidence.⁹³ On this ground the practice is not allowed in England⁹⁴ nor in some of the states in this country. While it may be fairly claimed that it is doubtful on which side the *weight of authority* is to be found, the better reasoning condemns the practice.⁹⁵ In a few jurisdictions the rule prevailed that the opinions of standard writers, as stated in their printed works, may be read to the jury as evidence, when the opinions of expert witnesses on the subject would be competent. It was argued that, since expert witnesses may found their opinions upon works of this character, it is quite as safe a practice to admit the opinions at first hand. But this rule is now generally rejected.⁹⁶ The better rule seems to be that when, in a judicial proceeding, it becomes necessary to invoke the aid of medical experts, it is safer to rely on the testimony of competent witnesses, who are produced, sworn, and subjected to a cross-examination, than to permit medical books or pamphlets to be read to the jury.⁹⁷ In a California case, in which the various authorities are learnedly considered,⁹⁸ the court clearly puts it that “quo-

⁹³ Boyle v. State, 57 Wis. 472, 46 Am. Rep. 41, 15 N. W. 827.

⁹⁴ Reg. v. Crouch, 1 Cox C. C. 94.

⁹⁵ Gallagher v. Market Str. R. Co., 67 Cal. 13, 56 Am. Rep. 713, 6 Pac. 869; People v. Wheeler, 60 Cal. 581, 44 Am. Rep. 70; Epps v. State, 102 Ind. 539, 550, 1 N. E. 491; Ware v. Ware, 8 Me. 42; People v. Hall, 48 Mich. 482, 42 Am. Rep. 477, 12 N. W. 665; Fraser v. Jennison, 42 Mich. 206, 3 N. W. 882; Payson v. Everett, 12 Minn. 216; Commonwealth v. Wilson, 1 Gray (Mass.), 337; Washburn v. Cuddihy, 8 Gray (Mass.), 430; Ashworth v. Kittridge, 12 Cush. (Mass.) 193, 59 Am. Dec. 178, and valuable note; Melvin v. Easley, 46 N. C. 386, 62 Am. Dec. 171; State v. Rogers, 112 N. C. 874, 17 S. E. 297; Huffman v. Click, 77

N. C. 55; State v. O'Brien, 7 R. I. 336; Fowler v. Lewis, 25 Tex. Supp. 380; St. Louis A. & T. R. Co. v. Jones (Tex.), 14 S. W. 309; Boyle v. State, 57 Wis. 472, 46 Am. Rep. 41, 15 N. W. 827; Collier v. Simpson, 5 Car. & P. 73; Reg. v. Taylor, 13 Cox C. C. 77.

⁹⁶ Crawford v. Williams, 48 Iowa, 247; Stoudenmeier v. Williamson, 29 Ala. 558; State v. Winter, 72 Iowa, 627, 34 N. W. 495; Merkle v. State, 63 Ala. 30; People v. Wheeler, 60 Cal. 581, 44 Am. Rep. 70, with an extended discussion of the cases relating to this subject.

⁹⁷ See cases cited to note 95, *supra*.

⁹⁸ People v. Wheeler, 60 Cal. 581, 44 Am. Rep. 70.

tations from medical works are not admissible as evidence when offered independently or when read by witnesses. It follows that counsel ought not to be allowed to read such to the jury; *a fortiori* when they are not proved to come from works of standard authority in the profession. A general history may be read from, but this is only to refresh the memory of the court as to something it is supposed to know. So under appropriate restrictions, domestic law books are permitted to be read to the jury. The court can always correct the counsel as to his law, or the application of it. But the opinions of medical experts are in their nature facts, to be established by living witnesses. They cannot be proved by hearsay alleged to come from those not present, and not even shown to be competent to express scientific opinions. Nor are they established by the mere statement of counsel." The question of the right to read from law books to the jury arises principally in criminal cases, and in civil cases it seems to be a matter within the sound discretion of the court.⁹⁹ As a general rule, the practice of allowing counsel, in either a civil or criminal action, to read law to the jury, is objectionable, and ought not to be tolerated. "Its usual effect is to confuse rather than to enlighten the jury. There are cases, however, in which it is permissible for counsel, by way of illustration, to read to the jury reported cases, or extracts from textbooks subject to the sound discretion of the court, whose duty it is to check promptly any effort on the part of counsel to induce the jury to disregard the instructions, or to take the law of the case from the books rather than from the court."¹⁰⁰

§ 581 (597). Admissibility of photographs.—It is a constant practice to receive as evidence pictures and drawings

⁹⁹ *Curtis v. State*, 36 Ark. 284; *People v. Anderson*, 44 Cal. 65; *Hudson v. State*, 6 Tex. App. 565, 32 Am. Rep. 593. And the manner of reading them as part of the argument also rests in the discre-

tion of the court. But it is the province of the court to determine whether the law proposed to be read is applicable to the facts of the case: *Curtis v. State*, *supra*.

¹⁰⁰ *People v. Anderson*, *supra*.

of objects which cannot be brought into court, after these have been proved to be accurate representations of the subject.¹ In like manner photographs are often admitted, when the proper preliminary proof as to their exactness and accuracy is offered.² They are of the same character of

¹ *Marey v. Barnes*, 16 Gray (Mass.), 161, 77 Am. Dec. 405; *Hollenbeck v. Rowley*, 8 Allen (Mass.), 473; *Ruloff v. People*, 45 N. Y. 213; *Udderzook v. Commonwealth*, 76 Pa. 340; *Church v. Milwaukee*, 31 Wis. 512; *Wood v. Willard*, 36 Vt. 82, 84 Am. Dec. 659; *Blair v. Pelham*, 118 Mass. 420; *Shook v. Pate*, 50 Ala. 91; *Ayers v. Harris*, 77 Tex. 108, 13 S. W. 768. See notes to *Kansas City etc. R. Co. v. Smith*, 24 Am. St. Rep. 755; *Baustian v. Young*, 75 Am. St. Rep. 468-479; *State v. Matheson*, 114 Am. St. Rep. 438-442; *Dederichs v. Salt Lake City R. Co.*, 35 L. R. A. 802-816. As to evidence by *phonograph*, see *Boyne City, G. & A. R. Co. v. Anderson*, 146 Mich. 328, 117 Am. St. Rep. 642, 10 Ann. Cas. 283, 8 L. R. A., N. S., 306, and note, 109 N. W. 429. See note on "Phonographic Reproduction of Sound as Evidence," to *Boyne City etc. R. Co. v. Anderson*, 10 Ann. Cas. 285. But they must be relevant: *McClurg v. Brenton*, 123 Iowa, 368, 101 Am. St. Rep. 323, 65 L. R. A. 519, 98 N. W. 881. So *X-ray pictures* are admissible: *City of Geneva v. Burnett*, 65 Neb. 464, 101 Am. St. Rep. 628, 58 L. R. A. 287, 91 N. W. 275; *De Forge v. New York etc. R. R. Co.*, 178 Mass. 59, 86 Am. St. Rep. 464, 59 N. E. 669; *Chicago & Joliet E. Ry. Co. v. Spence*, 213 Ill. 220, 104 Am. St. Rep. 213, 72 N. E. 796; *State v. Matheson*, 130 Iowa, 440, 114 Am. St. Rep. 427, and note 442, 8 Ann.

Cas. 430, 103 N. W. 137; *Jameson v. Weld*, 93 Me. 345, 45 Atl. 299; *Mauch v. Hartford*, 112 Wis. 40, 87 N. W. 816. X-ray photographs competent evidence when taken by expert, and shown to be properly taken and to be correct: *Dean v. Wabash R. Co.*, 229 Mo. 425, 129 S. W. 953. Proper foundation being laid therefor, X-ray photographs of bones of injured party's foot and of foot bones in normal position are competent as tending to show extent of injury: *Haywood v. Dering Coal Co.*, 145 Ill. App. 506. Scia-graph of injured limb competent, though taken several years after injury to it, in action against physician for malpractice: *Bonnet v. Foote*, 47 Colo. 282, 107 Pac. 252. For the last three illustrations we are indebted to 15 Current Law, 1802. See note to *Hampton v. Norfolk etc. R. Co.*, 35 L. R. A. 815. *Stereoscopic* views: *German Theological School v. Dubuque*, 64 Iowa, 736, 17 N. W. 153. See note on "X-ray Photographs as Evidence," to *State v. Matheson*, 8 Ann. Cas. 435. As to effect and conclusiveness of photographs introduced in evidence, see note to *Higgs v. Minneapolis etc. Ry. Co.*, 15 L. R. A., N. S., 1162. For useful discussion on photographs, including X-ray productions as evidence, see note to *State v. Matheson*, 114 Am. St. Rep. 437.

² *Archer v. New York, N. H. & H. Ry. Co.*, 106 N. Y. 589, 13 N. E. 318; *Maclean v. Scripps*, 52 Mich. 214, 17 N. W. 815, 18 N. W. 209; *Albertie*

evidence as diagrams and pictures drawn by hand; not necessarily carrying the same degree of probative force, but still of the same character; not in themselves evidence at all, but representing to the eye what the witness declares was the real appearance of the thing at the time he saw

v. New York, L. E. & W. Ry. Co., 118 N. Y. 77, 6 L. R. A. 765, 23 N. E. 35; Blair v. Inhabitant of Pelham, 118 Mass. 420; Cooper v. St. Paul City Ry. Co., 54 Minn. 379, 56 N. W. 42; Cunningham v. Fairhaven etc. R. Co., 72 Conn. 244, 43 Atl. 1047; State v. Hersom, 90 Me. 273, 38 Atl. 160; Martin v. Moore, 99 Md. 41, 57 Atl. 671; Baustian v. Young, 152 Mo. 317, 75 Am. St. Rep. 462, 53 S. W. 921; Goldsboro v. Central R. Co., 60 N. J. L. 49, 37 Atl. 433; Hupfer v. Nat. Distilling Co., 127 Wis. 306, 106 N. W. 831. This, of course, applies also to X-ray photographs: Carlson v. Benton, 66 Neb. 486, 1 Ann. Cas. 159, 92 N. W. 600. Photographs have been admitted on the question of *identity* of persons: Ruloff v. People, 45 N. Y. 213; People v. Smith, 121 N. Y. 578, 24 N. E. 852; Beavers v. State, 58 Ind. 530; State v. Holden, 42 Minn. 350, 44 N. W. 123; Udderzook v. Commonwealth, 76 Pa. 340; to show *appearance of an individual* at different times: Cowley v. People, 83 N. Y. 464, 38 Am. Rep. 464; Commonwealth v. Morgan, 159 Mass. 375, 34 N. E. 458; State v. Ellwood, 17 R. I. 763, 24 Atl. 782; Commonwealth v. Connors, 156 Pa. 147, 27 Atl. 366; Davis v. Seaboard Air Line Ry., 136 N. C. 115, 1 Ann. Cas. 214, 48 S. E. 591; Reddin v. Gates, 52 Iowa, 210, 2 N. W. 1079; Franklin v. State, 69 Ga. 36, 47 Am. Rep. 748; Walsh v. People, 88 N. Y. 458; Udderzook v. Commonwealth, 76 Pa. 340; Luke v. Calhoun County, 52 Ala. 115; or of a limb or other

portion of the body: Albertie v. New York, L. E. & W. Ry. Co., 118 N. Y. 77, 6 L. R. A. 765, 23 N. E. 35; Cooper v. St. Paul City Ry. Co., 54 Minn. 379, 56 N. W. 42; but it seems that this is improper if the limb can be shown to the jury: Baxter v. Railway Co., 104 Wis. 307, 80 N. W. 644. Photographs are admissible to show the *appearance* of a *street* in an action for damages against municipal corporations: Church v. Milwaukee, 31 Wis. 512; Blair v. Pelham, 118 Mass. 420; German Theol. School v. Dubuque, 64 Iowa, 736, 17 N. W. 153; or against railway companies: Dyson v. New York & N. E. Ry. Co., 57 Conn. 9, 14 Am. St. Rep. 82, 17 Atl. 137; Archer v. New York, N. H. & H. Ry. Co., 106 N. Y. 589, 13 N. E. 318; Missouri, K. & T. Ry. Co. v. Moore (Tex. App.), 15 S. W. 714; Kansas City etc. R. Co. v. Smith, 90 Ala. 25, 24 Am. St. Rep. 753, 8 South. 43; Locke v. Sioux City & P. R. Co., 46 Iowa, 109; Cleveland Ry. Co. v. Monaghan, 140 Ill. 474, 30 N. E. 869; Turner v. Boston & M. Ry. Co., 158 Mass. 261, 33 N. E. 520; or the appearance of any place which might be properly viewed by the jury, where such a view by the jury is impossible or impracticable: Omaha S. Ry. Co. v. Beeson, 36 Neb. 361, 54 N. W. 557, (see, also, People v. Buddensieck, 103 N. Y. 487, 57 Am. Rep. 766, 9 N. E. 44); so photographs are also admissible to show *personal features*: Travelers' Ins. Co. v. Sheppard, 85 Ga. 751, 12 S. E. 18; Shorten v. Judd, 56 Kan. 43, 54 Am. St. Rep.

it. Diagrams, drawings, and photographs are resorted to only because the witness cannot with language as clearly convey to the minds of the court and jury the scene as the light printed it on the retina of his own eye at the time of

587, 42 Pac. 337; *Commonwealth v. Campbell*, 155 Mass. 537, 30 N. E. 72; *People v. Carey*, 125 Mich. 535, 84 N. W. 1087; *People v. Webster*, 139 N. Y. 73, 34 N. E. 730; *highways*: *Carey v. Hubbardston*, 172 Mass. 106, 51 N. E. 521; *Baustian v. Young*, 152 Mo. 317, 75 Am. St. Rep. 462, 53 S. W. 921; *machinery*: *Livermore F. & M. Co. v. Union S. & C. Co.*, 105 Tenn. 187, 53 L. R. A. 482, 58 S. W. 270; *identity*: *State v. Ellwood*, 17 R. I. 763, 24 Atl. 782; *appearance of animals*: *State v. Cook*, 75 Conn. 267, 53 Atl. 589; *scene of crime*: *People v. Crandall*, 125 Cal. 129, 57 Pac. 785; *State v. O'Reilly*, 126 Mo. 597, 29 S. W. 577; *People v. Jackson*, 111 N. Y. 362, 19 N. E. 54; *People v. Pustolka*, 149 N. Y. 570, 43 N. E. 548; *Keyes v. State*, 122 Ind. 527, 23 N. E. 1097; *place of accident*: *Beardslee v. Columbia Tp.*, 188 Pa. 496, 68 Am. St. Rep. 883, 41 Atl. 617; *Dederichs v. Salt Lake*, 14 Utah, 137, 35 L. R. A. 802, 46 Pac. 656; *Sterling v. Detroit*, 134 Mich. 22, 95 N. W. 986; *Forseth v. Iron River Lumber Co.*, 142 Wis. 87, 124 N. W. 1036; *McManus v. Nichols-Chisholm Lumber Co.*, 109 Minn. 355, 123 N. W. 1080; *McClain v. Lewiston etc. Racing Assn.*, 17 Idaho, 63, 20 Ann. Cas. 60, 25 L. R. A., N. S., 691, 104 Pac. 1015; *railroad crossing*: *Dyson v. New York etc. R. Co.*, 57 Conn. 9, 14 Am. St. Rep. 82, 17 Atl. 137; *Miller v. Railway Co.*, 128 Ind. 97, 25 Am. St. Rep. 416, 27 N. E. 339; *Missouri, K. & T. R. Co. v. Moore (Tex.)*, 15 S. W. 714; *New York, C. & St. L. R. Co. v. Robins*, 38 Ind. App. 172, 76 N. E. 804;

premises: *McGar v. Borough of Bristol*, 71 Conn. 652, 42 Atl. 1000; *Commonwealth v. Robertson*, 162 Mass. 90, 38 N. E. 25; *Paulson v. State*, 118 Wis. 89, 94 N. W. 771; *condition of railway cars after collision*: *Maynard v. Oregon R. & Nav. Co.*, 46 Or. 15, 68 L. R. A. 477, 78 Pac. 983; *mill after fire, in which plaintiff was injured, competent*: *Turner v. Cochecho Mfg. Co.*, 75 N. H. 521, 77 Atl. 999. Photographs of premises showing effect of diversion of water from stream competent, evidence being offered to show correctness and circumstances under which taken: *Pickett v. Atlantic Coast Line R. Co.*, 153 N. C. 148, 69 S. E. 8. Photograph of hotel register competent to show signatures, hotel clerk and one familiar with signatures testifying in support: *Fuller v. Robinson*, 230 Mo. 22, 130 S. W. 343. For the last three illustrations we are indebted to 15 Current Law, 1802. See, also, an interesting discussion of the subject by Irving Browne in 5 Green Bag, 15, 60. See notes to *State v. Matheson*, 114 Am. St. Rep. 439 et seq.; and *Dederichs v. Salt Lake City R. Co.*, 35 L. R. A. 803. On the weight of photographs as evidence, see note to *Higgs v. Minneapolis etc. R. Co.*, 15 Ann. Cas. 98. See, also, the late cases: *Halloran v. New York etc. R. Co.*, 211 Mass. 132, 97 N. E. 631, *Davidson v. St. Louis etc. R. Co.*, 164 Mo. App. 701, 148 S. W. 406; *Sherlock v. Minneapolis etc. R. Co. (N. D.)*, 138 N. W. 976; *St. Louis etc. R. Co. v. Dale (Okl.)*, 128 Pac. 137; *Cincinnati etc. R. Co. v. De Owzo (Ohio)*, 100 N.

which he is testifying.³ The supreme court of New Jersey have said: "As evidence, photographs have been held as admissible upon the question of identity and comparison of handwriting, and as secondary evidence when the primary and better evidence could not be obtained. It may be generally regarded as a rule that they are never admitted but as secondary evidence."^{3a} The weight to be given this class of evidence, whether it be a diagram, painting or photograph, depends on the character of the thing shown in evidence. As a diagram drawn hastily or by an unskillful hand does not receive the same consideration as one drawn to a scale by a mathematician, so the art of photography does not render equally trustworthy results in the hands of the unskillful and the skillful artist. The art of photography is also not exempt from the possibility of perversion and of being made the means of creating false appearances. The supreme court of Pennsylvania have said:^{3b} "Photographs are competent evidence, and, when properly taken, are judicially recognized as of a high order of accuracy.^{3c} But in careless, or inexpert, or interested hands, they are capable of very serious misrepresentation of the original. Before they are permitted to be used in the trial, therefore, there should always be preliminary proof of care and accuracy in the taking of them, and of their relevancy to the issue before the jury. The further objection in the present case, that the photograph was not taken until after the township defendant had made changes in the road at the place of the accident, is not without difficulty. In photographs, as in plans, maps or other drawings used as evidence, there ought to be substantial identity in the person, place or thing photographed

E. 320; *Taylor v. Spokane etc. R. Co.* (Wash.), 130 Pac. 506; *Chicago etc. R. Co. v. Upton*, 194 Fed. 371, 115 C. C. A. 379.

³ *Baustian v. Young*, 152 Mo. 317, 75 Am. St. Rep. 462, 53 S. W. 921.

^{3a} *Goldsboro v. Central R. R. Co.*, 60 N. J. L. 49, 37 Atl. 433.

^{3b} *Beardslee v. Columbia Tp.*, 188 Pa. 502, 68 Am. St. Rep. 883, 41 Atl. 617.

^{3c} *Udderzook v. Commonwealth*, 76 Pa. 340.

and that which the jury are to consider in the case. But photographs of the scene of an accident taken at or near to the time are not always obtainable, and, bearing in mind the object sought, the assisting of the jury by knowledge of the locality to judge the conduct of the parties with reference to the issue raised, the only practicable rule would seem to be that the changes must not be such as to destroy the substantial identity, and that the changes, whatever they are, must be carefully pointed out and brought to the jury's attention. This would have to be the course pursued if a view were allowed to the jury at the trial, and no other appears practicable in regard to plans, photographs or other substitutes for a view. With these safeguards the subject must be largely left to the discretion of the trial judge." As evidence, photographs are admissible on questions of identity of persons, premises and things generally, and in all cases as secondary evidence where the primary or better evidence is not obtainable. Courts judicially notice the art, the mechanical and chemical processes employed, the scientific principles upon which they are based, and the results.⁴ Photographs are admitted, then, on the same grounds as maps or diagrams in illustration or explanation of the testimony.⁵ Photo-

⁴ See § 128, *ante*.

⁵ *Malachi v. State*, 89 Ala. 134, 8 South. 104; *Sellers v. State*, 93 Ark. 313, 124 S. W. 770; *People v. Mahatch*, 148 Cal. 200, 82 Pac. 779; *Mow v. People*, 31 Colo. 351, 72 Pac. 1069; *State v. Cook*, 75 Conn. 267, 53 Atl. 589; *Macfeat v. Philadelphia etc. R. Co.*, 5 Penne. (Del.) 52, 62 Atl. 898; *Ortiz v. State*, 30 Fla. 256, 11 South. 611; *Shaw v. State*, 83 Ga. 92, 9 S. E. 768; *Illinois Southern R. Co. v. Hayer*, 225 Ill. 613, 80 N. E. 316; *New York etc. R. Co. v. Robbins*, 38 Ind. App. 172, 76 N. E. 804; *State v. Rogers*, 129 Iowa, 229, 105 N. W. 455; *State v. Nordmark*, 84 Kan. 628, 114 Pac. 1068; *Louisville etc. R. Co.*

v. Brown, 127 Ky. 732, 13 L. R. A., N. S., 1135, 32 Ky. Law Rep. 552, 106 S. W. 795; *Consolidated Gas etc. Co. v. State*, 109 Md. 186, 72 Atl. 652; *State v. Herson*, 90 Me. 273, 38 Atl. 160; *McKarren v. Boston etc. R. Co.*, 194 Mass. 179, 10 Ann. Cas. 961, 80 N. E. 477; *Harrison v. Green*, 157 Mich. 690, 122 N. W. 205; *Brown v. Douglas Lumber Co.*, 113 Minn. 67, 129 N. W. 161; *State v. O'Reilly*, 126 Mo. 597, 29 S. W. 577; *Marion v. State*, 20 Neb. 233, 57 Am. Rep. 825, 29 N. W. 911; *State v. Roberts*, 28 Nev. 350, 82 Pac. 100; *State v. Ready*, 77 N. J. L. 329, 72 Atl. 445; *McGirr v. Bab-bitt*, 61 Misc. Rep. 291, 113 N. Y.

graphic copies have been received of the *public documents* on file at the governmental departments at Washington which public policy requires should not be removed.⁶ On the same principle, the courts, both of this country and of England, have received photographic copies of instruments in the *custody of other courts* which could not be obtained for use at the trial.⁷ As has already been stated, the authorities are in conflict on the question whether photographic copies may be used as a basis for the comparison of *handwriting*.⁸ The cases already cited agree as to the rule that, where a photograph or other similar mode of representation is used as evidence, there should be *proof of its accuracy* given by the photographer or by some other person acquainted with the fact. This is a *preliminary question* to be determined by the court;⁹ and the decision

Supp. 753; *Pickett v. Atlantic Coast Line R. Co.*, 153 N. C. 148, 69 S. E. 8; *Morris v. Territory*, 1 Okl. Cr. 617, 99 Pac. 760, 101 Pac. 111; *State v. Finch*, 54 Or. 482, 103 Pac. 505; *Commonwealth v. Connors*, 156 Pa. 147, 27 Atl. 366; *Curtis v. New York etc. R. Co.*, 32 R. I. 542, 80 Atl. 127; *Wade v. Southern Ry.*, 89 S. C. 280, 71 S. E. 859; *Accousi v. G. A. Stowers Furniture Co.* (Tex. Civ. App.), 87 S. W. 861; *Johnson v. Union Pac. R. Co.*, 35 Utah, 285, 100 Pac. 390; *Church v. Milwaukee*, 31 Wis. 512; *Wilson v. United States*, 162 U. S. 613, 40 L. Ed. 1090, 16 Sup. Ct. Rep. 895.

⁶ *Leathers v. Salvor Wrecking Co.*, 2 Wood (U. S.), 680, Fed. Cas. No. 8164. See also, *Luco v. United States*, 23 How. (U. S.) 515, 16 L. Ed. 545. See note to *Hampton v. Norfolk etc. R. Co.*, 35 L. R. A. 811 et seq.

⁷ *Daley v. McGuire*, 6 Blatchf. (U. S.) 137, Fed. Cas. No. 3551; *In re Stephens*, L. R. 9 C. P. 187. See note to *Hampton v. Norfolk etc. R. Co.*, 35 L. R. A. 812.

⁸ See § 555 et seq., *ante*. In *Luco v. United States*, 23 How. (U. S.) 515, 16 L. Ed. 545, and *United States v. Ortiz*, 176 U. S. 422, 44 L. Ed. 529, 20 Sup. Ct. Rep. 46, photographic copies of signatures were used for comparison. The same rule has been sanctioned in *Massachusetts: Macey v. Barnes*, 16 Gray (Mass.), 161, 77 Am. Dec. 405. See, also, *Eborn v. Zimpelman*, 47 Tex. 503, 26 Am. Rep. 315, and note discussing the subject; *Murphy v. People*, 213 Ill. 154, 72 N. E. 779. As to competency of photographic copy as standard for comparison of handwriting, see notes to *Gambrill v. Schooley*, 63 L. R. A. 438; *Dederichs v. Salt Lake City R. Co. and Hampton v. Norfolk etc. R. Co.*, 35 L. R. A. 802.

⁹ *Commonwealth v. Coe*, 115 Mass. 481; *Walker v. Curtis*, 116 Mass. 98; *Blair v. Inhabitants of Pelham*, 118 Mass. 420; *Roosevelt Hospital v. New York El. Ry. Co.*, 21 N. Y. Supp. 205; *Carey v. Town of Hubbardston*, 172 Mass. 106, 51 N. E. 521; *State v. Miller*, 43 Or. 325, 74 Pac. 658;

of the court is not subject to review by a higher tribunal.¹⁰ Photographs of documents are obviously secondary evidence, and should not be admitted when the original can be produced.¹¹ Frequently photographs have been held inadmissible on the ground that they were taken at too *remote* a time and when conditions had changed.¹² And in some cases where in view of the other evidence they seemed unnecessary or likely to give a *wrong impression* or to create undue sympathy or prejudice on the part of the jury.¹³ In an action for personal injuries to a girl illegally

Dolan v. Mutual Reserve etc. Assn., 173 Mass. 197, 53 N. E. 398; *Stone v. Lewiston, B. & B. St. Ry.*, 99 Me. 243, 59 Atl. 56. See note to *State v. Matheson*, 114 Am. St. Rep. 441. In *Corbet v. Union Dime Sav. Inst.*, 67 Misc. Rep. 175, 122 N. Y. Supp. 268, photographic copies of written instruments were held inadmissible in the absence of proof of the accuracy of the reproductions. In an action for personal injuries, the plaintiff may testify that a photograph is a correct representation of the scene of the accident: *Aecousi v. G. A. Stowers Furniture Co.* (Tex. Civ. App.), 87 S. W. 816. But where a man, suing for a divorce, on the ground of adultery, produces a photograph of his wife with her alleged paramour, it should be identified by some person other than the plaintiff: *Pessolano v. Pessolano*, 34 Misc. Rep. 16, 69 N. Y. Supp. 449.

¹⁰ *Blair v. Inhabitants of Pelham*, 118 Mass. 420; *Will of Foster*, 34 Mich. 21; *Commonwealth v. Morgan*, 159 Mass. 375, 34 N. E. 458; *Harris v. City of Ansonia*, 73 Conn. 359, 47 Atl. 672; *Babb v. Oxford Paper Co.*, 99 Me. 298, 59 Atl. 290; *Mauch v. Hartford*, 112 Wis. 40, 87 N. W. 816. See note to *State v. Matheson*, 114 Am. St. Rep. 441. See *Carlson v. Benton*, 66 Neb. 486, 1 Ann. Cas. 159,

92 N. W. 600; *Hupfer v. Nat. Distilling Co.*, 119 Wis. 417, 96 N. W. 809.

¹¹ *Duffin v. People*, 107 Ill. 113, 47 Am. Rep. 431; *Eborn v. Zimpelman*, 47 Tex. 503, 26 Am. Rep. 315, and note; *Maclean v. Scripps*, 52 Mich. 214, 17 N. W. 815, 18 N. W. 209; *Grooms v. State*, 40 Tex. Cr. 319, 50 S. W. 370. The same is true of personal injuries: *Faivre v. Mandcheid*, 117 Iowa, 724, 90 N. W. 76.

¹² *Chicago & E. Ill. Ry. Co. v. Crose*, 214 Ill. 602, 105 Am. St. Rep. 135, 73 N. E. 865; *Chicago & A. R. Co. v. Corson*, 198 Ill. 98, 64 N. E. 739; *Rock Island v. Drost*, 71 Ill. App. 613. See, also, *Cleveland etc. R. Co. v. Monaghan*, 140 Ill. 474, 30 N. E. 869; *San Antonio v. Talerico* (Tex. Civ. App.), 78 S. W. 28, 98 Tex. 151, 81 S. W. 518; *Tracy v. Baltimore etc. R. Co.*, 98 Fed. 633; *Miller v. New York*, 104 App. Div. 33, 93 N. Y. Supp. 227; *Maynard v. Oregon etc. Nav. Co.*, 46 Or. 15, 68 L. R. A. 477, 78 Pac. 983.

¹³ Photograph not verified as correct: *Cunningham v. Fairhaven etc. R. Co.*, 72 Conn. 244, 43 Atl. 1047; *Harris v. Ansonia*, 73 Conn. 359, 47 Atl. 672 (*changed conditions*); *Sellers v. State*, 91 Ark. 175, 120 S. W. 840; *Mow v. People*, 31 Colo. 351, 72 Pac. 1069; *Ortiz v. State*, 30 Fla.

employed, in that she was under the statutory age, a photograph of the plaintiff, taken a year before the employment, in the dress worn by her when she received her first Holy Communion, was admitted in evidence over the defendant's objection, upon testimony to the effect that it correctly represented the plaintiff's appearance at the time of the accident; that she was about the size indicated by the photograph when employed; and that the picture looked as she did when she was employed. "We all know," said the court, "that dress alone makes a great deal of difference in the apparent age of a person. The combination of dress and a photograph would be doubly deceptive. When employed, the plaintiff was six months below the age fixed by the statute. A photograph taken a year before, dressed as she was, with veil and flowers on her head, short white dress, white slippers and stockings, was no evidence of her appearance as to age when employed. The prejudicial character of the photograph is manifest. It could have served no possible purpose except to mislead, and its misleading character is the more manifest when we consider that the question at issue was the apparent age of a girl at a rapidly developing period of her life."¹⁴ In an action for wrongful death, caused by a watchman being thrown from a bridge by a passing train, photographs of the bridge

256, 11 South. 611; Chicago etc. R. Co. v. Corson, 198 Ill. 98, 64 N. E. 739; Iroquois Furnace Co. v. McCrea, 91 Ill. App. 337; New York etc. R. Co. v. Robbins, 38 Ind. App. 172, 76 N. E. 804; Stewart v. St. Paul City R. Co., 78 Minn. 110, 80 N. W. 855; Hiler v. Cox, 210 Mo. 696, 109 S. W. 679; Morris v. Territory, 1 Okl. Cr. 617, 99 Pac. 760, 101 Pac. 111; Buck v. McKeesport, 223 Pa. 211, 72 Atl. 514; Gibson v. State, 53 Tex. Cr. 349, 110 S. W. 41; Smith v. Central Vermont R. Co., 80 Vt. 208, 67 Atl. 535; Porter v. Buckley, 147 Fed. 140, 78 C. C. A. 138. See, also, Sample v. Chicago etc. R.

Co., 233 Ill. 564; 84 N. E. 643; not instructive: Harris v. Quincy, 171 Mass. 472, 50 N. E. 1042; Leidlein v. Meyer, 95 Mich. 586, 55 N. W. 367; Selleck v. City of Janesville, 104 Wis. 570, 76 Am. St. Rep. 872, 47 L. R. A. 691, 80 N. W. 944. See the late cases: Diller v. Northern Cal. Power Co., 162 Cal. 531, 123 Pac. 359 (enlarged photograph); Maryland El. R. Co. v. Beasley, 117 Md. 270, 83 Atl. 157; Rodiek v. Maine Cent. R. Co. (Me.), 85 Atl. 41; Pruner v. Detroit United Ry. (Mich.), 139 N. W. 48.

¹⁴ Dresch v. Elliott, 137 App. Div. 252, 122 N. Y. Supp. 14.

and approaching trestle and surroundings were introduced, over defendant's objection that they were taken long after the accident, and there was no evidence that the conditions were the same, when they were taken, as at the time of the accident; it was held that the presumption was that the condition of the bridge and trestle and surroundings at the time of the accident continued. If there had been any material change, defendant could easily have proved it.¹⁵

§ 582 (598). **Newspapers—When admissible.**—We have already shown that, as a general rule, books are not admissible as evidence of the facts stated in them, especially when the facts sought to be proved are such that other evidence is procurable; for the reasons, among others, that the statements in the books are not made under oath and no opportunity for cross-examination of the author is furnished. These reasons apply with equal force to the statements of newspaper reporters. It is hardly necessary to cite authorities to the proposition that, as a general rule, newspapers are not admissible as evidence of the facts stated therein. But when proof is made that one has usually read a newspaper, and that it has probably been brought to his attention, it may be offered in evidence for the purpose of showing that such person had *notice* of its contents;¹⁶ and when it is shown that a person is *the author* of, or otherwise responsible for statements or advertisements, they *may, of course, be used against him*.¹⁷ Such advertisements have been received to establish the public character

¹⁵ Wade v. Southern Ry., 89 S. C. 280, 71 S. E. 859.

¹⁶ Commonwealth v. Robinson, 1 Gray (Mass.), 555; Mann v. Russell, 11 Ill. 586; Somervell v. Hunt, 3 Har. & McH. (Md.) 113. See, also, Kellogg v. French, 15 Gray (Mass.), 354. See note to Sisson v. Cleveland etc. R. Co., 90 Am. Dec. 258.

¹⁷ Sweet v. Avaunt, 2 Bay (S. C.), 492; Berry v. Mathewes, 7 Ga. 457; Dennis v. Van Vay, 28 N. J. L. 158;

Dennis v. Van Voy, 31 N. J. L. 38. So a notice of marriage, or of a separation of man and wife, is admissible under proper circumstances: Redgrave v. Redgrave, 33 Md. 93; Jewell v. Jewell, 1 How. (U. S.) 219, 11 L. Ed. 108. But a notice in a newspaper published in New York of the death of a person in Texas is no evidence of his death: Fosgate v. Herkimer Mfg. etc. Co., 9 Barb. (N. Y.) 287.

of a hotel at a given time,¹⁸ the advertised time for the arrival of trains or coaches,¹⁹ and the dissolution of a partnership.²⁰ The courts have in various cases received those *market reports* in newspapers on which the commercial world rely as evidence of the state of the market. In discussing this subject an eminent judge used the following language: "As a matter of fact, such reports, which are based upon a general survey of the whole market, and are constantly received and acted upon by dealers, are far more satisfactory and reliable than individual entries or individual sales or inquiries; and courts would justly be the subject of ridicule, if they should deliberately shut their eyes to the source of information which the rest of the world relies upon, and demand evidence of a less certain and satisfactory character."²¹ Witnesses have been allowed to testify to the market value at a particular date, even though their knowledge was chiefly derived from daily price current lists.²² And those whose information is derived wholly or

¹⁸ *Stringer v. Davis*, 35 Cal. 25.

¹⁹ *Commonwealth v. Robinson*, 1 Gray (Mass.), 555.

²⁰ *Roberts v. Spencer*, 123 Mass. 397; *Hart v. Alexander*, 7 Car. & P. 746, 2 M. & W. 484, 6 L. J. Ex. 129. See, also, *Pitcher v. Barrows*, 17 Pick. (Mass.) 361, 28 Am. Dec. 306; *Vernon v. Manhattan Co.*, 22 Wend. (N. Y.) 183.

²¹ *St. Louis etc. R. Co. v. Pearce*, 82 Ark. 353, 118 Am. St. Rep. 75, 12 Ann. Cas. 125, 101 S. W. 760; *Nash v. Classon*, 163 Ill. 409, 45 N. E. 276; *Aulls v. Young*, 98 Mich. 231, 57 N. W. 119; *Peter v. Thickstun*, 51 Mich. 589, 17 N. W. 68; *Sisson v. Cleveland & T. R. Co.*, 14 Mich. 489, 90 Am. Dec. 252, and note; *Cliquot's Champagne*, 3 Wall. (U. S.) 114, 18 L. Ed. 116; *Lush v. Druse*, 4 Wend. (N. Y.) 313; *Moseley v. Johnson*, 144 N. C. 257, 56 S. E. 922; *Fairley v. Smith*, 87 N.

C. 367, 42 Am. Rep. 522; *St. Louis etc. R. Co. v. Gunter*, 39 Tex. Civ. App. 129, 86 S. W. 938; *Bullard v. Stewart*, 46 Tex. Civ. App. 49, 102 S. W. 174; *St. Louis etc. R. Co. v. May*, 53 Tex. Civ. App. 257, 115 S. W. 900. Where "prices current or commercial lists" are specially dealt with by statute, the documents offered must comply with the statute and evidence *dehors* should be excluded: *Kentucky Refining Co. v. Conner*, 145 Ala. 664, 39 South. 728. On "Market Reports as Evidence," see note to *St. Louis etc. R. Co. v. Pearce*, 12 Ann. Cas. 127. See, also, *Houston Packing Co. v. Griffith* (Tex. Civ. App.), 144 S. W. 1139.

²² *Whitney v. Thacher*, 117 Mass. 523; *Cliquot's Champagne*, 3 Wall. (U. S.) 114, 18 L. Ed. 116. See, also, *Chaffee v. United States*, 18 Wall. (U. S.) 541, 21 L. Ed. 908.

partly from published market reports, such as merchants usually rely upon, or from correspondence, are competent to testify as to the market value of commodities even in another city.²³ "Market value is a matter of opinion, which may require for its formation the consideration of a great variety of facts. To arrive at a just conclusion, prices current, sales, shipments, letters from dealers and manufacturers, may properly receive consideration."²⁴ In the famous *Cliquot's Champagne* case a seizure of champagne had been made for an alleged violation of the revenue laws, and upon the trial of the case it became necessary to prove the prices of champagne in France. For this purpose prices current obtained from the agent of the manufacturer and from dealers in the manufactured articles, which had been prepared and used by the parties furnishing them in the ordinary course of their business, were offered in evidence, and were objected to on the ground, among others, that they were hearsay, that no actual transaction was based upon them, that the price lists were not connected with the manufacturer of the wine in question, and that the wines enumerated did not appear to be the same in quality with those libeled. Upon this point, Mr. Justice Swayne, delivering the opinion of the supreme court of the United States, cited approvingly *Lush v. Druse*,^{24a} where it was held that a witness might testify to the value of wheat at certain periods in Albany, where his knowledge was derived from inquiries of large dealers of wheat at the place, and from an examination of their books, and said: "While courts in the administration of the law of evidence should be careful not to open the door to falsehood, they should be equally careful not to shut out truth. They should not encumber the law with rules which will involve labor and expense to the parties, and delay the progress of the remedy,—itself a serious evil,—without

²³ *Whitney v. Thacher*, 117 Mass. 523; *Sirrine v. Briggs*, 31 Mich. 443; *Laurent v. Vaughn*, 30 Vt. 90.

²⁴ *Chaffee v. United States*, *supra*.
^{24a} *Lush v. Druse*, 4 Wend. (N. Y.) 313.

giving any additional safeguard to the interests of justice. We think the price current is not liable to the objection that it was hearsay. It was prepared and used by the party who furnished it in the ordinary course of his business. It is as little liable to that objection as the entries in the books of the dealer, or his answers to the inquiries of a witness, both of which were admissible upon the authority of the case referred to in Wendell.²⁵ It was clearly relevant. What effect it should have, in connection with the other evidence adduced by the parties, was a question for the jury."²⁶ But in several jurisdictions such testimony was held incompetent without some evidence authenticating the report, or showing the mode in which the list was made up.²⁷ At common law *gazettes printed under the authority of government* are admissible as evidence of public royal proclamations, addresses and acts of state. But in such cases they are evidence only of matters of public interest, and not of matters merely affecting private rights.²⁸ Of course, the newspaper itself is the best evidence of an article published in it.²⁹ Under various statutes *census reports* are often received to prove the population of given political divisions or other facts properly reported.³⁰

²⁵ Lush v. Druse, 4 Wend. (N. Y.) 313.

²⁶ Cliquot's Champagne, 3 Wall. (U. S.) 114, 18 L. Ed. 116.

²⁷ Vogt v. Cope, 66 Cal. 31, 4 Pac. 915; Willard v. Mellor, 19 Colo. 534, 36 Pac. 148; National Bank of Commerce of New Bedford v. New Bedford, 175 Mass. 257, 56 N. E. 288; Brandon v. Atchison etc. R. Co., 134 Mo. App. 89, 114 S. W. 540; Whelan v. Lynch, 60 N. Y. 469, 19 Am. Rep. 202; Fairley v. Smith, 87 N. C. 367, 42 Am. Rep. 522; St. Louis etc. R. Co. v. May, 53 Tex. Civ. App. 257, 115 S. W. 900; Norfolk etc. R. Co. v. Reeves, 97 Va. 284, 33 S. E. 606. In Nat. Bank

v. New Bedford, *supra*, newspapers purporting to contain stock quotations furnished by named New Bedford stock brokers, who could have been called, were held properly rejected.

²⁸ Rex v. Holt, 5 Term Rep. 436, 101 Eng. Reprint, 245; Attorney General v. Theakstone, 8 Price, 89, 22 R. R. 716; Lurton v. Gilliam, 2 Ill. 577, 33 Am. Dec. 430; Del Hoyo v. Brundred, 20 N. J. L. 328.

²⁹ Bond v. Central Bank of Georgia, 2 Ga. 92.

³⁰ State v. Neal, 25 Wash. 264, 65 Pac. 188, 68 Pac. 1135. See, also, State v. County Court of Marion County, 128 Mo. 427, 30 S. W. 103, 31

§ 583 (599). **Proof and effect of letters.**—Before letters are received in evidence there must be, as in the case of other documents, some proof of their genuineness. This is not proved by the mere fact that the letter is received by mail, when the signature is not proved.³¹ The handwriting should be proved if possible, but it is not absolutely essential where the fact of the genuineness can be otherwise established. It may be proved by indirect or circumstantial evidence, as other facts; and, in some instances, this is the only character of evidence that can be adduced. Such instances are, of course, numerous and varied, but it is a familiar rule that if subsequent events fit in with statements made in a letter written by one who has exclusive knowledge of the facts leading up to them, he may fairly be taken to be the writer.³² Evidence that a letter was

S. W. 23; *State v. Evans*, 166 Mo. 347, 66 S. W. 355. As to admissibility of *price list*, see note to *Nelson etc. Co. v. Columbian Iron Works etc. Co.*, 17 L. R. A. 851 et seq.; *legislative journals*, see note to *State v. Jones*, 23 L. R. A. 340 et seq. On census reports as evidence, see note to *Priddy v. Boice*, 9 Ann. Cas. 882. On census returns as evidence of age, see note to *Priddy v. Boice*, 9 L. R. A., N. S., 718. As to *livestock registers*, reports of the American Trotting Association and like institutions, see *Pittsburgh etc. R. Co. v. Sheppard*, 56 Ohio St. 68, 60 Am. St. Rep. 732, 46 N. E. 61, in which *Williams, C. J.*, lays it down unmistakably that such records, when recognized as authentic, are admissible; *Louisville etc. R. Co. v. Frazee*, 24 Ky. Law Rep. 1273, 71 S. W. 437, in which a private catalogue containing a history of the plaintiff's horse was rejected: *Kuhns v. Chicago etc. R. Co.*, 65 Iowa, 528, 22 N. W. 661, in which a "herd-book" was admitted, being

regarded as a historical work of a particular subject.

³¹ *Sweeney v. Ten Mile Oil etc. Co.*, 130 Pa. 193, 18 Atl. 612; *State v. Hall*, 14 S. D. 161, 84 N. W. 766. Where part of letter is introduced by one party, the remainder may be introduced by the other party: *Reynolds v. Hinrichs*, 16 S. D. 602, 94 N. W. 694. As to presumption where a letter is received as an answer, see §§ 52, 547, *ante*. On the "Necessity of Proof of Genuineness of Reply Letter," see note to *Lancaster v. Ames*, in 17 L. R. A., N. S., 229. See, also, *Hays v. General Assembly*, 127 Mo. App. 195, 104 S. W. 1141. See the late cases: *Southern States etc. Ins. Co. v. De Long (Ala.)*, 59 South. 61; *Baldridge v. Stribling*, 101 Miss. 666, 57 South. 658; *Hicks v. National Surety Co. (Mo. App.)*, 155 S. W. 71; *Charles H. Scholes Co. v. Oppenheim*, 136 N. Y. Supp. 37; *Newman v. Norris Imp. Co. (Tex. Civ. App.)*, 147 S. W. 725.

³² *International Harvester Co. v. Campbell*, 43 Tex. Civ. App. 421, 96

received by the plaintiffs from the defendants in due course of mail was a circumstance indicating that it came from the defendants; and, while this circumstance alone would not be sufficient to show its execution, proof that an exact copy of the letter was produced by the defendants under notice supplied any deficiency in the formal proof of execution, and made the letter admissible. An exact copy of what was claimed to be an original, coming from the possession of the defendants, produced under notice, furnished very strong evidence that the original was the handiwork of the defendants.³³ The authenticity may also be proved by *admission*. An admission as to a writing is like an admission of any other fact, and when a competent witness testifies that a certain writing, which he produces, was received by him, and that the defendant admitted that he had sent it to him, he has laid the foundation for the introduction of the writing, and this though it be not in the handwriting of the defendant.³⁴ In the case last cited the witness stated that the defendant had telegraphed certain

S. W. 93. See, also, *Deep River Nat. Bank Appeal*, 73 Conn. 341, 47 Atl. 675; *Singleton v. Bremar*, Harp. (S. C.) 201. In the last-named case Mr. Justice Nott said: "The usual method of proving an instrument of writing, where there is no subscribing witness, is by proof of the handwriting. But that could not be expected in this case, as the party cannot write. Even if her name had been subscribed to the letters, the difficulty would not have been lessened. Some other method must, therefore, be resorted to, and why may not the letters be looked into? If they furnish internal evidence of the source from whence they were derived, I can see no reason why we may not avail ourselves of that evidence. Thus, for instance, if they relate to facts which cannot be known to any other person, it will be presumed that

they were written by her authority. If they embrace a number of facts which relate to her and her situation, and which cannot apply to any other person, each of those facts constitutes a link in the chain of circumstances, which go to strengthen the presumption. In ordinary cases, such evidence will not be allowed, because the writing is always presumed to be by the person by whom it purports to be written, and proof of the handwriting, therefore, is higher evidence. But in the present case, the evidence offered was the best which the nature of the case could afford. Whether it would have been sufficient to establish the fact is another question, but I think it ought to have been submitted to the jury."

³³ *Hollister Bros. v. Bluthenthal*, 9 Ga. App. 176, 70 S. E. 970.

³⁴ *Dunbar v. United States*, 156 U. S. 185, 39 L. Ed. 390, 15 Sup.

things to him. An objection being raised, he produced a typewritten telegram, and said that he received it from the defendant. It was further objected that it was not the original, the one prepared and signed by the defendant, whereupon the witness testified that it was delivered to him by the telegraph company, and that he afterward talked with the defendant about it, who confirmed it and admitted that he had sent it and it was properly permitted to be read in evidence. It is a familiar practice to receive letters in evidence as part of the *res gestae*,³⁵ as in the case of a letter inclosing a note sent from one bank to another,³⁶ or to show for what purpose the note was sent,³⁷ even though the writer of the letter might be examined on oath.³⁸ When letters properly form a part of the *res gestae*, they are received although they contain declarations in the party's favor.³⁹ Obviously statements in the form of letters are not more entitled to be received in evidence than mere verbal statements, and, unless they are competent as part of the *res gestae*, or as admissions, or under some other general rule of evidence, they should be rejected. Thus, a letter from the witness to a third party simply appended to a deposition in which there is no averment of the truth of its contents is inadmissible,⁴⁰ nor is a letter admissible for the party in whose favor it is sought to be introduced, except as a notice or demand, or as part

Ct. Rep. 325. See, also, *State v. Hubbard*, 201 Mo. 639, 100 S. W. 586.

³⁵ *Walnut Ridge Mercantile Co. v. Cohn*, 79 Ark. 338, 96 S. W. 413; *Crane v. Malony*, 39 Iowa, 39; *Kessler & Co. v. Ellis*, 27 Ky. Law Rep. 1042, 87 S. W. 798; *New England Mar. Ins. Co. v. De Wolf*, 8 Pick. (Mass.) 56; *Illinois Roofing etc. Co. v. Aerial Advertising Co.*, 142 Mich. 698, 106 N. W. 274; *Hammond v. Beeson*, 112 Mo. 190, 20 S. W. 474; *Uihlein v. Caplice Commercial*

Co., 39 Mont. 327, 102 Pac. 564; *Merrill v. Downs*, 41 N. H. 72; *Keel v. New York Life Ins. Co.*, 20 Okl. 195, 94 Pac. 177.

³⁶ *Bank of Monroe v. Culver*, 2 Hill (N. Y.), 531.

³⁷ *Breese v. Hurley*, 1 Stark. 23.

³⁸ *Roach v. Learned*, 37 Me. 110.

³⁹ *Beaver v. Taylor*, 1 Wall. (U. S.) 637, 17 L. Ed. 601.

⁴⁰ *Dwyer v. Dunbar*, 5 Wall. (U. S.) 318, 18 L. Ed. 489. See, also, *Winslow v. Newlan*, 45 Ill. 145.

of the *res gestae*.⁴¹ Nor are the letters of an agent to his principal admissible against a third person.⁴² In a celebrated trial, known as the "Anarchist Case," it was held that an unanswered letter found in the possession of a defendant may be received in evidence as in the nature of an admission, if from its terms it may be gathered that he invited it, or if evidence is adduced that he acted on it.⁴³ It is only the application of a familiar rule that proof of letters, when admissible, must be *by the best evidence*, that is, *the originals*, and that, before secondary evidence can be received, there must be proof of the loss of the original.⁴⁴ In order to present *secondary evidence* of the contents of a letter in the possession of the other party, notice to produce must have been given.⁴⁵ We have so far dealt only with the proof of letters as against the sender. It is almost unnecessary to say that the sender may not use his own letters against the sendee without proof of the receipt of them, or that the sendee in some manner acted or agreed to act upon them; otherwise it would amount to the party making evidence for himself.⁴⁶

⁴¹ *Richards v. Frankum*, 9 Car. & P. 221. As to admission of decoy letters, see *McCarney v. People*, 83 N. Y. 408, 38 Am. Rep. 456.

⁴² *United States v. Barker*, 4 Wash. C. C. 464, Fed. Cas. No. 14,520; *Insurance Co. v. Guardiola*, 129 U. S. 642, 32 L. Ed. 802, 9 Sup. Ct. Rep. 425.

⁴³ *Spies v. People*, 122 Ill. 1, 3 Am. St. Rep. 320, 12 N. E. 865, 17 N. E. 898.

⁴⁴ *Watson v. Roode*, 30 Neb. 264, 46 N. W. 491; *Huff v. Hall*, 56 Mich. 456, 23 N. W. 88; *Stevens v. Miles*, 142 Mass. 571, 8 N. E. 426. As to presumption of receipt of letters, see § 201, *ante*.

⁴⁵ *Chicago v. Greer*, 9 Wall. (U. S.) 726, 19 L. Ed. 769. See § 218 *et seq.*, *ante*.

⁴⁶ *Eatman v. State*, 48 Fla. 21, 37

South. 576; *Foster v. Leeper*, 29 Ga. 294; *A. Booth & Co. v. Steffey*, 150 Ill. App. 584; *Purinton v. Purinton*, 101 Me. 250, 115 Am. St. Rep. 361, 8 Ann. Cas. 205, 63 Atl. 925; *Heiden v. Roberts*, 134 Mass. 38, 45 Am. Rep. 276; *Sills v. Burge*, 141 Mo. App. 148, 124 S. W. 605; *Starr v. Torrey*, 22 N. J. L. 190; *Stonehill Wine Co. v. Lupo*, 110 N. Y. Supp. 408; *Thalhimer v. Brinckerhoff*, 6 Cow. (N. Y.) 90; *Huckestein v. Kelly*, 139 Pa. 201, 21 Atl. 78; *Griffith v. Lake* (Tex.), 12 S. W. 285; *Cooney v. McKinney*, 25 Utah, 329, 71 Pac. 485; *Campbell v. Beard*, 57 W. Va. 501, 50 S. E. 747; *Joannes v. Millerd*, 90 Wis. 68, 62 N. W. 916; *Smiths v. Shoemaker*, 17 Wall. (U. S.) 630, 21 L. Ed. 717. To prove the receipt of a letter sent by post, evidence may be given

§ 584 (600). **Admissibility of facts in histories.**—We have already dealt with the judicial notice taken of great historical events.⁴⁷ Historical facts of general and public notoriety may, indeed, be proved by reputation; and that reputation may be established by historical works of known character and accuracy. But evidence of this sort is confined in a great measure to ancient facts which do not presuppose better evidence in existence; and where, from the nature of the transactions, or the remoteness of the period, or the public or general reception of the facts, a just foundation is laid for general confidence.⁴⁸ Such testimony is competent only when the facts necessary to be established are properly matters of history. In such cases, it is competent because of the difficulty or impossibility of establishing the facts by other testimony.⁴⁹ In a New York case, in which the question of receiving the testimony of historians of reputation was involved, the court said: “In their search for truth, the courts are required, in instances like the one under consideration, to receive evidence which would be inadmissible, if offered, respecting events occurring within the memory of living witnesses. Thus the statements of historians of established merit, the recitals in public records, in statutes and legislative journals, the proceedings in courts of justice, and their averments and

that on the envelope was a printed request for a return of the letter to the sender's postoffice, if not called for in ten days, and that it had not been returned: *Hedden v. Roberts*, *supra*. The mere fact of the letter not showing on its face to whom it is addressed is of no consequence where it is produced by the party in interest and relates to the subject matter of the controversy: *Armistead v. Brook*, 18 Ark. 521.

⁴⁷ § 125, *ante*.

⁴⁸ *Morris v. Harmer*, 7 Pet. (U. S.) 554, 8 L. Ed. 781; *McKinnon v. Bliss*, 21 N. Y. 206; *State v. Wagner*, 61 Me. 178.

⁴⁹ *State v. Wagner*, 61 Me. 178; *Charlotte v. Chouteau*, 33 Mo. 194; *Bow v. Allenstown*, 34 N. H. 351, 69 Am. Dec. 489; *Bogardus v. Trinity Church*, 4 Sand. Ch. (N. Y.) 724; *Morris v. Edwards*, 1 Ohio, 189; *Commonwealth v. Alburger*, 1 Whart. (Pa.) 475; *Gregory v. Baugh*, 4 Rand. 611; *Morris v. Harmers*, 7 Pet. (U. S.) 554, 8 L. Ed. 781; *Read v. Lincoln*, App. Cas. [1892] 644, 67 L. T., N. S., 128, 62 L. J. P. C. 1, 56 J. P. 725. On “Historical Words as Evidence,” see note to *Lazell v. Boardman*, 13 Ann. Cas. 675.

results, and the depositions of witnesses in suits or in legal controversies are, from necessity, received as evidence of facts to which they relate, but always with great caution, and with due allowance for its imperfections and its capability of misleading, and restricted, as to historical evidence, to facts of a public or general nature.”^{49a} “History is only admissible to prove history, that is, such facts as being matters of interest to a whole people are usually incorporated in a general history of the state or nation.”^{49b} In an English case, *Camden’s Britannia* was offered in evidence upon a question as to the custom of Droitwich, but the court refused to receive it, holding that a general history might be given in evidence to prove a matter relating to the kingdom in general, because the nature of the thing requires it, but not to prove a *particular right or custom*.^{49c} Hence, facts which have recently transpired and are within the knowledge of persons living cannot be proved in this way;⁵⁰ and the work of a living author who is within the reach of the process of the court would not be admissible. In the latter case, the witness may be called and examined as to the sources of his information.⁵¹ According to this view, statements in his-

^{49a} *Bogardus v. Trinity Church*, 4 Sand. Ch. (N. Y.) 724.

^{49b} *McKinnon v. Bliss*, 21 N. Y. 206.

^{49c} *Stainer v. Burgesses of Droitwich*, 1 Salk. 281, 91 Eng. Reprint, 247.

⁵⁰ *Morris v. Edwards*, 1 Ohio, 209. In *Whiton v. Albany City Ins. Co.*, 109 Mass. 24, the defendants were refused permission to read to the jury an article in *Appleton’s Cyclopaedia*. A book published in this country by a private person is not competent evidence of facts, stated therein, of recent occurrence, and which might be proved by living witnesses or other better evidence; and the book in question, not being

shown to have been approved by any public authority, or to be in general use among merchants or underwriters, had no tendency to show that the island of Navassa, in the Caribbean sea, was commonly called and known as a Guano Island: *Fuller v. Princeton*, 2 Dane Abr. (Mass.) 333, 334; *Morris v. Edwards*, 1 Ohio, 189, 209; *Morris v. Harmer*, 7 Pet. (U. S.) 554, 8 L. Ed. 781; *Houghton v. Gilbert*, 7 Car. & P. 701.

⁵¹ *Morris v. Harmer*, 7 Pet. (U. S.) 554, 8 L. Ed. 781. The work of a living author, however, may be admissible, under some circumstances, for the purpose of explaining, qualifying or controlling his testimony as a witness: *Morris v. Harmer*, *supra*.

tories as to *mere private rights* are not admissible. The facts should be of a general and public nature;⁵² nor are *mere local histories* admissible.⁵³ Although matters of general history may be received without that *full proof* which is necessary for the establishment of a private fact,⁵⁴ yet a jury should not be left to their own knowledge or information upon such subjects. Some proof should be furnished.⁵⁵ In some jurisdictions statutes provide that historical works made by others than the parties to an action are evidence of facts of general notoriety and interest.⁵⁶

§ 585 (601). Effect of judgments — General rule.—It would be impracticable to enter into an elaborate discussion as to the admissibility or binding effect of judgments when offered in evidence. The subject is so vast that volumes have been filled by text-writers, and the subject has by no means been exhausted. The most that can be attempted is to state the general rules governing the subject with their limitations. The rule is one generally recognized among civilized nations that, when a matter has been adjudicated and finally determined by a competent tribunal, *the determination is conclusive* as between the parties and their privies. *Interest reipublicae ut sit finis*

⁵² *Neale v. Fry*, 1 Salk. 281; Steph. Ev., art. 35.

⁵³ As *histories of counties*: *McKinnon v. Bliss*, 21 N. Y. 206; *Evans v. Getting*, 6 Car. & P. 586; *Roe v. Strong*, 107 N. Y. 350, 14 N. E. 294; *college catalogues, court guides, directories, etc.*: *State v. Daniels*, 44 N. H. 383; *Tayl. Ev.*, 10th ed., § 1785; *registers*: *Wetmore v. United States*, 10 Pet. (U. S.) 647, 9 L. Ed. 567; *city directories*: *Tichenor v. Newman*, 186 Ill. 264, 57 N. E. 826; *gazetteer of the United States*: *Spalding v. Hedges*, 2 Pa. 240. In *Lazell v. Boardman*, 103 Me. 292, 13 Ann. Cas. 673, 69 Atl. 97, *supra*, three historical works, a history of Maine, a his-

tory of Belfast, and a history of Islesboro, were admitted to locate an island within the boundary of the "Waldo Patent," although the court intimated they were of little weight.

⁵⁴ *Queen v. Hepburn*, 7 Cranch (U. S.), 290, 3 L. Ed. 348.

⁵⁵ *Gregory v. Baugh*, 4 Rand. (Va.) 611.

⁵⁶ In Oregon they are primary evidence: *State v. Moy Looke*, 7 Or. 54. In Utah, *prima facie* evidence: *Hilton v. Roylance*, 25 Utah, 129, 95 Am. St. Rep. 821, 58 L. R. A. 723, 69 Pac. 660, holding that historical works were admissible to explain the terms "sealed" and "sealing ceremony" used in the Mormon Church.

litium.⁵⁷ If the court has jurisdiction of the subject matter and the parties, its decision stands as a finality between them and their privies, until set aside by a rehearing on appeal or in some other mode recognized by the law.⁵⁸ It involves the consideration of the maxim, also, that a man

⁵⁷ *Lock v. Norborne*, 3 Mod. 141, 87 Eng. Reprint, 91; *Outram v. Morewood*, 3 East, 353, 102 Eng. Reprint, 630; *Rex v. Mayor of York*, 5 Term Rep. 66, 101 Eng. Reprint, 38; *Croudson v. Leonard*, 4 Cranch (U. S.), 36, 2 L. Ed. 670; *Northwestern Bank v. Hays*, 37 W. Va. 475, 16 S. E. 561; *Roman Catholic Archbishop v. Shipman*, 69 Cal. 586, 11 Pac. 343; *Strayer v. Johnson*, 110 Pa. 21, 1 Atl. 222; *Woods v. Montevallo Coal etc. Co.*, 84 Ala. 560, 5 Am. St. Rep. 393, 3 South. 475; *Maloney v. Dewey*, 127 Ill. 395, 11 Am. St. Rep. 131, 19 N. E. 848; *Singer v. Hutchinson*, 183 Ill. 606, 75 Am. St. Rep. 133, 56 N. E. 388; *Garden City v. Merchants & Farmers' Nat. Bank*, 65 Kan. 345, 93 Am. St. Rep. 284, 69 Pac. 325; *Hargrave v. Mouton*, 109 La. 533, 33 South. 590; *Gardner v. Buckbee*, 3 Cow. 120, 15 Am. Dec. 256; *Peay v. Duncan*, 20 Ark. 85; *Lore v. Truman*, 10 Ohio St. 45; *Wales v. Lyon*, 2 Mich. 276; *People's Saving Bank v. Eberts*, 96 Mich. 396, 55 N. W. 996; *Ahlers v. Thomas*, 24 Nev. 407, 77 Am. St. Rep. 820, 56 Pac. 93; *Newton v. Marshall*, 62 Wis. 8, 21 N. W. 803; *Castle v. Noyes*, 14 N. Y. 329; *Finney v. Boyd*, 26 Wis. 366; *Sanford v. Oberlin College*, 50 Kan. 342, 31 Pac. 1089; *Lazarus v. Phelps*, 156 U. S. 202, 39 L. Ed. 397, 15 Sup. Ct. Rep. 271; *State v. Irwin*, 51 W. Va. 192, 41 S. E. 124; *Hart v. Moulton*, 104 Wis. 349, 76 Am. St. Rep. 881, 80 N. W. 599. For a general discussion of the effect of judgments as evidence, see notes to *Morrill v. Mor-*

rill, 23 Am. St. Rep. 103; *Lazier v. Westtrott*, 82 Am. Dec. 411; *Lea v. Lea*, 96 Am. Dec. 775-788; *Hawk & Co. v. Evans*, 14 Am. St. Rep. 250; *Gould v. Sternburg*, 15 Am. St. Rep. 142; *King v. Chase*, 41 Am. Dec. 681; *Martin v. Houck*, 7 L. R. A. 577-582. This rule holds, even though the amount of the judgment was so small as to prevent a review: *Johnson Co. v. Wharton*, 152 U. S. 252, 38 L. Ed. 429, 14 Sup. Ct. Rep. 608; or although it was rendered on evidence improperly introduced: *Parker v. Albee*, 86 Iowa, 46, 52 N. W. 533; or although it was rendered after the defendant's death: *New Orleans v. Gaines*, 138 U. S. 595, 34 L. Ed. 1102, 11 Sup. Ct. Rep. 428; or was palpably erroneous: *Wolverton v. Baker*, 86 Cal. 591, 25 Pac. 54; or where the bill in the former suit was defective: *Griswold v. Hazard*, 141 U. S. 260, 35 L. Ed. 678, 11 Sup. Ct. Rep. 972; or where damages, not allowed by law, were recovered in the former action: *Baker v. Flint & P. M. Ry. Co.*, 91 Mich. 298, 30 Am. St. Rep. 471, 16 L. R. A. 154, 51 N. W. 897.

⁵⁸ *Wall v. Wall*, 28 Miss. 409; *Parrish v. Ferris*, 2 Black (U. S.), 606, 17 L. Ed. 317; *Foster v. Wells*, 4 Tex. 101; *Swiggart v. Harber*, 5 Ill. 364, 39 Am. Dec. 418; *La Grange v. Ward*, 11 Ohio, 257; *Peay v. Duncan*, 20 Ark. 85; *Housemire v. Moulton*, 15 Ind. 367; *Hart v. Jewett*, 11 Iowa, 276; *Wallace v. Usher*, 4 Bibb (Ky.), 508; *Lefebvre v. De Montilly*, 1 La. Ann. 42; *Vandyke v. Bastedo*, 15 N. J. L. 224; *Page v. Esty*, 54

shall not be twice vexed for the same cause—*nemo debet bis vexari pro una et eadem causa*. “If,” as remarked by Lord Kenyon, C. J., “an action be brought and the merits of the question be discussed between the parties, and a final judgment obtained by either, the parties are concluded, and cannot canvass the same question again in another action, although, perhaps, some objection or argument might have been urged upon the first trial, which would have led to a different judgment.”⁵⁹ In such a case, the matter in dispute having passed *in rem judicatam*, the former decision is conclusive between the parties, if either attempts, by commencing another action, to reopen the question.⁶⁰ The same learned judge in another case⁶¹ said: “If this action could be maintained, I know not what cause of action could ever be at rest. After a recovery by process of law, there must be an end of litigation, otherwise there would be no security for any person.” If the same matter or cause of action has already been finally adjudicated on between the parties by a court of competent jurisdiction, the plaintiff has lost his right to put it in suit, either before that or any other court. The conditions for the exclusion of jurisdiction on the ground of *res judicata*, are, that the same identical matter shall have come in question already in a court of competent jurisdiction, that the matter shall have been controverted and that it shall have been finally decided.⁶² It is well settled that a former judgment by a legally constituted court, or a court of competent jurisdiction over the parties and subject matter, if rendered upon the merits either as to questions of law or of fact, constitutes an absolute bar to a subsequent action for the same cause between the same parties or their privies, if such judgment be certain, final and remain

Me. 319; Wingate v. Haywood, 40 N. H. 437; Hibshman v. Dulleban, 4 Watts (Pa.), 183; Kelley v. Mize, 3 Sneed (Tenn.), 59; Dick v. Webster, 6 Wis. 481.

⁵⁹ Greathead v. Bromley, 7 T. R. 456, 101 Eng. Reprint, 1073.

⁶⁰ Broom's Legal Max., 74th ed., 329.

⁶¹ Marriott v. Hampton, 7 Term. Rep. 269, 101 Eng. Reprint, 969.

⁶² Longmead v. Maple, 18 Com. B., N. S., 270, 11 Jur., N. S., 177, 12 L. T. 143.

in force. The parties are concluded not only upon all the issues which were directly involved and actually tried, but upon all issues which ought to have been tried; or, as it is sometimes said, though perhaps inaccurately, upon all issues "which might have been tried" in the former action. Such judgment is conclusive not only of the point which it professes to decide, but of matters which it was necessary to decide, which must have been found in order to warrant or uphold the judgment or decree, and which were actually determined as the groundwork of the decision. This estoppel extends, of course, to every material allegation in the cause, which was either expressly or by necessary implication in issue. A new action, therefore, for the same cause of action, between the same parties, cannot be maintained or defended on grounds which ought to have been tried and determined in the former action. Such former judgment is conclusive against the plaintiff's right to recover, whether pleaded in bar or given in evidence under the general issue, where such evidence is legally admissible.⁶³ The general rule laid down above does not, of course, apply where the litigation is a direct proceeding for

⁶³ *Watts v. Rice*, 75 Ala. 289; *Ellis v. Clarke*, 19 Ark. 420, 70 Am. Dec. 603; *Garwood v. Garwood*, 29 Cal. 515; *Phelan v. Gardner*, 43 Cal. 306; *Supples v. Canon*, 44 Conn. 424; *Attorney General v. Chicago etc. R. Co.*, 112 Ill. 520, 539; *Rogers v. Higgins*, 57 Ill. 244; *Greenup v. Crooks*, 50 Ind. 410, and numerous cases there cited; *Wilson v. Stripe*, 5 G. Greene (Iowa), 551, 61 Am. Dec. 138; *Griffin v. Seymour*, 15 Iowa, 30, 83 Am. Dec. 396; *Goodenow v. Litchfield*, 59 Iowa, 226, 9 N. W. 107, 13 N. W. 86; *Letzler v. Huntington*, 24 La. Ann. 331; *Heroman v. Louisiana Institute etc.*, 34 La. Ann. 805; *Shafer v. Stonebraker*, 4 Gill & J. (Md.) 345; *Dunlap v. Glidden*, 34 Me. 517; *Lord v. Chad-*

bourne, 42 Me. 429, 66 Am. Dec. 290; *Jennison v. Inhabitants of West Springfield*, 13 Gray (Mass.), 544; *Foye v. Patch*, 132 Mass. 110; *Perry v. Lewis*, 49 Miss. 443; *Tutt v. Price*, 7 Mo. App. 194; *Towns v. Nims*, 5 N. H. 259, 20 Am. Dec. 578; *Taylor v. Barron*, 30 N. H. 78, 64 Am. Dec. 281; *Doty v. Brown*, 4 N. Y. 71, 53 Am. Dec. 355, and extended note; *Bernard v. City of Hoboken*, 27 N. J. L. 412; *Budwell v. Knight*, 51 Barb. (N. Y.) 267; *Bissell v. Kellogg*, 60 Barb. (N. Y.) 617; *Brinkley v. Brinkley*, 50 N. Y. 184, 10 Am. Rep. 460; *Bennett v. Holmes*, 1 Dev. & B. (18 N. C.) 486; *Grant v. Ramsey*, 7 Ohio St. 157; *Lentz v. Wallace*, 17 Pa. 412, 55 Am. Dec. 569; *Warwick v. Underwood*, 3 Head (Tenn.), 238.

the purpose of setting aside the former adjudication;⁶⁴ for a judgment sought to be annulled cannot be opposed as *res judicata* to the action of nullity.⁶⁵ Nor does such general rule preclude the constitutionality of a statute from being questioned, although that point might have been raised and determined in the first instance.⁶⁶ A former judgment however, is *res judicata*, between the same parties for the same cause, though it be erroneous; for an erroneous judgment until reversed is as binding and conclusive upon parties and privies as one in which no error is found.⁶⁷ Whether the judgment is in fact right or erroneous, just or unjust, it *cannot be collaterally attacked*.⁶⁸ The rule is by no means limited to courts of record or those of general jurisdiction. The same principle obtains whether the judgment is that of a justice of the peace, acting within his jurisdiction, or that of a court of general jurisdiction.⁶⁹ The rule that judgments are evidence between parties and privies in subsequent actions will be found to be tacitly recognized in most of the cases hereinafter referred to while discussing the limitations of the rule.

§ 586 (602). As to what persons judgments are conclusive.—Having regard to the rule that a final judgment

75 Am. Dec. 767; *Lee v. Kingsbury*, 13 Tex. 68, 62 Am. Dec. 546; *Church v. Chapin*, 35 Vt. 223; *Chrisman v. Harman*, 29 Gratt. (Va.) 494; *Western Mg. & Mfg. Co. v. Virginia Cannel Co.*, 10 W. Va. 250; *Henry v. Davis*, 13 W. Va. 230; *Williams v. Williams*, 63 Wis. 58, 53 Am. Rep. 253, 23 N. W. 110; *Russell v. Place*, 94 U. S. 606, 24 L. Ed. 214.

⁶⁴ *Attorney General v. Chicago etc. R. Co.*, *supra*.

⁶⁵ *Heroman v. Louisiana Institute etc.*, *supra*.

⁶⁶ *Boyd v. Alabama*, 94 U. S. 645, 24 L. Ed. 302.

⁶⁷ *Gray v. Dougherty*, 25 Cal. 266.

⁶⁸ *Elliott v. Peirsol*, 1 Pet. (U. S.) 328, 7 L. Ed. 164; *Mills v. Duryee*, 7 Cranch (U. S.), 481, 3 L. Ed. 411; *Holmes v. Remson*, 20 Johns. 229, 11 Am. Dec. 269; *Latham v. Edgerton*, 9 Cow. 227; *Loring v. Mansfield*, 17 Mass. 394; *Hollister v. Abbott*, 31 N. H. 442, 64 Am. Dec. 342; *Homer v. Fish*, 1 Pick. 435, 11 Am. Dec. 218; *Baker v. Flint & P. M. Ry. Co.*, 91 Mich. 298, 30 Am. St. Rep. 471, 16 L. R. A. 154, 51 N. W. 897.

⁶⁹ *Sheets v. Hawk*, 14 Serg. & R. (Pa.) 173, 16 Am. Dec. 486; *Adams v. Pearson*, 7 Pick. 341, 19 Am. Dec. 290; *Hopkins v. Lee*, 6 Wheat. (U. S.) 109, 114, 5 L. Ed. 218.

is conclusive as between the parties and their privies, it is to be considered who the parties are that are thus brought within its operation. In discussing the conclusiveness of judgments upon parties and privies, Greenleaf lays down the rule that "parties, in the larger legal sense, are all persons having a right to control the proceedings to make defense, to adduce and cross-examine witnesses and to appeal from the decision."⁷⁰ It has been a little differently, but more comprehensively, put by the United States supreme court:⁷¹ "Conclusive effect of judgments respecting the same cause of action, and between the same parties, rests upon the just and expedient axiom that it is for the interest of the community that a limit should be opposed to the continuance of litigation, and that the same cause of action should not be brought twice to a final determination. Parties in that connection include all who are directly interested in the subject matter, and who had a right to make a defense, control the proceedings, examine and cross-examine witnesses, and appeal from the judgment. Persons not having those rights substantially are regarded as strangers to the cause; but all who are directly interested in the suit, and have knowledge of its pendency, and who refuse or neglect to appear and avail themselves of those rights, are equally concluded by the proceedings."⁷² It needs no authority for the rule that a judgment—and in this connection we refer only to a valid final judgment—is conclusive on the parties of record in the particular action or suit in which it was rendered; subject, of course, to the exception that the mere fact of a name

⁷⁰ 1 Greenl. Ev., § 535. See note to *Hill v. Bain*, 2 Am. St. Rep. 877.

⁷¹ *Robbins v. Chicago*, 4 Wall. (U. S.) 657, 18 L. Ed. 427.

⁷² See, also, *Brown v. Chaney*, 1 Ga. 410; *McLellan v. Rosser*, 116 La. 801, 41 South. 97; *Parsons v. Urie*, 104 Md. 238, 10 Ann. Cas. 278, 8 L. R. A., N. S., 559, 64 Atl. 927; *Courtney v. William Knabe etc.*

Mfg. Co., 97 Md. 499, 99 Am. St. Rep. 456, 55 Atl. 614; *Weld v. Clarke*, 109 Mass. 9, 95 N. E. 651; *Rieschick v. Klingelhoefer*, 91 Mo. App. 430; *Hendrick v. Biggar*, 66 Misc. Rep. 576, 122 N. Y. Supp. 162; *Peterson v. Lothrop*, 34 Pa. 223; *Goldberg v. Sisseton Loan etc. Co.*, 24 S. D. 49, 140 Am. St. Rep. 775, 123 N. W. 266.

appearing in the proceedings is not sufficient where the party was not served with the process or the court has not acquired jurisdiction of him.⁷³ Parties to a judgment are not bound by it, in a subsequent controversy between each other, unless they were adversary parties in the original action.⁷⁴ No party is, as a general rule, bound in a subsequent proceeding by a judgment, unless the adverse party now seeking to secure the benefit of the former adjudication would have been prejudiced by it if it had been determined the other way.⁷⁵ In dealing with its conclusiveness on others than those appearing of record, we find that a judgment may be evidence against and conclusive upon the rights of one who was not a nominal party in the former proceeding, if he is the person *who controlled* and directed the action,⁷⁶ but the mere fact that one has contributed to

⁷³ *Gee v. Williamson*, 1 Port. (Ala.) 313, 27 Am. Dec. 628; *Clark v. Grayson*, 2 Ark. 149; *County of Los Angeles v. Winans*, 13 Cal. App. 234, 109 Pac. 640; *Converse v. Aetna Nat. Bank*, 79 Conn. 163, 7 Ann. Cas. 75, 64 Atl. 341; *Bullard v. Wynn*, 134 Ga. 636, 68 S. E. 439; *Garrigue v. Arnott*, 80 Ill. App. 24; *Paulus v. Latta*, 93 Ind. 34; *Goodnow v. Plumb*, 64 Iowa, 672, 21 N. W. 133; *Shaefer v. Gates*, 2 B. Mon. (Ky.) 453, 38 Am. Dec. 164; *Lumpkin v. Lumpkin*, 108 Md. 470, 25 L. R. A., N. S., 1063, 70 Atl. 238; *Timberlake v. Supreme Commandery etc.*, 208 Mass. 411, 94 N. E. 685; *Englehard v. Sutton*, 7 How. (Miss.) 99; *Gates v. Tebbetts*, 83 Neb. 573, 17 Ann. Cas. 1183, 20 L. R. A., N. S., 1000, 119 N. W. 1120; *Eisert v. Bowen*, 117 App. Div. 488, 102 N. Y. Supp. 707; *Clarke & Co. v. Doyle*, 17 N. D. 340, 116 N. W. 348; *Cox v. Hill*, 3 Ohio, 411; *Handley v. Jackson* (Or.), 51 Pac. 1098; *Updegraff v. Cooke*, 8 Phila. (Pa.) 336; *Fitch v. Huntington*, 125 Wis. 204, 102 N. W. 1066;

Roberts v. Bolles, 101 U. S. 119, 25 L. Ed. 880.

⁷⁴ *Dent v. King*, 1 Ga. 200, 44 Am. Dec. 638; *Harvey v. Osborn*, 55 Ind. 535; *Walters v. Wood*, 61 Iowa, 290, 16 N. W. 116; *Montgomery v. Road*, 34 Kan. 122, 8 Pac. 253; *McMahan v. Geiger*, 73 Mo. 145, 39 Am. Rep. 489; *Rice v. Cutler*, 17 Wis. 351, 84 Am. Dec. 747.

⁷⁵ 1 Freem. Judgments, § 159.

⁷⁶ *Aslin v. Parkin*, 2 Burr. 668, 97 Eng. Reprint, 501; *Hitchin v. Campbell*, 2 W. Black. 827, 96 Eng. Reprint, 487; *Outram v. Morewood*, 3 East, 346, 102 Eng. Reprint, 630; *Bennitt v. Wilmington Star Min. Co.*, 119 Ill. 9, 7 N. E. 498; *Castle v. Noyes*, 14 N. Y. 329; *Cecil v. Cecil*, 19 Md. 72, 81 Am. Dec. 626; *Peterson v. Lothrop*, 34 Pa. 223; *French v. Neal*, 24 Pick. (Mass.) 61; *Adams v. Barnes*, 17 Mass. 365; *Case v. Reeve*, 14 Johns. 82; *Calhoun's Lessee v. Dunning*, 4 Dall. (Pa.) 120, 1 L. Ed. 767; *Wood v. Ensel*, 53 Mo. 193; *Stokes v. Morrow*, 54 Ga. 597; *Shugart v. Miles*, 125 Ind. 445, 25

a defense does not make the judgment conclusive upon him.⁷⁷ But generally one who defends or prosecutes by employing counsel, paying costs and doing those things that are generally done by a party will be bound by the judgment, though not a party.⁷⁸ Nor is it necessary that there be absolute *identity as to the parties* in the two actions, for although there were different parties in the two suits, this has frequently been held immaterial as between those who were parties to both suits.⁷⁹ In order that the judgment should be a bar on the ground that the parties are the same, it is necessary that the persons should sue or be sued in the *same capacity*; for example, if the same person sue in his own right and afterward as administrator, the former judgment is not a bar.⁸⁰ Neither the benefit of judgments on the one side nor the obligations on

N. E. 551; *Daskam v. Ullman*, 74 Wis. 474, 43 N. W. 321; *Hauke v. Cooper*, 108 Fed. 922, 48 C. C. A. 144; *McClellan v. Hurd*, 21 Colo. 197, 40 Pac. 445.

⁷⁷ *Goodnow v. Litchfield*, 63 Iowa, 275, 19 N. W. 226; *Schroeder v. Lahrman*, 26 Minn. 87, 1 N. W. 801; *Gross v. Board of Commrs.*, 158 Ind. 531, 58 L. R. A. 394, 64 N. E. 25; *Central Baptist Church & Society v. Manchester*, 17 R. I. 492, 33 Am. St. Rep. 893, 23 Atl. 30.

⁷⁸ *McNamee v. Moreland*, 26 Iowa, 96; *Stoddard v. Thompson*, 31 Iowa, 80; *Wood v. Ensel*,¹ 63 Mo. 193; *The Town of Fulton v. Pomeroy*, 111 Wis. 663, 87 N. W. 831; *Baxter v. Myers*, 85 Iowa, 328, 39 Am. St. Rep. 298, 52 N. W. 234; *Parr v. State*, 71 Md. 220, 17 Atl. 1020.

⁷⁹ *Delano v. Jacoby*, 96 Cal. 275, 31 Pac. 290; *Chatman v. Hodnett*, 127 Ga. 360, 56 S. E. 439; *Hanna v. Read*, 102 Ill. 596, 40 Am. Rep. 608; *Goble v. Dillon*, 86 Ind. 327, 44 Am. Rep. 308; *Davenport v. Barnett*, 51 Ind. 329; *State v. Krug*, 94 Ind. 366;

Larum v. Wilmer, 35 Iowa, 244; *Peterson v. Warner*, 6 Kan. App. 298, 50 Pac. 1091; *Hawkins v. Lambert*, 18 B. Mon. (Ky.) 99; *French v. Neal*, 24 Pick. (Mass.) 55; *Whitcomb v. Hardy*, 68 Minn. 265, 71 N. W. 263; *Nave v. Adams*, 107 Mo. 414, 28 Am. St. Rep. 421, 17 S. W. 958; *Tauziede v. Jumel*, 133 N. Y. 614, 30 N. E. 1000; *Lawrence v. Hunt*, 10 Wend. 80, 25 Am. Dec. 539; *Daws v. McMichael*, 6 Paige Ch. (N. Y.) 139; *Fowler v. Osborne*, 111 N. C. 404, 16 S. E. 470; *Parker v. Legett*, 12 Rich. (S. C.) 198; *Russell v. Farquhar*, 55 Tex. 355; *Girardin v. Dean*, 49 Tex. 243; *Blondin v. Brooks*, 83 Vt. 472, 76 Atl. 184; *Leggett v. Ross*, 14 Wash. 41, 44 Pac. 111; *Western Min. etc. Co. v. Virginia Cannel Coal Co.*, 10 W. Va. 250; *Marshall v. Pinkhan*, 73 Wis. 401, 41 N. W. 529; *Thompson v. Roberts*, 24 How. (U. S.) 233, 16 L. Ed. 648.

⁸⁰ *Leggott v. Great Northern Ry. Co.*, 1 Q. B. Div. 599; *Karr v. Parks*, 44 Cal. 46; *Collins v. Hydorn*, 135

the other are limited exclusively to parties and their privies. Or, in other words, there is a numerous and important class of persons who, being neither parties upon the record nor acquirers of interest from those parties after the commencement of the suit, are nevertheless bound by the judgment. Prominent among these are persons on whose behalf and under whose direction the suit is prosecuted or defended in the name of some other person. The real party in interest cannot escape the result of a suit conducted by him in the name of another.⁸¹ And generally it may be said he will be bound if he were represented in the action either expressly, as in the case of one suing for a class,⁸² or indirectly, as in the case of an owner of a con-

N. Y. 320, 32 N. E. 69; *Brooking v. Dearmond*, 27 Ga. 58; *Lander v. Arno*, 65 Me. 26; *Downing v. Diaz*, 80 Tex. 436, 16 S. W. 49; *Landon v. Townshend*, 112 N. Y. 93, 8 Am. St. Rep. 712, 19 N. E. 424 (a foreclosure against a person as assignee in bankruptcy does not bar his individual right); *Stockton Building & L. Assn. v. Chalmers*, 75 Cal. 332, 7 Am. St. Rep. 173, and note, 17 Pac. 229; *Fuller v. Metropolitan L. Ins. Co.*, 68 Conn. 55, 57 Am. St. Rep. 84, 35 Atl. 766; *Erwin v. Garner*, 108 Ind. 488, 9 N. E. 417; *Farmers' Loan & Trust Co. v. Essex*, 66 Kan. 100, 71 Pac. 268; *Bamka v. Chicago etc. Railway Co.*, 61 Minn. 549, 52 Am. St. Rep. 618, 63 N. W. 1116.

⁸¹ *Kelly v. Hancock*, 75 Ala. 229; *Valentine v. Mahoney*, 37 Cal. 389; *People v. Wilson*, 6 Cal. App. 122, 91 Pac. 661; *Bennitt v. Wilmington S. M. Co.*, 18 Ill. App. 17; *Ward v. Clendenning*, 245 Ill. 206, 91 N. E. 1028; *Palmer v. Hayes*, 112 Ind. 289, 13 N. E. 882; *Faust v. Baumgartner*, 113 Ind. 139, 15 N. E. 337; *Conger v. Chilcote*, 42 Iowa, 18; *McMahan v. Noble*, 83 Kan. 749, 112 Pac. 600; *Johnston v. Curchills (Ky.)*,

Litt. Sel. Cas. 177; *Rogers v. Haines*, 3 Me. 362; *Attorney General v. Detroit etc. R. Co.*, 157 Mich. 144, 121 N. W. 814; *Estelle v. Peacock*, 48 Mich. 469, 12 N. W. 659; *Walsh v. First Nat. Bank*, 139 Mo. App. 641, 123 S. W. 101; *Clark v. Kittenplan*, 63 Misc. Rep. 122, 118 N. Y. Supp. 404; *Walker v. Philadelphia*, 195 Pa. 168, 78 Am. St. Rep. 801, 45 Atl. 657; *Follansbee v. Walker*, 74 Pa. 306; *Still v. Wood*, 85 S. C. 562, 67 S. E. 910; *Kennedy v. Security Bldg. etc. Assn. (Tenn.)*, 57 S. W. 388; *McClesky v. State*, 4 Tex. Civ. App. 322, 23 S. W. 518; *Smith v. Milwaukee*, 18 Wis. 369; *Gill v. United States*, 7 Ct. of Cl. 522; *Stone v. Farmers' Bank of Kentucky*, 174 U. S. 409, 43 L. Ed. 1027, 19 Sup. Ct. Rep. 880.

⁸² *Haese v. Heitzeg*, 159 Cal. 569, 114 Pac. 816; *Johnson v. De Pauw University*, 116 Ky. 671, 76 S. W. 851; *Kerr v. Blodgett*, 48 N. Y. 62; *Carpenter v. Cincinnati etc. Canal Co.*, 35 Ohio St. 307; *Galveston etc. R. Co. v. Gillespie*, 48 Tex. Civ. App. 56, 106 S. W. 707; *Seminole Securities Co. v. Southern Life Ins. Co.*, 182 Fed. 85. These suits are var-

tingent right in realty whose interest is bound up with that of the party who represents interests dependent upon his own.⁸³ Parol evidence is admissible to show who are the real parties in interest,⁸⁴ and when it is shown, the real parties are concluded by the judgment.

§ 587 (603, 604). Effect of judgments on persons in privity with each other.—The term “privity” denotes mutual or successive relationship to the same rights of property.⁸⁵ Privies are generally classified as *privies in law*, such as tenant by curtesy, tenant in dower, executor or administrator; *privies in blood* such as heirs and coparceners; *privies in estate*, such as those where there is a mutual or successive relationship to rights of property, not occasioned by descent nor by act of law.⁸⁶ There is no

iously styled class suits, creditors' suits, and stockholders' suits.

⁸³ When the subject matter of an action is to determine the title to real property, if all the parties are brought before the court that can be brought before it, and it acts properly according to rights that appear, there being no fraud or collusion, its decision is conclusive as to the state of the title, and binds all contingent interests in the property. All other parties who can at any time claim a contingent remainder or contingent estate are bound, upon the principle of representation, by the decree adjudging title: *Mathews v. Lightner*, 85 Minn. 333, 89 Am. St. Rep. 558, 88 N. W. 992; *Miller v. Texas etc. R. Co.*, 132 U. S. 662, 33 L. Ed. 487, 10 Sup. Ct. Rep. 206.

⁸⁴ *Tarleton v. Johnson*, 25 Ala. 300, 60 Am. Dec. 515; *Shirley v. Fearn*, 33 Miss. 653, 69 Am. Dec. 376; *Palmer v. Hayes*, 112 Ind. 289, 13 N. E. 882.

⁸⁵ *Greenl. Ev.*, § 189.

⁸⁶ 2 Coke Litt. 352b; *Freem. Judg.*,

4th ed., § 162. A judgment binding upon the *testator* or intestate in his life is also binding on his *executor* or administrator: *Torrey v. Pond*, 102 Mass. 355; or upon his *heirs* at law: *Lock v. Norborne*, 3 Mod. 141, 87 Eng. Reprint, 91; *Ross v. Banta*, 140 Ind. 120, 34 N. E. 865, 39 N. E. 732; his *legatee*, devisee, tenant in dower or by curtesy: *Lock v. Norborne*, 3 Mod. 141, 87 Eng. Reprint, 91; *Outram v. Morewood*, 3 East, 353, 102 Eng. Reprint, 630. The rule applies to *purchasers* of property concerning which litigation is pending: *Inloe v. Harvey*, 11 Md. 519; *Shotwell v. Lawson*, 30 Miss. 27, 64 Am. Dec. 145; *Haynes v. Calderwood*, 23 Cal. 409; *Loomis v. Riley*, 24 Ill. 307; *Green v. White*, 7 Blackf. (Ind.) 242; *McGregor v. McGregor*, 21 Iowa, 441; *Wickliffe v. Bascom*, 7 B. Mon. (Ky.) 681; *Thurston v. Spratt*, 52 Me. 202; *Steele v. Taylor*, 1 Minn. 274; *Commonwealth v. Dieffenbach*, 3 Grant (Pa.), 368; *Thomsen v. McCormick*, 136 Ill. 135, 26 N. E. 373; to subsequent encumbrancers and lessees: *Commonwealth v. Dieffenbach*, 3

such privity of estate between the real and personal representatives of a deceased person, hence judgments against *administrators or executors* are not conclusive against *heirs or devisees*.⁸⁷ Although in jurisdictions where the administrator or executor fully represents the heirs, as well as the creditors and next of kin, a different rule would prevail.⁸⁸ The executor or administrator is not concluded by a judgment against the heirs in an action which has been brought by such heirs in disregard of the rights of the creditors;⁸⁹ nor is the executor or administrator bound by

Grant (Pa.), 368; National Bank v. Sprague, 21 N. J. Eq. 530; Miller v. White, 80 Ill. 580; *assignees*: Smith v. Kernochen, 7 How. (U. S.) 198, 12 L. Ed. 666; and grantees: Doe v. Earl of Derby, 1 Ad. & E. 787, 110 Eng. Reprint, 1406; provided their succession to the rights of the property affected occurred previously to the institution of the suit: Sampson v. Ohleyer, 22 Cal. 200; Ex parte Reynolds, 1 Caines (N. Y.), 500; Goerges v. Hufschmidt, 44 Mo. 179; Garrison v. Savignac, 25 Mo. 47, 69 Am. Dec. 448. But a judgment against a *tenant* is not binding on his cotenant: Morrison v. Clark, 89 Me. 103, 56 Am. St. Rep. 395, 35 Atl. 1094. In the case of *joint debtors*, provision of the New York Code Civ. Proc., § 1937, makes a judgment as against one of them not summoned conclusive evidence: Hofferberth v. Nash, 50 Misc. Rep. 328, 98 N. Y. Supp. 684; Vereinigte Pinsel-Fabriken v. Rogers, 52 App. Div. 529, 65 N. Y. Supp. 478. Between *husband and wife* there is no legal privity as to their separate rights. A wife not a party to an action brought by her husband cannot be affected by any judgment or other relief he may obtain therein declaring him to be the owner of real estate which in fact belongs

solely to her; nor can any deed obtained by him pursuant to such judgment amount to color of title: Orthwein v. Thomas, 127 Ill. 554, 11 Am. St. Rep. 159, 4 L. R. A. 434, 21 N. E. 430. See, also, Milam v. Coley, 144 Ala. 535, 39 South. 511; Duffee v. Boston El. R. Co., 191 Mass. 563, 77 N. E. 1036; Doe v. Prettyman, 1 Houst. (Del.) 334; Hamilton v. Wright, 30 Iowa, 480; McArthur v. Franklin, 16 Ohio St. 193; Baxter v. Brown, 26 R. I. 381, 59 Atl. 73; Bishop v. Gesteau (Tex. Civ. App.), 136 S. W. 1141. As to action for wife's personal injuries, see Neumeister v. Dubuque, 47 Iowa, 465; Mundell v. Greeley, 76 Kan. 797, 92 Pac. 1117; Canterbury v. Kansas City, 130 Mo. App. 1, 108 S. W. 574.

⁸⁷ McCoy v. Nichols, 5 Miss. 31; Vernon v. Ehrieh, 2 Hill Eq. (S. C.) 257; Collinson v. Owens, 6 Gill & J. (Md.) 4; Robertson v. Wright, 17 Gratt. (Va.) 534; Early v. Garland, 13 Gratt. (Va.) 1; Dorr v. Stockdale, 19 Iowa, 269.

⁸⁸ Shannon v. Taylor, 16 Tex. 413; Castellaw v. Guilmartin, 54 Ga. 299.

⁸⁹ Dorr v. Stockdale, 19 Iowa, 269.

proceedings against a distributee.⁹⁰ There is no such relation between a *corporation* and its *stockholders* that the latter can bind the corporation by an action brought in their own names;⁹¹ but, if an action is brought by a next friend in behalf of an infant, the judgment may be proved as a bar to any future action by the infant on the same cause.⁹² As a rule, *agents* and *principals* have no mutual or successive relationship to rights of property, and are not in privity with each other.⁹³ But if the principal knows of a pending suit in which his agent is a party, in respect to property in his hands as such agent, and if he controls the litigation, he will be bound by the judgment.⁹⁴ So in trespass against the principal, the latter may give, as evidence in his favor, a former judgment rendered on the merits of the case in favor of his servant, where in both cases the same facts are relied on as constituting the trespass which was alleged to have been by the command of the principal.⁹⁵ Although the *tenant* is in privity with the *landlord*, and is bound by a recovery against him, the landlord is not affected by the proceedings against the tenant,⁹⁶ unless he assumes control of the

⁹⁰ Johnson v. Longmire, 39 Ala. 143.

⁹¹ Trustees of Wadsworthville Poor School v. Meetze, 4 Rich. (S. C.) 50. See, also, Victor Talking Machine Co. v. American Graphophone Co., 189 Fed. 359 from the syllabus of which we learn it is held that "A stockholder in a corporation which is sued for infringement of a patent, although owning a majority of its stock, has not the legal right to control the defense in such suit, nor to intervene and make a separate defense, and is not bound individually as a party or privy by the decree therein, where he does not in fact assume such defense." The court adopted the meaning of "parties" as declared in

Robbins v. Chicago, 4 Wall. (U. S.) 657, 18 L. Ed. 427; Green v. Bogue, 158 U. S. 478, 39 L. Ed. 1091, 15 Sup. Ct. Rep. 975; Litchfield v. Goodnow, 123 U. S. 549, 31 L. Ed. 199, 8 Sup. Ct. Rep. 210.

⁹² Morgan v. Thorn, 7 Mees. & W. 400.

⁹³ Pico v. Webster, 12 Cal. 140; Lawrence v. Ware, 37 Ala. 553; Freem. Judg., 4th ed., § 164.

⁹⁴ Warfield v. Davis, 14 B. Mon. (Ky.) 40.

⁹⁵ Emery v. Fowler, 39 Me. 326, 63 Am. Dec. 627.

⁹⁶ Wenman v. MacKenzie, 5 El. & B. 447, 119 Eng. Reprint, 547; Chant v. Reynolds, 49 Cal. 213; Bartlett v. Boston Gas Light Co., 122 Mass. 209.

prosecution or defense, in which case he is bound.⁹⁷ As to purchasers of *judicial sale*, it is not necessary that a person who claims title to property under a judgment or execution against certain defendants should have been a party to the suit in order to enable him to show, in an action for the same property between those defendants and himself, the judgment or execution under which he claims, and by which their title had been adjudicated. The judgment is conclusive of the title of the parties against whom it is rendered, whenever the title has been the subject matter of the suit, and has been adjudicated.⁹⁸ While a mortgagee is privy in estate with a mortgagor as to actions begun before the mortgage was given,⁹⁹ he is not bound by judgments or decrees against the mortgagor in suits begun by third parties subsequent to the execution of the mortgage, unless he or someone authorized to represent him, like the trustee of a mortgage bondholder, is made a party to the litigation, although it would be other-

⁹⁷ *Valentine v. Mahoney*, 37 Cal. 389; *Chirac v. Reinecker*, 2 Pet. (U. S.) 613, 7 L. Ed. 538 (held admissible but not conclusive); *Thomson v. McCormick*, 136 Ill. 135, 26 N. E. 373. In South Carolina it is held otherwise: *Samuel v. Dinkins*, 12 Rich. (S. C.) 172, 75 Am. Dec. 729.

⁹⁸ *Faulkner v. Vickers*, 94 Ga. 531, 21 S. E. 233; *Spurgin v. Bowers*, 82 Iowa, 187, 47 N. W. 1029; *Dismukes v. Musgrove*, 2 La. 335; *Shirley v. Fearne*, 33 Miss. 653, 69 Am. Dec. 375; *Strayer v. Johnson*, 110 Pa. 21, 1 Atl. 222; *Soper v. Guernsey*, 71 Pa. 219; *Schmidt v. Olympia Light etc. Co.*, 46 Wash. 360, 90 Pac. 212; *Hurxthal v. St. Lawrence Boom etc. Co.*, 53 W. Va. 87, 97 Am. St. Rep. 954, 44 S. E. 520; *St. Louis etc. R. Co. v. Stark*, 55 Fed. 758, 5 C. C. A. 264. But there is no such privity between a purchaser of a decedent's estate and

a judgment creditor of the executor as such, as would render the judgment res judicata as to the purchaser: *In re Catlin's Estate*, 57 Misc. Rep. 269, 109 N. Y. Supp. 542. As to purchasers of personal property pending or after judgment in an action concerning it, the purchaser is bound: *Merritt v. Eagan*, 59 Ill. 212; *Shufelt v. Shufelt*, 9 Paige Ch. (N. Y.) 137, 37 Am. Dec. 381; *Marsh v. Pier*, 4 Rawle (Pa.), 273, 26 Am. Dec. 131; *Calkins v. First Nat. Bank*, 20 S. D. 466, 107 N. W. 675; *Nichols v. Campbell*, 10 Gratt. (Va.) 560; *Mellen v. Moline Malleable Iron Works*, 131 U. S. 352, 33 L. Ed. 178, 9 Sup. Ct. Rep. 781; *Confectioners Machinery etc. Co. v. Racine Engine etc. Co.*, 163 Fed. 914.

⁹⁹ *American Mtg. Co. v. Boyd*, 92 Ala. 139, 9 South. 166.

wise if the mortgage were executed pending the suit or after the decree.¹⁰⁰ It has been truly said that the classification of privies is not of any considerable importance in considering the operation of judgments. All privies are in effect, if not in name, *privies in estate*.^{100a} They are bound because they have succeeded to some estate or interest which was bound in the hands of its former owner; and the extent of the estoppel, so far as the privy is concerned, is limited to controversies affecting this estate or interest. The manner in which the estate was lawfully acquired neither limits nor extends the operation of the estoppel created by a former adjudication, and is therefore immaterial. It is well understood, though not usually stated in express terms, in works upon the subject, that no one is privy to a judgment whose succession to the rights of property thereby affected occurred previously to the institution of the suit. The late learned writer on Judgments says:¹ "It is essential to privity, as the term is here

¹⁰⁰ *Keokuk etc. R. Co. v. Missouri*, 152 U. S. 301, 38 L. Ed. 450, 14 Sup. Ct. Rep. 592. A leading case on this point is *Campbell v. Hall*, 16 N. Y. 575, in which it was held that a second mortgagee of land was not estopped by a judgment in an action between his mortgagor and a prior mortgagee, rendered after the execution of the *second mortgage*, but might litigate the amount due upon the first mortgage, notwithstanding the judgment. Speaking of the rule that a *grantee* is estopped by a judgment against his *grantor*, because he holds by a derivative title from his grantor, and cannot, therefore, be in a better situation than the party from whom he obtained his right, the court observed: "This being the reason for the rule, it follows that it can have no application except where the conveyance is made after the event out of which the estoppel arises.

The principle in such case is that the estoppel attaches itself to and runs with the land. The grantor can transfer no greater right than he himself has, and hence the title which he conveys must necessarily be subject; in the hands of the grantee, to all the burdens which rested upon it at the time of the transfer. On the other hand, nothing which the grantor can do or suffer to be done after such transfer can affect the rights previously vested in the grantee." See, also, *Mathes v. Cover*, 43 Iowa, 512; *Bryan v. Malloy*, 90 N. C. 508; *Scates v. King*, 110 Ill. 456; *Dooley v. Potter*, 140 Mass. 49, 2 N. E. 935; *Coles v. Allen*, 64 Ala. 98; *Todd v. Flournoy*, 56 Ala. 99, 28 Am. Rep. 758; *Shay v. McNamara*, 54 Cal. 169.

^{100a} 1 Freeman, Judgm., § 162.

¹ 1 Freeman, Judgm., § 162.

used, that one person should have succeeded to an estate or interest formerly held by another. He who has so succeeded is in privity with him from whom he succeeded, and all the estate or interest which he has acquired is bound by judgment recovered against his predecessor while he held such estate or interest. On the other hand, except to the extent which one person has succeeded to an estate or interest formerly held by another, there can be no privity between them, no matter what were or are their relations to each other or to the same piece of property. Therefore, while a mortgagee is in privity with a mortgagor as to all that happened before the execution of the mortgage, he is not in privity with respect to anything happening afterward. The fact that parties are jointly liable, or are joint owners of property, or are otherwise associated in business, does not place them in privity with each other, except in so far as one may have succeeded to the interest of the other. Hence there is no privity between the maker, indorser, and acceptor of a note, nor between the surviving member of a partnership and the heirs of a deceased partner. Kinship, whether by affinity or consanguinity, does not create privity, except where it results in the descent of an estate from one to another. Therefore, there is no privity between husband and wife, or parent and child, or other relatives, when neither of them has succeeded to an estate or interest in property formerly held by the other."

§ 588 (605). Admissibility of judgments as against strangers.—The term "parties" includes all persons who are directly interested in the subject matter in issue, who have a right to make a defense, control the proceedings, or appeal from the judgment. Strangers to the suit are persons who do not possess these rights.² The plaintiff is he who, in a personal action, seeks a remedy in a court of justice for an injury to, or a withholding of, his rights.

² Hunt v. Haven, 52 N. H. 162.

The legal plaintiff is he in whom the legal title or right of action is vested. The equitable plaintiff is he who, not having the legal title to the right of action, is in equity entitled to the thing sued for. Such are the accepted definitions of the terms "parties" and "plaintiff."^{2a} In a celebrated case it was declared to be the generally accepted rule that "a transaction between two parties in judicial proceedings ought not to be binding upon a third. For it would be unjust to bind any person who could not be admitted to make a defense, or to examine witnesses, or to appeal from a judgment he might think erroneous; and, therefore, the depositions of witnesses in another cause in proof of a fact, the verdict of the jury finding the fact and the judgment of the courts upon facts found, although evidence against the parties and all claiming under them, are not, in general, to be used to the prejudice of strangers."³

^{2a} United States v. Henderlong, 102 Fed. 2.

³ McCann v. Ellis, 172 Ala. 60, 55 South. 303; Little v. Williams, 88 Ark. 37, 113 S. W. 340; County of Los Angeles v. Winans, 13 Cal. App. 234, 109 Pac. 640; Hackett v. Larimer etc. Reservoir Co., 48 Colo. 178, 109 Pac. 965, 1 Water and Min. Cas. 224; Cook v. Town of Morris, 66 Conn. 137, 33 Atl. 594; Burton v. Hazzard, 4 Harr. (Del.) 100; Logan v. Childs, 51 Fla. 233, 41 South. 197; Hinkle v. Smith, 133 Ga. 255, 65 S. E. 427; Ex parte Sharp, 15 Idaho, 120, 18 L. R. A., N. S., 886, 96 Pac. 563; Sill v. Pate, 133 Ill. App. 423; Brown v. Clow, 158 Ind. 403, 62 N. E. 1006; Sawyer v. Kelly, 148 Iowa, 644, 127 N. W. 977; Peck v. Merchants' Transfer etc. Co., 85 Kan. 126, 116 Pac. 365; Ratterman v. Apperson, 141 Ky. 821, 133 S. W. 1005; Behrman v. Louisiana Ry. etc. Co., 127 La. 775, 54 South. 25; Nutwell v. Commissioners of Anne Arundel

County, 110 Md. 667, 73 Atl. 710; Adams v. Clapp, 99 Me. 169, 58 Atl. 1043; Old Dominion Copper Min. etc. Co. v. Bigelow, 203 Mass. 159, 89 N. E. 193; Bean v. Bean, 163 Mich. 379, 128 N. W. 413; Teal v. Scandinavian-American Bank, 114 Minn. 435, 131 N. W. 486; Mel-sheimer v. McKnight, 92 Miss. 386, 46 South. 827; Badger Lumber Co. v. Staley, 141 Mo. App. 295, 125 S. W. 779; Butte Land etc. Co. v. Merriman, 32 Mont. 402, 108 Am. St. Rep. 590, 80 Pac. 675; McCarthy v. Benedict, 89 Neb. 293, 131 N. W. 598; Costello v. Scott, 30 Nev. 43, 93 Pac. 1, 94 Pac. 222; Genest v. Odell Mfg. Co., 75 N. H. 365, 74 Atl. 593; Faitoute v. Wright, 78 N. J. Eq. 560, 80 Atl. 559; Townsend v. Perry, 124 N. Y. Supp. 143; Hobbs v. Cashwell, 152 N. C. 183, 67 S. E. 495; Martinson v. Marzolf, 15 N. D. 471, 108 N. W. 801; State v. Cincinnati Tin etc. Co., 66 Ohio St. 182, 64 N. E. 68; Andrews v. Donnelly, 59 Or. 138, 116 Pac. 569;

And the converse rule is equally just, that the stranger who is not bound by a judgment cannot avail himself of it for his own benefit.⁴ But it is an exception, generally recognized, that verdicts and judgments on questions of a *public nature*, where evidence of a *general reputation* would be received, may be admitted as evidence, although the parties are not the same or in privity with each other. But in such cases the judgment is not conclusive against strangers to the record, although admissible.⁵ Another exception to the

Woods v. Klein, 223 Pa. 256, 72 Atl. 523; Richmond v. James, 27 R. I. 154, 61 Atl. 54; Logan v. Atlantic etc. R. Co., 82 S. C. 518, 64 S. E. 515; Kammann v. Barton, 26 S. D. 371, 128 N. W. 329; Walter v. Hartman (Tenn.), 67 S. W. 476; Scales v. Wren, 103 Tex. 304, 127 S. W. 164; Boucoufski v. Jacobsen, 36 Utah, 165, 104 Pac. 117; Wright v. Hazen, 24 Vt. 143; Krebs v. Welch, 111 Va. 432, 69 S. E. 346; Schmidt v. Olympia Light etc. Co., 46 Wash. 360, 90 Pac. 212; Blake v. O'Neal, 63 W. Va. 483, 16 L. R. A., N. S., 1147, 61 S. E. 410; Connor v. Sheridan, 116 Wis. 666, 93 N. W. 835; Street Grading Dist. v. Hagadorn, 186 Fed. 451, 108 C. C. A. 429; Anderson v. Collinson, [1901] 2 K. B. 107, 84 L. T., N. S., 465, 49 Wkly. Rep. 623; Duchess of Kingston's Case, 20 How. St. Tr. 538; Sleeth v. Hurlbert, 25 Can. S. Ct. 620; 2 Phill. Ev., 4.

⁴ Christopher v. Mungen, 61 Fla. 513, 534, 55 South. 273; Winston v. Starke, 12 Gratt. (Va.) 317; Meisenheimer v. Meisenheimer, 55 Wash. 32, 133 Am. St. Rep. 1005, 104 Pac. 159.

⁵ Reed v. Jackson, 1 East, 357, 102 Eng. Reprint, 137; Pile v. McBratney, 15 Ill. 314; Patterson v. Gaines, 6 How. (U. S.) 550, 12 L. Ed. 553; 2 Tayl. Ev., 10th ed., §

1683. Such judgments have been received in a second action, although the parties were different, in cases affecting *customs*: Reed v. Jackson, 1 East, 357, 102 Eng. Reprint, 137; Berry v. Banner, Peake, 156; *boundaries* between parishes and counties: Brisco v. Lomax, 8 Ad. & E. 198, 112 Eng. Reprint, 812; Evans v. Rees, 10 Ad. & E. 151, 113 Eng. Reprint, 58; *liabilities to repair roads*: Rex v. St. Pancras, Peake, 220; Rex v. Haughton, 1 El. & B. 501, 118 Eng. Reprint, 523; to prove the existence of a *highway* where the party claims by prescription: Fowler v. Savage, 3 Conn. 90; to show the *dedication* of a public square or park: Elson v. Comstock, 150 Ill. 303, 37 N. E. 207; People v. Holladay, 102 Cal. 661, 36 Pac. 27; to determine questions relating to *tolls*: City of London v. Clerke, Carth. 181, 90 Eng. Reprint, 710; *pedigrees*: Vaughan v. Phebe, Mart. & Y. (Tenn.) 5, 17 Am. Dec. 770; and other questions of *public and general interest*: Mulholland v. Killen, Ir. R. 9 Eq. 471; on questions of the *death* of a person therein named: Pile v. McBratney, 15 Ill. 314; Koch v. West, 118 Iowa, 468, 96 Am. St. Rep. 39, 92 N. W. 663, on a feigned issue to try whether the defendant was a *person of color*: McCollum v. Fitzsimons, 1 Rich. (S. C.) 252.

rule that statements in judgments are not relevant, except between parties and privies, has been recognized in *actions in rem*. This is illustrated in actions for the condemnation of ships as prizes.⁶ As illustrations of the general rule that judgments are not admissible except between parties or privies to the action, it has been held that, in an action for slander against a husband, a judgment in a former action between the plaintiff and the *husband and wife* for the same slanderous words could not be received.⁷ So in an action by a town against a husband for support furnished the wife, a judgment in divorce is not admissible on the issue whether she was justified in leaving him.⁸

§ 589 (606). Judgments in civil cases no bar in criminal cases.—It requires but little consideration to note the necessary divergence when the judgment offered in evidence in a civil cause comes from a criminal court or *vice versa*. Although the same fact may be involved in two cases, one civil and the other criminal, the *parties are necessarily different*, for one action is prosecuted by an individual, the other by the state; and the judgment in one case is not generally admissible in the other to establish the facts

⁶ *Gelston v. Hoyt*, 13 Johns. (N. Y.) 561, 3 Wheat. (U. S.) 246, 4 L. Ed. 381; *Risley v. Phenix Bank*, 83 N. Y. 318, 332, 38 Am. Rep. 421; *Steph. Ev.*, art. 42. But see *Farrell v. City of St. Paul*, 62 Minn. 271, 54 Am. St. Rep. 641, 29 L. R. A. 778, 64 N. W. 809. Applies to actions where a judgment is rendered as to the *status* of some particular subject matter by a tribunal of competent jurisdiction, as in *attachment* proceedings against a nonresident: *Pennoyer v. Neff*, 95 U. S. 714, 24 L. Ed. 565; *McKinney v. Collins*, 88 N. Y. 216; or where the issue relates to such questions as *marriage and divorce*: *People v. Baker*, 76 N. Y. 78, 32 Am. Rep. 274; *naturalization*: *State v. McDonald*, 108 Wis. 8, 81 Am. Rep.

878, 84 N. W. 171; *settlements of paupers*: *Dorset v. Overseers of Manchester*, 3 Vt. 370; *Gibson v. Overseers of Nicholson*, 2 Serg. & R. (Pa.) 422; *grants of probate*: *Noell v. Wells*, 1 Lev. 235, 83 Eng. Reprint, 385; *Allen v. Dumas*, 3 Term Rep. 125, 100 Eng. Reprint. 490; *Bonne-mort v. Gill*, 167 Mass. 338, 45 N. E. 768; and *administration*: *Bouchier v. Taylor*, 4 Brown P. C. 708; *Prosser v. Wagner*, 1 Com. B., N. S., 289, 26 L. J. P. 81, 5 W. R. 146.

⁷ *Magauran v. Patterson*, 6 Serg. & R. (Pa.) 278; *Killingsworth v. Bradford*, 2 Overt. (Tenn.) 204; *Chapman v. Chapman*, 1 Munf. (Va.) 398.

⁸ *Inhabitants of Sturbridge v. Franklin*, 160 Mass. 149, 35 N. E. 669.

on which it was rendered.⁹ Thus, in an action to recover a reward for the detection and conviction of an offender, the record of his conviction, though admissible to show that fact, does not determine conclusively the question of his guilt.¹⁰ Although the clear weight of authority supports the proposition illustrated by the foregoing cases, there are instances in which a different rule has been held.¹¹ Even

⁹ *Smith v. Rummens*, 1 Camp. 9; *Hathaway v. Barrow*, 1 Camp. 151; *Jones v. White*, 1 Str. 68, 93 Eng. Reprint, 389; *Hillyard v. Grantham*, cited by Ld. Hardwicke in *Brownsword v. Edwards*, 2 Ves. Sr. 246, 28 Eng. Reprint, 157; *Morch v. Raubitschek*, 159 Pa. 559, 28 Atl. 369; *Marceau v. Travelers' Ins. Co.*, 101 Cal. 338, 35 Pac. 856, 36 Pac. 813; *Mead v. Boston*, 3 Cush. (Mass.) 404; *Betts v. New Hartford*, 25 Conn. 180; *Corbley v. Wilson*, 71 Ill. 209, 22 Am. Rep. 98; *Steel v. Cazeaux*, 8 Mart. (La.), O. S., 318, 13 Am. Dec. 288; *Cluff v. Mutual Ben. Life Ins. Co.*, 99 Mass. 317; *Cottingham v. Weeks*, 54 Ga. 275; *McDonald v. Stark*, 176 Ill. 456, 52 N. E. 37; *Martin v. Blattner*, 68 Iowa, 286, 25 N. W. 131, 27 N. W. 244; *Fowle v. Child*, 164 Mass. 210, 49 Am. St. Rep. 451, 41 N. E. 291; *People v. Kenyon*, 93 Mich. 19, 52 N. W. 1033. For a full discussion of *res judicata* in criminal proceedings, see note to *Mitchell v. State*, 103 Am. St. Rep. 19-29. As to judgment in criminal action as *res judicata* in civil action, see note to *State v. Roach*, 31 L. R. A., N. S., 670. See, also, note to *Micks v. Mason*, 11 L. R. A., N. S., 653.

¹⁰ *Mead v. Boston*, 3 Cush. (Mass.) 404. An action for trover for stolen money is not defeated by the fact that the defendant has been acquitted of the theft in a criminal action: *Hutchinson v. Merchants' Mechanics' Bank of Wheeling*, 41 Pa. 42, 80 Am. Dec. 596; *Beausoliel v. Brown*,

15 La. Ann. 543; and a conviction for forging a bill of exchange is not admissible to prove *forgery* in an action on the bill: *Castrique v. Imrie*, L. R. 4 H. L. 414, 39 L. J. C. P. 350, 23 L. T. 48, 19 W. R. 1. So in a civil action for the *killings* of a person, the record of the defendant's acquittal is not admissible: *Cottingham v. Weeks*, 54 Ga. 275. Among the later cases, see: *Myers v. Maryland Casualty Co.*, 123 Mo. App. 682, 101 S. W. 124; *Beckworth v. Phillips*, 6 Ga. App. 859, 65 S. E. 1075. See, also, *Holloman v. Tifton*, 3 Ga. App. 293, 59 S. E. 823 (judgment of conviction for keeping *intoxicating liquors* held conclusive in action against city for fine); *In re Patrick*, 136 App. Div. 450, 120 N. Y. Supp. 1006 (against *attorney for felony* conclusive for *disbarment*): *Underwood v. Commonwealth*, 32 Ky. Law Rep. 32, 105 S. W. 151 (against *attorney for retailing intoxicating liquors* conclusive for *disbarment*). But not when the conviction of the attorney was in another state: *In re Ebbs*, 150 N. C. 44, 17 Ann. Cas. 592, 19 L. R. A., N. S., 892, 63 S. E. 190.

¹¹ *Moses v. Bradley*, 3 Whart. (Pa.) 272; *Maybee v. Avery*, 18 Johns. (N. Y.) 352; *Anderson v. Anderson*, 4 Me. 100, 16 Am. Dec. 237; *Randall v. Randall*, 4 Me. 326; *R. v. Fontaine Moreau*, 11 Q. B. 1033, 116 Eng. Reprint, 757; *Bradley v. Bradley*, 11 Me. 367; *Green v. Bedell*, 48 N. H. 546; *Clark v. Irvin*, 9 Ohio, 131.

where the parties are the same, there seems to be an injustice in admitting an acquittal in a criminal prosecution in evidence in a civil action, because to procure a conviction in a criminal prosecution the jury must be convinced, beyond a reasonable doubt, while in a civil action it is their duty to find according to the preponderance of evidence.¹² Nevertheless, the authorities indicate that when a prosecution is conducted by and in the name of the United States, and results in an acquittal, the judgment is conclusive in favor of the defendant in a subsequent trial of a suit *in rem*, brought by the United States against the same defendant, in which the issues are the same as those involved in the criminal prosecution.¹³ But if a defendant has *pleaded guilty* in a criminal case, the judgment entered upon such plea may be received as an *admission*, although it is not

¹² 1 Freeman, Judgments, § 319.

¹³ Coffey v. United States, 116 U. S. 436, 29 L. Ed. 684, 6 Sup. Ct. Rep. 437. In this case the defendant was acquitted in a criminal prosecution for violating the internal revenue laws. He subsequently claimed the property involved, and it was sought to use against him the same act involved in the criminal prosecution as a cause for the forfeiture of the property. Mr Justice Blatchford, after referring to *Gelston v. Hoyt*, 3 Wheat. (U. S.) 246, 4 L. Ed. 381, said that the doctrine in that case was applicable to this. "The judgment of acquittal in the criminal proceeding ascertained that the facts which were the basis of that proceeding, and are the basis of this one, and which are made by the statute the foundation of any punishment, personal or pecuniary, did not exist. This was ascertained once for all between the United States and the claimant, in the criminal proceeding, so that the facts cannot be again litigated be-

tween them, as the basis of any statutory punishment denounced as a consequence of the existence of the facts. This is a necessary result of the rules laid down in the unanimous opinion of the judges in the case of *Rex v. Duchess of Kingston*, 20 How. St. Tr. 355, 538, and which were formulated thus: the judgment of a court of concurrent jurisdiction, directly upon the point, is as a plea at bar, or as evidence conclusive, between the same parties, upon the same matter directly in question in another court; and the judgment of a court of exclusive jurisdiction, directly upon the point, is, in like manner, conclusive upon the same matter, between the same parties, coming incidentally in question in another court for a different purpose. In the present case, the court is the same court and had jurisdiction; and the judgment was directly on the point now involved and between the same parties." See, also, *United States v. Rosenthal*, 174 Fed. 652, 98 C. C. A. 406.

conclusive.¹⁴ It is always instructive to note what Freeman has written upon any subject relating to judgments. He says:^{14a} “Notwithstanding the weight of reason and of precedent opposing the admission of any record of a criminal cause as an estoppel in any civil action, it must be admitted that the precedents are not, on this subject, consistent with one another. In one case it was declared not to be an error to instruct a jury on a trial in a civil action for an assault and battery that the conviction of the defendant on an indictment for the same offense showed that the plaintiff was entitled to damages; in another, the record of the conviction of the defendant for adultery was received, in a subsequent action against him for divorce, as evidence both of the adultery and of his marriage to plaintiff; and the record of plaintiff’s conviction is doubtless conclusive evidence against him, in an action for malicious prosecution resulting in such conviction, that such prosecution was not without probable cause. This effect of such conviction continues in some of the states, though a new trial has been granted or the judgment reversed upon appeal; in others, such conviction, after being set aside upon appeal, or by the granting of a new trial, is *prima facie* evidence only of the existence of probable cause; while in others it remains conclusive evidence, unless shown to have been procured by artifice or fraud. Of course, judgments in criminal, like those in civil, cases are always competent evidence of their own rendition. Thus in an action for malicious prosecution, the record in the criminal case may be put in evidence to establish the fact that there was a prosecution resulting in an acquittal. In prosecutions against accessories or against receivers of stolen goods, the conviction of the principal is admissible for the purpose of establishing that a conviction of the principal has been had, but not to show that a crime was committed, or that the principal is in fact guilty. . . . So

¹⁴ Crawford v. Bergen, 91 Iowa, 675, 60 N. W. 205; Hauser v. Griffith, 102 Iowa, 215, 71 N. W. 223.

^{14a} 1 Freem. Judg., § 319.

it has been held, under a prosecution for trespass in unlawfully removing stakes and rails from a boundary line, a judgment in a civil action rendered before the commission of the alleged trespass, in an action to which defendant was a party, was conclusive evidence against him of the location of such line." The conviction of a defendant may be offered in evidence in a subsequent criminal prosecution against him. If so, the parties to the two prosecutions and the rules of evidence applicable to them being the same, it would appear that the former conviction is conclusive evidence of any and every fact necessarily affirmed by it, and must be received as such in the second prosecution.¹⁵

§ 590 (607). Judgments admissible against third persons for incidental purposes.—Although, where the parties to the suit are not the same or in privity, the record of the former suit cannot be introduced to establish the facts on which it was rendered, yet there are, in addition to the exceptions referred to,¹⁶ certain incidental purposes for which such records may be introduced.¹⁷ A judgment may be offered in evidence for two purposes: 1. To establish the mere fact of its own rendition, and those legal consequences which result from that fact; 2. In addition to the first purpose, for the further purpose of proving some other fact as found by that verdict, or upon whose supposed existence the judgment is based. For the first of these purposes every judgment is admissible in evidence against the whole world.¹⁸ For example, if it becomes material to show that a judgment has been rendered, although against one who

¹⁵ Commonwealth v. Feldman, 131 Mass. 588; Commonwealth v. Evans, 101 Mass. 25.

¹⁶ § 588, *ante*.

¹⁷ Freem. Judg., 4th ed., § 154; Black, Judgm., 2d ed., §§ 534, 600.

¹⁸ Notes 273 and 274 to Phillips on Evidence, by Cowen & Hill; Williams v. McGrade, 13 Minn. 46;

Spencer v. Dearth, 43 Vt. 98; Harrison v. Harrison, 39 Ala. 489; Mortland v. Smith, 32 Mo. 225, 82 Am. Dec. 128; Stephens v. Jack, 3 Yerg. (Tenn.) 403, 24 Am. Dec. 583; McCamant v. Roberts, 66 Tex. 260, 1 S. W. 260; Taylor v. Means, 73 Ala. 468; Smith v. Chapin, 31 Conn. 530; Maple v. Beach, 43 Ind. 51; Pico v. Webster, 14 Cal. 202, 73 Am. Dec. 647.

is a stranger to the pending suit, the record may be offered for that purpose,¹⁹ and it becomes evidence, not only of the rendition of the judgment, but of its *legal effect*.²⁰ This rule is thus stated by Stephen: "All judgments, whatever, are conclusive proof, as against all persons, of the existence of that state of things which they actually effect, when the existence of the state of things so effected is a fact in issue, or is, or is deemed to be, relevant to the issue."²¹ For such purposes, judgments have been received to show that one person was a *creditor* of another at a given time, though he was a stranger to the suit,²² and are conclusive, in the absence of fraud, as to the *fact and amount of the indebtedness* when

¹⁹ Taylor v. Means, 73 Ala. 468; Watrous v. Cunningham, 71 Cal. 30, 11 Pac. 811; Smith v. Chapin, 31 Conn. 530; Koren v. Roemheld, 7 Ill. App. 646; Maple v. Beach, 43 Ind. 51; Burdick v. Chicago etc. R. Co., 87 Iowa, 384, 54 N. W. 439; Head v. McDonald, 7 T. B. Mon. (Ky.) 203; Morgan v. Yarborough, 13 La. 74, 33 Am. Dec. 553; Fox v. Fox, 4 La. Ann. 135; Atkinson v. Parks, 84 Me. 414, 24 Atl. 891; Key v. Dent, 14 Md. 86; Goodnow v. Smith, 97 Mass. 69; Lee v. Lee, 21 Mo. 531, 64 Am. Dec. 247; Sheibley v. Fales, 81 Neb. 795, 116 N. W. 1035; Harrington v. Wadsworth, 63 N. H. 400; Vogt v. Ticknor, 48 N. H. 242; Spurr v. North Hudson County R. Co., 56 N. J. L. 346, 28 Atl. 582; Faltoute v. Wright, 78 N. J. Eq. 560, 80 Atl. 559; Farmers' etc. Nat. Bank v. Erie Ry. Co., 72 N. Y. 188; Kip v. Bringham, 7 Johns. (N. Y.) 168; State v. Foster, 3 McCord (S. C.), 442; Hill v. Parker, 5 Rich. (S. C.) 87; Stephens v. Jack, 3 Yerg. (Tenn.) 403, 24 Am. Dec. 583; McCamant v. Roberts, 66 Tex. 260, 1 S. W. 260; Ray v. Clemens, 6 Leigh (Va.), 600; Spencer v. Dearth, 43 Vt. 98; Seattle v. Saulez, 47 Wash. 365, 92 Pac. 140;

Waggoner v. Wolf, 28 W. Va. 820, 1 S. E. 25; Southern R. Co. v. Banknight, 70 Fed. 442, 30 L. R. A. 823, 17 C. C. A. 181.

²⁰ Stark. Ev. 287. See, also, cases cited in the last note. While a judgment obtained on a claim against a contractor under section 4 of the mechanic's lien law in the state of New Jersey is conclusive as to the correctness of the claim upon the parties to the action and their privies, it is not conclusive in that respect upon the owner of the building nor upon other persons claiming the contractor's moneys by reason of assignments thereof made before the suit resulting in such judgment was begun, who had no notice of the suit, and who have not by their actual intervention brought themselves within its binding effect: Faltoute v. Wright, *supra*.

²¹ Steph. Ev., art. 40; Dorrell v. State, 83 Ind. 357; Chamberlain v. Carlisle, 26 N. H. 540; Wadsworth v. Sharpsteen, 8 N. Y. 388, 59 Am. Dec. 499.

²² Vogt v. Ticknor, 48 N. H. 242; Goodnow v. Smith, 97 Mass. 69; Church v. Chapin, 35 Vt. 223; Inman v. Mead, 97 Mass. 310; Candee v. Lord, 2 N. Y. 269, 51 Am. Dec. 294.

they are called in question in another action.²³ They have been received to show the former acquittal of the plaintiff in an action for malicious prosecution.²⁴ The records are admissible to identify a case, if this becomes material,²⁵ or if they constitute a part of the *res gestae* out of which the present action has grown.²⁶ On the same principle, where the plaintiff, but not the defendant, was a party in the former action, the record in the former case was admitted to rebut the presumption that the claim was stale, as well as for the purpose of showing the filing of a *lis pendens* in relation to the property in controversy.²⁷ In actions by sureties or guarantors, judgments rendered against them in former actions may be admitted to show their rendition as well as the consequence of the default of the principal and amount of damages, although this is not necessarily conclusive as to the debt or misconduct of the principal.²⁸ The same rule applies where a judgment has been rendered against a *master* for the negligence

²³ Bain v. Wells, 107 Ala. 562, 19 South. 774; Welch v. Sargent, 127 Cal. 72, 59 Pac. 319; Rice v. Rice, 108 Ill. 199; Stewart Lumber Co. v. Downs, 142 Iowa, 420, 19 Ann. Cas. 1100, 120 N. W. 1067; Harrison v. Shaffer, 60 Kan. 176, 55 Pac. 881; Bothick v. Greves, 34 La. Ann. 907; Sidensparker v. Sidensparker, 52 Me. 481, 83 Am. Dec. 527; Pabst Brewing Co. v. Jensen, 68 Minn. 293, 71 N. W. 384; Aron v. Chaffe, 72 Miss. 159, 17 South. 11; Dempsey v. Schawacker, 140 Mo. 680, 38 S. W. 954, 41 S. W. 1100; Vogt v. Ticknor, 48 N. H. 242; Raymond v. Richmond, 78 N. Y. 351; Belding v. Archer, 131 N. C. 287, 42 S. E. 800; First Nat. Bank v. Oldham, 6 Lea (Tenn.), 718; Lehman v. Stone (Tex. App.), 16 S. W. 784; Cooper v. Utah Light etc. Co., 35 Utah, 570, 136 Am. St. Rep. 1075, 102 Pac. 202; Cox v. Thomas, 9 Gratt. (Va.) 323; Turner v. Stewart, 51 W. Va. 493, 41 S. E. 924;

Clasgens Co. v. Silber, 93 Wis. 579, 67 N. W. 1122; Central Trust Co. v. Charlotte etc. R. Co., 65 Fed. 257. They cannot, however, go further than the existence of the debt at the time of its rendition. They do not relate back and operate, for example, as proof of the consideration of the instrument upon which the judgment was rendered at the time of its execution: Langley v. Pulliam, 162 Ala. 142, 50 South. 365.

²⁴ Sayles v. Briggs, 4 Met. (Mass.) 421; Burt v. Place, 4 Wend. (N. Y.) 591.

²⁵ Harris v. Miner, 28 Ill. 135.

²⁶ Wells v. Shipp, 1 Miss. 353.

²⁷ Sowden v. Craig, 26 Iowa, 156, 96 Am. Dec. 125.

²⁸ Lewis v. Knox, 2 Bibb (Ky.), 453; Cox v. Thomas, 9 Gratt. (Va.) 323; Copp v. McDugall, 9 Mass. 1; Lee v. Clark, 1 Hill (N. Y.), 56; Tyler v. Ulmer, 12 Mass. 163.

of his *servant*, and the master sues the servant for indemnity.²⁹ A judgment may constitute part of a chain of title to real or personal estate, or, though not amounting to title, it may show the character of the possession of one of the parties to a suit. In either case it is admissible in evidence for or against strangers, as well as for or against the parties to the original suit.³⁰ Whenever a judgment transfers a title, or is the foundation of a claim to possession, it is admissible, upon the same principle, as a voluntary conveyance.³¹ Judgments are admissible as evidence against third parties where the existence or validity of collateral proceedings is in issue.³² In an action against

²⁹ Green v. New River Co., 4 Term Rep. 590, 100 Eng. Reprint, 1192.

³⁰ Chapman v. Moore, 151 Cal. 509, 121 Am. St. Rep. 130, 91 Pac. 324; Fowler v. Savage, 3 Conn. 90; Bussey v. Dodge, 94 Ga. 584, 21 S. E. 151; Gage v. Goudy, 141 Ill. 215, 30 N. E. 320, (Ill.) 29 N. E. 896; House v. Wiles, 12 Gill & J. (Md.) 338; Chamberlain v. Bradley, 101 Mass. 188, 3 Am. Rep. 331; Kurtz v. St. Paul etc. R. Co., 61 Minn. 18, 63 N. W. 1; Railroad Equipment Co. v. Blair, 145 N. Y. 607, 39 N. E. 962; Finch v. Finch, 131 N. C. 271, 42 S. E. 615; Buckingham v. Hanna, 2 Ohio St. 551; Martin v. Rutt, 127 Pa. 380, 17 Atl. 993; Glezen v. Haskins, 23 R. I. 601, 51 Atl. 219; Wardlaw v. Hammond, 9 Rich. (S. C.) 454; Caruthers v. Hadley (Tex. Civ. App.), 134 S. W. 757; Building etc. Co. v. Fray, 96 Va. 559, 32 S. E. 58; McMillan v. Walker, 48 Wash. 342, 93 Pac. 520; Barr v. Gratz, 4 Wheat. (U. S.) 213, 4 L. Ed. 553; Webb v. Den, 17 How. (U. S.) 576, 15 L. Ed. 35; Davies v. Lowndes, 1 Bing. N. C. 597, 4 L. J. C. P. 214; 2 Freeman, Judg., § 416.

³¹ Fowler v. Savage, 3 Conn. 90;

Koogler v. Huffman, 1 McCord (S. C.), 495; Masters v. Varner, 5 Gratt. (Va.) 168, 50 Am. Dec. 114; Cravens v. Jameson, 59 Mo. 68; Wharton on Evidence, § 821; Richardson v. Hobart, 1 Stew. (Ala.) 500, 18 Am. Dec. 70; Moon v. Rollins, 36 Cal. 333, 95 Am. Dec. 181.

³² Barr v. Gratz, 4 Wheat. (U. S.) 213, 4 L. Ed. 553; Key v. Dent, 14 Md. 86; King v. Chase, 15 N. H. 9, 41 Am. Dec. 675. A judgment rendered in a former action against one of the defendants, adjudging that a certain *cul-de-sac* was a private way, and not a public way, was admissible as an adjudication against such defendant, and was also proper evidence against the other defendants, as tending to show that plaintiff had not consented to the use of it as a public highway: Gilfillan v. Shattuck, 142 Cal. 27, 75 Pac. 646. See O'Connell v. Chicago etc. R. Co., 184 Ill. 308, 56 N. E. 355, where a decree that a certain road did not exist over certain lots was admissible as to the nonexistence of the road in regard to a lot contiguous to those in the original suit. See, also, Mansfield v. New York etc. R. Co., 102 N. Y. 205, 6 N. E. 386; Phillips

an *indorser*, a judgment against the maker may be introduced for the purpose of showing diligence.³³ So the record may be introduced where it is a *matter of inducement* or necessarily introductory to other evidence.³⁴ The distinction to be noted is that as between parties and privies the judgment is conclusive of the facts forming the ground of the judgment; while as between strangers, or a party and a stranger, statements as to the facts on which the judgment is based are irrelevant, except in admiralty and other judgments *in rem*.^{34a}

§ 591 (608). Judgments against principals in actions against their sureties.—For what purpose and to what extent a judgment against the principal may be introduced in evidence against the surety is a matter about which there is much contrariety of opinion among text-writers, which is the direct outcome of an irreconcilable conflict in the decisions as to the admissibility and effect of judgments against principals, when offered in actions against their sureties.³⁵ This conflict is due in part to dissimilarity of statutes affecting the subject in the several states, and in part to the differences in the conditions of the bonds or other obligations which have been the subject of litigation. It may be suggested at the outset, as a partial solution of some of the diversity of decision in regard to the effect of

v. Yon, 61 S. C. 426, 39 S. E. 618; *Miller v. Freeman* (Tex. Civ. App.), 127 S. W. 302, where a decree in a partition suit was held inadmissible on the ground that the suit was instituted after a right of way over the land was acquired and that the suit did not involve any part of the way; *Nugent v. Wade* (Tex. Civ. App.), 132 S. W. 883, which adopts *McCamant v. Roberts*, 66 Tex. 260, 1 S. W. 260.

³³ *Lane v. Clark*, 1 Mo. 657.

³⁴ *Kip v. Brigham*, 6 Johns. (N. Y.) 158, 7 Johns. (N. Y.) 168; *Weld v. Nichols*, 17 Pick. (Mass.) 538;

Head v. McDonald, 7 T. B. Mon. (Ky.) 203; *Foster v. Shaw*, 7 Serg. & R. (Pa.) 156; *Barr v. Gratz*, 4 Wheat. (U. S.) 213, 4 L. Ed. 553; *Jackson v. Wood*, 3 Wend. (N. Y.) 27; *Fowler v. Savage*, 3 Conn. 90; *Farwell v. Hilliard*, 3 N. H. 318; *Davies v. Lowndes*, 1 Bing. N. C. 607, 131 Eng. Reprint, 1247; *Greenl. Ev.*, § 539, and cases there cited.

^{34a} See *Reynolds' Steph. Ev.*, arts. 41, 42.

³⁵ *Grommes v. St. Paul Trust Co.*, 147 Ill. 634, 37 Am. St. Rep. 248, 35 N. E. 820.

judgments against principals upon their sureties, that in some states sureties have opportunities of contesting judgments against their principals, while in other states they have not; and also, that sureties assume different kinds and degrees of liability in different cases.³⁶ There are many cases which, although they recognize the general rule that judgments conclude only parties and privies, have held former judgments against a principal admissible in actions against the surety on the ground that the language of the contract has been such that the surety has made himself liable for the conduct of his principal and for the results or consequences of a suit between other parties.³⁷ Further than this, the cases do not agree. "Although there is a conflict of authority on the subject, it seems to be the better opinion that, except in cases where, upon the fair construction of the contract, the surety may be held to have undertaken to be responsible for the result of a suit, or when he is made privy to the suit by notice, and the opportunity being given him to defend it, a judgment against the principal alone, is as a general rule, evidence against the surety of the fact of its recovery only, and not of any fact which it was necessary to find in order to recover such judgment."³⁸ This proposition, we take it, is sound, if we are to understand that a surety's being "made privy to the suit by notice" is not a common-law right, and is permitted by the procedure in a portion of the states only, either generally or in special instances.³⁹ Mr. Justice Redfield divides these cases into two classes, say-

³⁶ *State v. Holt*, 27 Mo. 340, 72 Am. Dec. 273.

³⁷ *Thomas v. Hubbell*, 15 N. Y. 405, 69 Am. Dec. 619; *Douglass v. Howland*, 24 Wend. (N. Y.) 35; *Lee v. Clark*, 1 Hill (N. Y.), 56; *Duffield v. Scott*, 3 Term Rep. 374, 100 Eng. Reprint, 628; *Rapelye v. Prince*, 4 Hill (N. Y.), 119, 40 Am. Dec. 267; *Lartigue v. Baldwin*, 5 Mart. (La.), O. S. 193; *Firemen's Ins. Co. v. McMillan*, 29 Ala. 147; *Arrington v.*

Porter, 47 Ala. 714. See notes to *Stephens v. Shafer*, 33 Am. Rep. 802, and *Charles v. Hoskins*, 83 Am. Dec. 380-390, as to the general subject of this section.

³⁸ *Brandt on Suretyship*, § 524.

³⁹ See note to *Charles v. Hoskins*, 83 Am. Dec. 380, where the subject is exhaustively discussed, and note to *Henry v. Heldmaier*, 9 Ann. Cas. 153.

ing: "The general rule undoubtedly is that in a collateral undertaking by way of guaranty, where a suit (against the principal) is necessary to fix the liability of the guarantor, the first judgment is *prima facie* evidence of the default. But, where the guarantor is liable without suit against the principal, the judgment against him is regarded as strictly matter *inter alios*. . . . Where the suit may, in the first instance, be brought directly against the guarantor, the judgment against the principal, without notice to the guarantor, is not evidence; and so, too, if the guarantor have notice of suit against the principal, he is not obliged to concern himself in its defense, but may await a suit against himself, and then insist upon the right to contest the whole ground. The cases of joint and several obligors, and especially of sureties and cosureties, as a general rule, we apprehend, have been ranked under the latter class of cases."⁴⁰ In another Vermont case^{40a} Mr. Justice Aldis divides these cases into two classes, saying, in effect, that when a surety, either expressly or by reasonable implication from the nature and intent of his obligation, stipulates to pay the damages and costs which may be recovered against his principal, or otherwise to abide the judgment or decree against the principal, he is bound by the judgment, though he has no notice of the suit. But when a surety merely becomes holden for the payment of money—as, for instance, a surety on a promissory note—or the performance of some act on the part of the principal, he is not bound by the judgment. Not only are there differences of decision upon the subject generally, but it ramifies into the various kinds of contracts upon which the judgment has been obtained against the principal. So far as it is possible to attempt a classification it will be found: 1. That in some jurisdictions the judgment against the principal is not generally admissible against the surety, although many of the cases disclose the adoption of the rule

⁴⁰ Fletcher v. Jackson, 23 Vt. 581,
56 Am. Dec. 98.

^{40a} Chamberlain v. Godfrey, 36 Vt.
380, 84 Am. Dec. 690.

as expressed by Mr. Justice Redfield, and others have taken the matter of notice to the surety into account;⁴¹ 2. In others the strictness of the common-law rule on this subject has undoubtedly been much relaxed in holding judgments against the principal *prima facie* evidence against the surety, in the absence of fraud or collusion;⁴² 3. And in some jurisdictions such judgments are held *conclusive*.⁴³ From these conflicting decisions it is impossible to do more than select the rule most consonant with justice, and it is believed that the better reasoning is in favor of the doctrine

⁴¹ Fidelity etc. Co. of Maryland v. Robertson, 136 Ala. 379, 34 South. 933; Pico v. Webster, 14 Cal. 202, 73 Am. Dec. 647; Foxcroft v. Nevens, 4 Me. 72; Roberts v. Woven Wire Mattress Co., 46 Md. 374; American Bldg. etc. Assn. v. Stoneman, 53 Minn. 212, 54 N. W. 1115; De Greiff v. Wilson, 30 N. J. Eq. 435; Thomas v. Hubbell, 15 N. Y. 405, 69 Am. Dec. 619; Bradford v. Frederick, 101 Pa. 445; Barksdale v. Butler, 6 Lea (Tenn.), 450; Glasscock v. Hamilton, 62 Tex. 143; Ballantine v. Fenn, 84 Vt. 117, 78 Atl. 713; Simonton v. Boucher, 22 Fed. Cas. No. 12,877, 2 Wash. C. C. 473.

⁴² Baxter County Bank v. Ozark Ins. Co., 98 Ark. 143, 135 S. W. 819; Bone v. Torrey, 16 Ark. 83; Haddock v. Perham, 70 Ga. 572; Curry v. Mack, 90 Ill. 606; McConnell v. Poor, 113 Iowa, 133, 52 L. R. A. 312, 84 N. W. 968, full discussion; Commonwealth v. Bracken, 17 Ky. Law Rep. 785, 32 S. W. 609; City of Lowell v. Parker, 10 Met. (Mass.) 309, 43 Am. Dec. 436; McPharlin v. Fidelity etc. Co., 162 Mich. 141, 127 N. W. 307; Calhoun v. Gray, 150 Mo. App. 591, 131 S. W. 478; Jayne's Ex. v. Platt, 47 Ohio St. 262, 21 Am. St. Rep. 810, 24 N. E. 262; Jacobs v. Hill, 2 Leigh (Va.), 393; Spencer v. Dearth, 43 Vt. 98; Graf-

ton v. Hinkley, 111 Wis. 46, 86 N. W. 859; McLaughlin v. Bank of the Potomac, 7 How. (U. S.) 220, 12 L. Ed. 675; Drummond v. Prestman, 12 Wheat. (U. S.) 515, 6 L. Ed. 712; United States v. Rundle, 107 Fed. 227, 52 L. R. A. 505, 46 C. C. A. 251; Berger v. Williams, 4 McLean (U. S.), 577, Fed. Cas. No. 1341. See, also, Park v. Ensign, 66 Kan. 50, 97 Am. St. Rep. 352, 71 Pac. 230; Beh v. Bay, 127 Iowa, 246, 109 Am. St. Rep. 385, 103 N. W. 119.

⁴³ Bell v. Wilson, 159 Cal. 57, 112 Pac. 1100; Price v. Carlton, 121 Ga. 12, 68 L. R. A. 736, 48 S. E. 721; Meyer v. Purcell, 114 Ill. App. 472; Fuller v. Wright, 59 Ind. 333; Fusz v. Trager, 39 La. Ann. 292, 1 South. 535; Cutter v. Evans, 115 Mass. 27; Higdon v. Vaughn, 58 Miss. 572; Pasewalk v. Bollman, 29 Neb. 519, 26 Am. St. Rep. 399, 45 N. W. 780; Deegan v. Deegan, 22 Nev. 185, 58 Am. St. Rep. 742, 37 Pac. 360; Nimocks v. Pope, 117 N. C. 315, 23 S. E. 269; Jayne's Ex. v. Platt, 47 Ohio St. 262, 21 Am. St. Rep. 810, 24 N. E. 262; Parkhurst v. Sumner, 23 Vt. 538, 56 Am. Dec. 94; Henry v. Aetna Indemnity Co., 36 Wash. 553, 79 Pac. 42; McLaughlin v. Bank of the Potomac, 7 How. (U. S.) 220, 12 L. Ed. 675.

that a judgment against the principal is at least *prima facie* evidence against the sureties.⁴⁴ When one is responsible by force of law, or by contract, for the faithful performance of the duty of another, a judgment against the other for a failure in the performance of such duty, if not collusive, is *prima facie* evidence in a suit against the party so responsible for that other. If it can be made to appear that such judgment was obtained by fraud or collusion, it will be wholly set aside. But otherwise it is *prima facie* evidence, to stand until impeached or controlled, in whole or in part, by countervailing proof.⁴⁵ In the Iowa case already cited,^{45a} which was an action against the principal and sureties upon the official bond of a sheriff, the court said: "The principle governing is, that the liability of the surety is dependent upon that of the principal. Though not a party, the surety is not a stranger to the judgment. He covenants that his principal shall discharge certain official duties. When it is once fairly determined by a competent judicial tribunal that there has been a breach of the official undertaking, the liability of the surety *prima facie* attaches, whether he was a party to the action adjudging the breach or not. In an action against him, the surety may show fraud or collusion in obtaining the judgment against the principal, or he may show a mistake in the amount, or that it has been paid. And as the surety could claim the benefit of a judgment in favor of his principal, so he is concluded, as above explained, by a judgment against him." Where judgment has been recovered against one who, by reason of facts found in such action, has the right to recover damages against another bound to indemnify him, and who had due and timely notice to appear and defend such action, the judgment may be evidence in an action for such indemnity, although the parties are different.⁴⁶ In actions

⁴⁴ Charles v. Hoskins, 14 Iowa, 471, 83 Am. Dec. 378.

⁴⁵ City of Lowell v. Parker, 10 Met. (Mass.) 309, 43 Am. Dec. 436; Drummond v. Prestman, *supra*.

^{45a} Charles v. Hoskins, *supra*. See, also, § 592, *post*.

⁴⁶ Rochester v. Montgomery, 72 N. Y. 65; Kip v. Brigham, 6 Johns. (N. Y.) 158; Portland v. Richard-

against sureties on the bonds of executors and administrators, it is generally conceded that the judgment against the principal is admissible for some purposes.⁴⁷ In such cases, the contention is over the question whether the judgment should be *conclusive or only prima facie evidence*. The bonds of executors and administrators generally contain some condition, the legal effect of which is that the principals shall be bound by the orders or decrees of the court and hence the sureties may be regarded as having contracted to abide the judgment of the court. In such cases there is general uniformity in the view that the judgment against the principal is not *res inter alios acta*, but is competent evidence against the surety.⁴⁸ In the opinion of the author, the weight of authority sustains the view that in such cases the judgment is conclusive against the surety on the principle that he has in effect contracted to be bound thereby.⁴⁹

son, 54 Me. 46, 89 Am. Dec. 720; Boston v. Worthington, 10 Gray (Mass.), 496, 71 Am. Dec. 678; Inhabitants of Milford v. Holbrook, 9 Allen (Mass.), 17, 85 Am. Dec. 735; Chicago v. Robbins, 2 Black (U. S.), 418, 17 L. Ed. 298.

⁴⁷ See cases cited below. As to the general subject of this and succeeding sections, see notes to Charles v. Hoskins, 83 Am. Dec. 380-390; Stephens v. Shafer, 33 Am. Rep. 802.

⁴⁸ See cases cited below; also note to Heard v. Lodge, 32 Am. Dec. 202.

⁴⁹ Martin v. Tally, 72 Ala. 23. The Alabama rule must be taken as modified by Banks v. Speers, 97 Ala. 560, 11 South. 841, and Woodall v. Wright, 142 Ala. 205, 37 South. 846; Irwin v. Backus, 25 Cal. 214, 85 Am. Dec. 125; Willey v. Paulk, 6 Conn. 74; Nevitt v. Woodburn, 160 Ill. 203, 53 Am. St. Rep. 315, 43 N. E. 385; Housh v. People, 66 Ill. 178; Ralston v. Wood, 15 Ill. 159, 58 Am. Dec. 604 (by statute); Salyer v. State, 5 Ind.

202; Hobbs v. Middleton, 1 J. J. Marsh. (Ky.) 176; Bourne v. Todd, 63 Me. 427; Jenkins v. State, 76 Md. 255, 23 Atl. 608, 790; White v. Weatherbee, 126 Mass. 450; Heard v. Lodge, 20 Pick. (Mass.) 53, 32 Am. Dec. 197; Clark v. Fredenburg, 43 Mich. 263, 5 N. W. 306; State ex rel. Taaffe v. Goggin, 191 Mo. 482, 109 Am. St. Rep. 826, 90 S. W. 379; State v. Holt, 27 Mo. 340, 72 Am. Dec. 273; Kenck v. Parchen, 22 Mont. 519, 74 Am. St. Rep. 625, 57 Pac. 94; Judge of Probate v. Sullo-way, 68 N. H. 511, 73 Am. St. Rep. 619, 49 L. R. A. 347, 44 Atl. 720; Ordinary v. Kershaw, 14 N. J. Eq. 527; Conway v. Carter, 11 N. M. 419, 68 Pac. 941; Power v. Speckman, 126 N. Y. 354, 27 N. E. 474; Casoni v. Jerome, 58 N. Y. 315; Baggott v. Boulger, 2 Duer (N. Y.), 160; Sjolli v. Hogenson, 19 N. D. 82, 122 N. W. 1008; State v. Pike, 74 N. C. 531 (by statute); Smith v. Rhodes, 68 Ohio St. 500, 68 N. E. 7; Greer v. McNeal, 11 Okl. 519, 69 Pac. 891; Bellinger

But it must be conceded that in a large number of cases the judgment has been held to be only *prima facie* evidence against the principal.⁵⁰ The same general principles apply when judgments are offered in evidence against sureties of *guardians*, as in the case of executors and administrators.⁵¹ It need hardly be stated that the judgment may be attacked on the ground of *want of jurisdiction*;⁵² and it is always competent for the surety to prove that the judgment against the principal was obtained by *fraud or collusion*.⁵³

§ 591a. Judgments against sureties in actions against their principals.—The converse of the circumstances involves less conflict, and a judgment against a surety, obtained without fraud, or collusion, in an action of which the principal or any cosurety had notice, is conclusive in

v. Thompson, 26 Or. 320, 37 Pac. 714, 40 Pac. 229; Commonwealth v. Ruhl, 199 Pa. 40, 48 Atl. 905; Boyd v. Caldwell, 4 Rich. (S. C.) 117; Wiseman v. Swain (Tex. Civ. App.), 114 S. W. 145; Wallber v. Wilmanns, 116 Wis. 216, 93 N. W. 47; Stoval v. Banks, 10 Wall. (U. S.) 583, 19 L. Ed. 1036. There are several exceptional cases based on the rule of conclusiveness. It may be assumed from the rigor of it the courts have held that where the liability is not untrammelled, the rule does not apply; for instance, where the judgment is against the representative of a deceased executor, or made against an administrator *de bonis non*, or some other deviation from the direct liability on the contract: See Street v. Henry, 124 Ala. 153, 27 South. 411; Rutter v. Hall, 31 Ill. App. 647; Bourne v. Todd, 63 Me. 427.

⁵⁰ Bennett v. Graham, 71 Ga. 211; Brown v. Wiley, 107 Ga. 85, 32 S. E. 905; Fauntleroy v. Lyle, 5 T. B.

Mon. (Ky.) 266; Wiemann v. Mainegra, 112 La. 305, 36 South. 358; Canal etc. Co. v. Brown, 4 La. Ann. 545; Verret v. Belanger, 6 La. Ann. 109; Iglehart v. State, 2 Gill & J. (Md.) 235; Lipscomb v. Postell, 38 Miss. 476, 77 Am. Dec. 651; Seat v. Cannon, 1 Humph. (Tenn.) 471; Hobson v. Yancey, 2 Gratt. (Va.) 73; Crim v. England, 46 W. Va. 480, 76 Am. St. Rep. 826, 33 S. E. 310; American Bonding etc. Co. v. United States, 23 App. Cas. (D. C.) 535.

⁵¹ Shepard v. Pebbles, 38 Wis. 373; Watts v. Gayle, 20 Ala. 417; Willey v. Paulk, 6 Conn. 74; Love v. Gibson, 2 Fla. 598; McKellar v. Bowell, 4 Hawks (N. C.), 34. See, also, Baldwin v. State, 179 U. S. 220, 45 L. Ed. 160, 21 Sup. Ct. Rep. 105; Robb v. Perry, 35 Fed. 102.

⁵² Buckner v. Archer, 1 McMul. (S. C.) 85.

⁵³ Annett v. Terry, 35 N. Y. 256; Irwin v. Backus, 25 Cal. 214, 85 Am. Dec. 125. See, also, cases cited in note 49 to this section, *ante*.

favor of the surety in an action against the principal or the cosurety for contribution. If the principal has notice of the suit against his surety, he is bound by the result of the litigation, and a foreign judgment has the same effect in this regard as one of the courts in which the suit for indemnity is brought.⁵⁴ In such case, the principal cannot complain that the suit was unskillfully defended by the surety.⁵⁵ Brant gives also the following strong illustration: "The surety on a note, who, without knowing of a defense, has let judgment go against him by default, and has paid the judgment, may recover indemnity from the principal, notwithstanding the fact that the principal, who was sued at the same court in another suit, by defending the same, obtained a judgment in his favor. 'To the suggestion that the surety might have resisted and defeated the recovery, he may reply that he was a stranger to the consideration of the note, and was privy to nothing more than the terms of an absolute obligation, which he bound himself to make good, if not punctually fulfilled. But if he had been made privy to the principal's defense, then he might have lost his right to redress.'"^{55a} If a judgment rendered against a principal and a surety upon their bond is paid by the latter, the former cannot, in a suit to recover from him the amount thus paid, show want of consideration in the bond.⁵⁶

§ 592 (609). Same—Other classes of bonds.—With regard to the effect of the judgment against the principal upon sureties on bonds given in *judicial proceedings*, there is less want of harmony. The principle already stated applies in respect to those classes of bonds where the language of the contract has been such that the surety has made himself liable for the conduct of his principal, or for

⁵⁴ 1 Brandt, Sur. & Guar., § 235; Konitzky v. Meyer, 49 N. Y. 571. See, also, on same subject, Hare v. Grant, 77 N. C. 203.

⁵⁵ 1 Brandt, Sur. & Guar., § 235; Rice v. Rice, 14 B. Mon. (Ky.) 417.

^{55a} 1 Brandt, Sur. & Guar., § 235; Stinson v. Brennan, Cheves' L. (S. C.) 15.

⁵⁶ Pitts v. Fugate, 41 Mo. 405.

the results or consequences of a suit between other parties.⁵⁷ There has been great diversity of opinion on this subject in actions against sureties on *sheriff's and constable's bonds*. In these official bonds the surety does not generally undertake that the principal shall do a specified act in a given way to be ascertained by the court. The bonds are in general terms to the effect that the principal will perform certain official duties; and in such cases, the rule applied to executors and administrators does not necessarily govern. Accordingly, it has been decided in numerous cases that a judgment against the principal on the bond of a sheriff or other officer is no evidence against the surety of any fact necessary to be found in the recovery of the judgment, although admissible to show the fact of its rendition.⁵⁸ In other cases, the judgment has been held admissible against the surety as *prima facie* evidence of the right of the plaintiff to recover as well as of the amount of such recovery.⁵⁹ While in still other cases, it has been held that

⁵⁷ *Thomas v. Hubbell*, 15 N. Y. 405, 69 Am. Dec. 619; *Douglass v. Howland*, 24 Wend. (N. Y.) 35; *Duffield v. Scott*, 3 Term Rep. 374; *Rapelye v. Prince*, 4 Hill (N. Y.), 119, 40 Am. Dec. 267; *Firemen's Ins. Co. v. McMillan*, 29 Ala. 147; *Arrington v. Porter*, 47 Ala. 714; *Giltinan v. Strong*, 64 Pa. 242; *Pico v. Webster*, 14 Cal. 202, 73 Am. Dec. 647. Sureties have been held bound by the judgment against the principal in *attachment* proceedings: *Cutter v. Evans*, 115 Mass. 27; *Tracy v. Maloney*, 105 Mass. 90; see valuable note to *Charles v. Hoskins*, 83 Am. Dec. 380-390; on *appeal bonds*: *Murdock v. Brooks*, 38 Cal. 596; recognizances or *bail bonds*: *Parkhurst v. Sumner*, 23 Vt. 538, 56 Am. Dec. 94; *Keane v. Fisher*, 10 La. Ann. 261; *Way v. Lewis*, 115 Mass. 26 (but see *Mott v. Hazen*, 27 Vt. 208); in *injunction* proceedings: *McBroom v. Sommerville*,

2 Stew. (Ala.) 515; *Lothrop v. Southworth*, 5 Mich. 436; *Towle v. Towle*, 46 N. H. 431; *Methodist Churches v. Barker*, 18 N. Y. 463; and in *replevin* or on a redelivery bond: *Kennedy v. Brown*, 21 Kan. 171; *Schott v. Youree*, 142 Ill. 233, 31 N. E. 591; *Richardson v. People's Nat. Bank*, 57 Ohio St. 299, 48 N. E. 1100; *Cheatham v. Morrison*, 37 S. C. 187, 15 S. E. 924. On "Recital in Replevin Writ or Bond as Evidence of Value in Action on Bond," see note to *Maguire v. Pan-American Amusement Co.*, 18 Ann. Cas. 113; on "*claim bond*," *Harvey v. Head*, 68 Ga. 247.

⁵⁸ *Lucas v. Governor*, 6 Ala. 826; *Pico v. Webster*, 14 Cal. 202, 73 Am. Dec. 647; *Carmichael v. Governor*, 4 Miss. 236. See, also, § 591, *ante*.

⁵⁹ *Stephens v. Shafer*, 48 Wis. 54, 33 Am. Rep. 793, note and cases cited, 3 N. W. 835; *State v. Jennings*, 14 Ohio St. 73; *Taylor v.*

the judgment against the principal is *conclusive* against the sureties as to the default or misconduct of the principal and the amount of damages.⁶⁰ A similar conflict of opinion is found in actions brought by sheriffs against sureties on the *bonds of the sheriff's deputies*. In some cases, the original judgment against the sheriff for misconduct of the deputy has been held *prima facie* evidence of the right to recover in an action against the sureties,⁶¹ and in others it is held to be *conclusive*.⁶² In a well-considered Virginia case,⁶³ the court, dealing also with the question of notice to the sureties, said: "When a suit was brought against the sheriff, for any act or default of the deputy, it should only be necessary for the former to notify the latter of the pendency of the suit in order to make the judgment rendered in such suit conclusive evidence, not only against the deputy, but his sureties also, in a proceeding against them for the indemnity of the sheriff against such act or default. The relations between the sheriff and his deputy, and the terms of the official bond of the latter and his sureties, made it his duty to defend such a suit, which he only in fact could do, and made the judgment rendered in it conclusive, both against him and them, in the absence of fraud and collusion, though he only had notice of the pendency of the suit. To have required the sheriff, in order to make the judgment thus conclusive, to give such notice, not only to the deputy but to all his sureties, would have been unreasonable in the last degree. The penalty of

Johnson, 17 Ga. 521; Graves v. Bulkley, 25 Kan. 249, 37 Am. Rep. 249; Mullen v. Scott, 9 La. Ann. 173; Munford v. Overseers of Poor, 2 Rand. (Va.) 313; Atkins v. Baily, 9 Yerg. (Tenn.) 111. See note to King v. Chase, 41 Am. Dec. 683.

⁶⁰ Tracey v. Goodwin, 5 Allen (Mass.), 409 (bond being joint); State v. Colerick, 3 Ohio, 487; McBroom v. Governor, 4 Port. (Ala.) 90; Dane v. Gilmore, 51 Me. 544; Masser v. Strickland, 17 Serg. & R.

(Pa.) 354, 17 Am. Dec. 668; Evans v. Commonwealth, 8 Watts (Pa.), 398, 34 Am. Dec. 477; McMicken v. Commonwealth, 58 Pa. 213.

⁶¹ Westervelt v. Smith, 2 Duer (N. Y.), 449; Stephens v. Shafer, 48 Wis. 54, 33 Am. Rep. 793, and note, 3 N. W. 835.

⁶² Chamberlain v. Godfrey, 36 Vt. 380, 84 Am. Dec. 690; Crawford v. Turk, 24 Gratt. (Va.) 176.

⁶³ Crawford v. Turk, *supra*.

the bond is large, and we know very well that the sureties are often numerous and scattered. To give notice to them all, including the representatives of such as are dead, would be extremely inconvenient, to say the least of it; and what good purpose would it answer? The sureties know nothing of the facts and could only notify the deputy to make defense."

§ 593 (610). Judgments—When admissible as against third persons who are liable to make indemnity.—In many cases, persons not parties to actions are in some way responsible over to defendants therein, against whom judgments or decrees have been rendered. The question is, to what extent, if any, are such persons, ultimately liable, bound by such judgments or decrees? It frequently happens, where a judgment is recovered against a defendant, that, by reason of the facts found in that action, he has the right to recover damages against another who is bound to indemnify him by reason of some contract or other relation. In such cases, the judgment recovered in the first action may be given in evidence in the second against the one bound to give indemnity, provided he has been given proper and timely *notice to appear and defend* such action, although the parties are different.⁶⁴ In order to make the

⁶⁴ Pope v. Nance, 1 Stew. (Ala.) 354, 18 Am. Dec. 60; Bailey v. Bussing, 37 Conn. 349; Bullock v. Winter, 10 Ga. 214; Vigeant v. Scully, 35 Ill. App. 44; Hoosier Stone Co. v. Louisville etc. R. Co., 131 Ind. 575, 31 N. E. 365; Penobscot Lumbering Assn. v. Bussell, 92 Me. 256, 42 Atl. 408; Chesapeake Lighterage etc. Co. v. Western Assur. Co., 99 Md. 433, 58 Atl. 16; Prichard v. Farrar, 116 Mass. 213; Knickerbocker v. Wilcox, 83 Mich. 200, 21 Am. St. Rep. 595, 47 N. W. 123; Cartwright v. Carpenter, 7 How. (Miss.) 328, 40 Am. Dec. 66; Strong v. Phoenix Ins. Co., 62 Mo. 289, 21 Am. Rep. 417;

May v. Poluhoff, 65 Misc. Rep. 546, 120 N. Y. Supp. 827; Kip v. Brigham, 7 Johns. (N. Y.) 168; Rochester v. Montgomery, 72 N. Y. 65; Cincinnati v. Diekmeyer, 31 Ohio St. 242; Lloyd v. Barr, 11 Pa. 41; Ward v. Bond, 1 Nott & McC. (S. C.) 201; Tyree v. Magness, 1 Sneed (Tenn.), 276; Spencer v. Dearth, 43 Vt. 98; Rowell v. Smith, 123 Wis. 510, 3 Ann. Cas. 773, 102 N. W. 1; Clarke v. Carrington, 7 Cranch (U. S.), 308, 3 L. Ed. 354; Freem. Judg., 4th ed., § 181. On the general subject of this section, see note to Charles v. Hoskins, 83 Am. Dec. 380-390. After due notice to defend, a judgment against a town

judgment conclusive evidence against the one alleged to be liable for indemnity, the notice to defend should be given in time so that there may be full *opportunity to appear and defend*; and he should be so notified of the controversy that he may know the consequences of his failure to defend.⁶⁵ It seems, upon the principle that no one shall be condemned or made answerable without an opportunity to defend, that in order to bind one by a judgment to which he is not a party, he should be allowed all the means of defense open to him had he been made a party; and that a nominal party, wishing to bind by a judgment one not a party to the action, must not only notify him of its pendency, but give him to understand that he is desired to defend it, and will be allowed such control as may be essential to his defense.⁶⁶ In Michigan, one who wishes to bind a warrantor of the title to real estate by a judgment must give him written notice;⁶⁷ but elsewhere oral notices, if not otherwise objec-

or city for damages caused by a defective highway may be given as evidence against a person or corporation liable over to such town or city: *Chicago v. Robbins*, 2 Black (U. S.), 418, 17 L. Ed. 298; *Robbins v. Chicago*, 4 Wall. (U. S.) 657, 18 L. Ed. 427; *Boston v. Worthington*, 10 Gray (Mass.), 496, 71 Am. Dec. 678; *Milford v. Holbrook*, 9 Allen (Mass.), 17, 85 Am. Dec. 735; *Portland v. Richardson*, 54 Me. 46, 89 Am. Dec. 720. The same rule applies in actions against those who have agreed to indemnify sheriffs or other officers: *Train v. Gold*, 5 Pick. (Mass.) 380; *Miller v. Rhoades*, 20 Ohio St. 494; *Lovejoy v. Murray*, 3 Wall. (U. S.) 1, 18 L. Ed. 129. As to the surety or indemnifier obtaining the benefit of a judgment in favor of the principal, see *Featherston v. President etc. of Newburgh etc. Co.*, 71 Hun, 109, 24 N. Y. Supp. 603; *Eckles v. Des Moines Casket*

Co., 152 Iowa, 164, 130 N. W. 113. Thus a town sued for injuries from obstruction in highway may set up, by way of estoppel, judgment in favor of the defendant in a former action brought by the same plaintiff, to recover for the same injuries, against the person alleged to have caused such obstruction: *Hill v. Bain*, 15 R. I. 75, 2 Am. St. Rep. 873, 23 Atl. 44.

⁶⁵ *Turpin v. Thomas*, 2 Hen. & M. (Va.) 139, 3 Am. Dec. 615; *Peabody v. Phelps*, 9 Cal. 213; *Sampson v. Ohleyer*, 22 Cal. 200; *Somers v. Schmidt*, 24 Wis. 417, 1 Am. Rep. 191; *Boyd v. Whitfield*, 19 Ark. 447; *Davis v. Wilbourne*, 1 Hill (S. C.), 27, 26 Am. Dec. 154.

⁶⁶ *Eaton v. Lyman*, 26 Wis. 61; *Saveland v. Green*, 36 Wis. 612; *Axford v. Graham*, 57 Mich. 422, 24 N. W. 158.

⁶⁷ *Mason v. Kellogg*, 38 Mich. 132.

tionable, are sufficient.⁶⁸ It must be understood that the judgment is not evidence of the fact of suretyship. That must be proved in the ordinary way.⁶⁹ There are, however, a few cases, not in harmony with the last statement, which hold that the party to be affected need not have *express notice*, and that it is enough if he knew of the pendency of the suit, and might have appeared and protected his interests.⁷⁰ The weight of authority, however, sustains the view that notice should be given, and that, when properly given, the judgment is *conclusive*,⁷¹ although there is a line of authorities which hold that the relation which exists between a principal and a surety does not render one privy to a suit against the other; that a judgment against the principal is not even *prima facie* evidence in a subsequent action against the surety, and that the surety or indemnitor is not concluded by such judgment, even though due notice

⁶⁸ *Ferre v. Chabot*, 63 Cal. 564; *Miner v. Clark*, 15 Wend. (N. Y.) 425; *Cummings v. Harrison*, 57 Miss. 275; *Davenport v. Muir*, 3 J. J. Marsh. (Ky.) 310, 20 Am. Dec. 143. No particular form of words is required. The party must certainly have notice of the pendency of the action, and this notice must be given at such a time as will permit of his having a fair opportunity of making a defense: 1 *Freem.*, Judgm., § 181; *Williams v. Burg*, 9 Lea (Tenn.), 455; *Somers v. Schmidt*, 24 Wis. 417, 1 Am. Rep. 191; *Hersey v. Long*, 30 Minn. 114, 14 N. W. 508; *Boyd v. Whitfield*, 19 Ark. 447; *Davis v. Wilbourne*, 1 Hill (S. C.), 27, 26 Am. Dec. 154.

⁶⁹ *Chicago etc. R. Co. v. Northern Line Packet Co.*, 70 Ill. 217. The measure of damages would be the amount of the judgment: *Missouri etc. R. Co. v. Twiss*, 35 Neb. 267, 37 Am. St. Rep. 437, 53 N. W. 76. Where one of the parties to a pending action claims that a third person is liable over to him in the event he

loses in the suit, and vouches that person by notifying him of the pendency of the suit and giving him opportunity to appear therein, the judgment in that suit is conclusive on the person vouched as to the correctness of the judgment, but it is not conclusive of the fact that there is such a relationship between the person vouched and the person vouching as that a right of action over exists: *Central of Georgia R. Co. v. Macon etc. Co.*, 9 Ga. App. 628, 71 S. E. 1076. This case contains a highly useful opinion by *Powell, J.*, on the subject generally.

⁷⁰ *Chicago v. Robbins*, 2 Black (U. S.), 418, 17 L. Ed. 298; *Robbins v. Chicago*, 4 Wall. (U. S.) 657, 18 L. Ed. 427.

⁷¹ *Boston v. Worthington*, 10 Gray (Mass.), 496, 71 Am. Dec. 678; *Milford v. Holbrook*, 9 Allen (Mass.), 17, 85 Am. Dec. 735; *Portland v. Richardson*, 54 Me. 46, 89 Am. Dec. 720; *State v. Colerick*, 3 Ohio, 487; *State v. Jennings*, 14 Ohio St. 73.

to defend has been given.⁷² It is not certain that he must be requested to assume the defense, some of the decisions declaring this not to be essential.⁷³ In general, the fact that the covenantor appeared and conducted or participated in the defense is of itself sufficient proof that he had due notice of the action, and a full and fair opportunity to contest it on the merits.⁷⁴ If a party to a suit has the right to resort to another upon his failure in the action, whether upon covenants of warranty or on the ground that he is indemnified by such third party, then it is clearly his duty to give full notice to his covenantor or indemnitor of the pendency of the suit what it is he requires him to do in the suit, and the consequences which may follow if he neglects to defend. Mere knowledge of the existence of such action is entirely insufficient to bind the party by the judgment. Unless he is notified to furnish testimony, or to defend the action or to aid in it, he may well suppose the party to be in need of no assistance, and he may well rely upon that supposition; for if the party desires his aid, it is his duty to give him a full notice a reasonable time before the trial of the action, to enable him to prepare for it.⁷⁵ "The purpose of giving notice," said Buller, J.,^{75a} "is not in order to give a ground of action; but if a demand be made which a person indemnifying is bound to pay, and notice be given to him, and he refuse to defend the action, in consequence of which the person to be indemnified is obliged to pay the demand, that is equivalent to a judgment, and estops the other party from saying that the defendant in the first action was not bound to pay the money." This case differs, however, from that of a mere surety. The judgment is of course, not conclusive as to a fact not necessarily determined by it. Thus, where the owner of a note

⁷² Jackson v. Griswold 4 Hill (N. Y.), 522; Pico v. Webster, 14 Cal. 202, 73 Am. Dec. 647.

⁷³ Cummings v. Harrison, 57 Miss. 275; Heiser v. Hatch, 86 N. Y. 614.

⁷⁴ Harding v. Larkin, 41 Ill. 413; Mackey v. Fisher, 36 Minn. 347, 31 N.

W. 363; Davis v. Smith, 79 Me. 351, 10 Atl. 55.

⁷⁵ Sampson v. Ohleyer, 22 Cal. 200; Peabody v. Phelps, 9 Cal. 213.

^{75a} Duffield v. Scott, 3 Term Rep. 374, 100 Eng. Reprint, 628.

recovered a judgment for damages against a bank, because of its negligence in omitting to give due notice of protest to an indorser, in an action by the bank over against its cashier, who was notified of the suit against the bank, and that the bank intended to hold him responsible, the judgment is evidence to show a recovery against the bank, and the amount of damages it had been compelled to pay, but not of the negligence of the cashier.^{75b} It is the prevailing rule that a *warrantor of the title of land* is bound by a judgment against a warrantee, when proper notice to defend the title has been given, and that he cannot be heard, in the absence of fraud or collusion, to claim that the judgment against the warrantee should not have been rendered. In such case, the judgment in ejectment is conclusive evidence that the warrantee has been evicted by paramount title.⁷⁶ But the defendant may show that this covenant was only a special covenant or prove such other defenses, as that the recovery was on a title derived from the warrantee, or on account of some fact occurring after the date of the cov-

^{75b} *Bank of Oswego v. Babcock*, 5 Hill (N. Y.), 152.

⁷⁶ *Collier v. Cowger*, 52 Ark. 322, 6 L. R. A. 107, 12 S. W. 702; *Seyfried v. Knoblauch*, 44 Colo. 86, 96 Pac. 993; *Hinds v. Allen*, 34 Conn. 185; *Wimberly v. Collier*, 32 Ga. 13; *Ashburn v. Watson*, 8 Ga. App. 566, 70 S. E. 19; *McConnell v. Downs*, 48 Ill. 271; *Bever v. North*, 107 Ind. 544, 8 N. E. 576; *Marsh v. Smith*, 73 Iowa, 295, 34 N. W. 866; *Sullivan v. Hill*, 33 Ky. Law Rep. 962, 112 S. W. 564; *Elliott v. Saufley*, 89 Ky. 52, 10 Ky. Law Rep. 958, 11 S. W. 200; *Kling v. Sejour*, 4 La. Ann. 128; *Hardy v. Nelson*, 27 Me. 525; *Hamilton v. Cutts*, 4 Mass. 349, 3 Am. Dec. 222; *Chamberlain v. Preble*, 11 Allen (Mass.), 370; *Cummings v. Harrison*, 7 Miss. 275; *Leet v. Gratz*, 137 Mo. App. 208, 117 S. W. 642; *Wheelock v. Overshiner*, 110

Mo. 100, 19 S. W. 640; *Chandler v. Brown*, 59 N. H. 370; *Olmstead v. Rawson*, 110 App. Div. 809, 97 N. Y. Supp. 239; *Cooper v. Watson*, 10 Wend. (N. Y.) 202; *Jones v. Balsley*, 154 N. C. 61, 69 S. E. 827; *Smith v. Dixon*, 27 Ohio St. 471; *Paul v. Witman*, 3 Watts & S. (Pa.) 407; *Terry v. Drabenstadt*, 68 Pa. 400; *Davis v. Wilbourne*, 1 Hill (S. C.), 27, 26 Am. Dec. 154; *Williams v. Burg*, 9 Lea (Tenn.), 455; *Johns v. Hardin*, 81 Tex. 37, 16 S. W. 623; *Farwell v. Bean*, 82 Vt. 172, 72 Atl. 731; *Knapp v. Marlboro*, 34 Vt. 235; *Daskam v. Ullman*, 74 Wis. 474, 43 N. W. 321; *Gaines v. City of New Orleans*, 17 Fed. 16, 4 Woods, 213. See note, 43 Am. Dec. 569. As to rule on building contract and bond, see *McConnell v. Poor*, 113 Iowa, 133, 52 L. R. A. 312, 84 N. W. 968.

enant.⁷⁷ The same principle applies in the case of warranty of personal property.⁷⁸

§ 594 (611). Judgment must be final.—The rule upon this subject, and the grounds upon which it is based, are well stated by Pothier. He says: "A judgment, to have the authority or even the name of *res judicata*, must be a definitive judgment of condemnation or dismissal. A provisional condemnation, then, cannot have either the name or the authority of *res judicata*, for although it gives the party obtaining it a right to compel the opposite party to pay, or deliver provisionally, the money or things demanded, it does not put an end to the cause, or form a presumption *juris de jure*, that what is ordered to be paid or delivered is due, since the party condemned may be admitted in the principal case to prove that what he was ordered to pay was not due, and consequently to obtain a reversion of the judgment."⁷⁹ It is essential to the conclusive effect of a former judgment that it should be a *final judgment*. Until such judgment, the litigation is not deemed to be at an end, and there cannot be said to be a final adjudication of the point in controversy. Thus, mere *verdicts or findings*, not resulting in judgment, are not conclusive, for they are still liable to be set aside on motion for new trial.⁸⁰ It has

⁷⁷ Chicago etc. R. Co. v. Northern Line Packet Co., 70 Ill. 217; Davenport v. Muir, 3 J. J. Marsh. (Ky.) 310, 20 Am. Dec. 143.

⁷⁸ Salle v. Light, 4 Ala. 700, 39 Am. Dec. 317; Boyd v. Whitfield, 19 Ark. 447; Thurston v. Spratt, 52 Me. 202; Pickett v. Ford, 5 Miss. 246; Barney v. Dewey, 13 Johns. (N. Y.) 224, 7 Am. Dec. 372.

⁷⁹ Pothier on Obligations, pt. 4, c. 3, § 3, art. 1.

⁸⁰ Reed v. Proprietors, 8 How. (U. S.) 274, 12 L. Ed. 1077; McReady v. Rogers, 1 Neb. 124, 93 Am. Dec. 333; Lord v. Chadbourne, 42 Me. 429, 66 Am. Dec. 290; Allen v. Blunt, 3 Story

(U. S.), 742, Fed. Cas. No. 216; Estate of Holbert, 57 Cal. 257; Harris v. Gano, 117 Ga. 934, 44 S. E. 11; Wadsworth v. Connell, 104 Ill. 369; Ridgely v. Spenser, 2 Binn. (Pa.) 70; Child v. Morgan, 51 Minn. 116, 52 N. W. 1127; Humphreys v. Browne, 19 La. Ann. 158; Saylor v. Hicks, 36 Pa. 392; Dunlap v. Robinson, 12 Ohio St. 530; Pearson v. Post, 2 Dak. 220, 9 N. W. 684; Gapen v. Bretternitz, 31 Neb. 302, 47 N. W. 918. See, also, Wood v. Jackson, 8 Wend. (N. Y.) 9, 22 Am. Dec. 603. See extended notes to Naftzger v. Gregg, 37 Am. St. Rep. 29-32; and Lea v. Lea, 96 Am. Dec. 775-788.

been held otherwise, however, as to verdicts before justices of the peace who have no power to grant new trials.⁸¹ It is, therefore, only a final judgment upon the merits, which prevents further contest upon the same issue, and becomes evidence in another action between the same parties or their privies. Until final judgment is reached the proceedings are subject to change and modification, are imperfect and inchoate, and can avail nothing as a bar, or as evidence, until the judgment, with its verity as a record, settles finally and conclusively the questions at issue. An *interlocutory order* is not such a judgment. It is not a judgment at all.⁸² "And if as an order it partakes, in equity cases, of the character of what was long known as an interlocutory decree, yet, whenever it is not final, whenever it fails to fix and determine the ultimate rights of the parties, whenever it leaves room for a final decision yet to be made, it is not admissible in another action, for the plain reason that it has finally decided and settled nothing. Until the judgment comes, no man can know what the ultimate decision will be."⁸³ The fact that a decree which constituted

But it is otherwise if the time for setting aside the verdict has elapsed: *Hume v. Schintz*, 90 Tex. 72, 36 S. W. 429. See, also, *Wilson v. Jackson*, 204 Mass. 432, 90 N. E. 866; *Bunker v. Bunker*, 140 N. C. 18, 52 S. E. 237.

⁸¹ *Aurora City v. West*, 7 Wall. (U. S.) 82, 19 L. Ed. 42; *Sherman v. Dilley*, 3 Nev. 21. But see *Doe v. Wright*, 10 Ad. & E. 763, 783, 113 Eng. Reprint, 289; *Munroe v. Pilkington*, 31 L. J. Q. B. 81.

⁸² *Belmont v. Ponvert*, 3 Rob. (N. Y.) 693.

⁸³ *Webb v. Buckelew*, 82 N. Y. 555. See, also, *Capell v. Landano*, 34 Ala. 135; *Rosenthal v. McMann*, 93 Cal. 505, 29 Pac. 121; *Drach v. Isola*, 48 Colo. 134, 109 Pac. 748; *Rockwell v. District Court Lake Co.*, 17 Colo. 118, 31 Am. St. Rep. 265, 29 Pac. 454;

Brown v. Clark, 80 Conn. 419, 68 Atl. 1001; *McKinnon v. Johnson*, 57 Fla. 120, 48 South. 910; *Sumner v. Sumner*, 121 Ga. 1, 48 S. E. 727; *Seofield v. Marinette Sawmill Co.*, 153 Ill. App. 469; *Wapello State Sav. Bank v. Colton*, 143 Iowa, 359, 122 N. W. 149; *Manley v. Park*, 62 Kan. 553, 64 Pac. 28; *Bowen v. Highbaugh*, 30 Ky. Law Rep. 1114, 100 S. W. 221; *Baugh v. Baugh*, 4 Bibb (Ky.), 556; *Hockaday v. Skeggs*, 18 La. Ann. 681; *Humphreys v. Browne*, 19 La. Ann. 158; *Shaw, Appellant*, 81 Me. 207, 16 Atl. 662; *Gann v. Dearborn Mfg. Co.*, 129 Mo. App. 425, 107 S. W. 15; *Hamilton Nat. Bank v. American L. & T. Co.*, 72 Neb. 81, 100 N. W. 202; *Stevens v. Melcher*, 152 N. Y. 551, 46 N. E. 965; *Brakefield v. Lucas*, 10 Okl. 584, 64 Pac. 10; *Coleman's Estate*, 7 Pa. Dist. 721;

an adjudication as between the parties to a second suit did not become final until after an interlocutory decree had been entered was declared not to affect it as a bar when presented before final decree therein.⁸⁴ Where the action is remanded for further proceedings, the judgment cannot be offered as a bar, until there is a final judgment;⁸⁵ and it may, of course, be shown by the party against whom the judgment is offered that it has been reversed.⁸⁶

§ 595 (612). Finality of judgments—Must be on the merits.—It is one of the limitations to the general rule under discussion that the judgment, in order to be conclusive evidence as a bar, *must be upon the merits.*⁸⁷

Pell v. Ball, 1 Rich. Eq. (S. C.) 361; Childs v. Dennis (Tenn. Ch. App.), 61 S. W. 1092; Henderson v. Moss, 82 Tex. 69, 18 S. W. 555; Yates v. Wilson, 86 Va. 625, 10 S. E. 976; Anderson v. Burgoyne, 60 Wash. 511, 111 Pac. 777; McGourkey v. Toledo etc. R. Co., 146 U. S. 536, 36 L. Ed. 1079, 13 Sup. Ct. Rep. 170; R. Co. v. Seminary, 16 Can. S. Ct. 606.

⁸⁴ Bredin v. National Metal Co., 147 Fed. 741; Penfield v. Potts, 126 Fed. 475, 61 C. C. A. 371; Bradley Mfg. Co. v. Eagle Mfg. Co., 57 Fed. 980, 6 C. C. A. 661. See, also, Duffy v. Lytle, 5 Watts (Pa.), 120; Casebeer v. Mowry, 55 Pa. 419, 93 Am. Dec. 766. In Bredin v. National Metal Co., *supra*, the excellent syllabus in the Federal Reporter says: "A decree in a prior suit for the infringement of a patent is none the less conclusive between the parties on the issues of validity and infringement because it was merely interlocutory, when the second suit was commenced, where it is set up therein as an adjudication by a supplemental bill, after having ripened into a final decree."

⁸⁵ Aurora City v. West, 7 Wall.

(U. S.) 82, 19 L. Ed. 42; Board of Education v. Fowler, 19 Cal. 11. A judgment for costs is not final: Dusing v. Nelson, 7 Colo. 184, 2 Pac. 922; Riddle v. Yates, 10 Neb. 510, 7 N. W. 289; but the rule is otherwise if costs are directed to be paid out of a specific fund: Williams v. Morgan, 111 U. S. 684, 28 L. Ed. 559, 4 Sup. Ct. Rep. 638; Victor G. & S. M. Co. v. Nat. Bank, 18 Utah, 87, 72 Am. St. Rep. 767, 55 Pac. 72.

⁸⁶ Reg. v. Drury, 3 Car. & K. 193, 18 L. J. M. C. 189, 3 Cox C. C. 546; Wood v. Jackson, 8 Wend. (N. Y.) 9, 22 Am. Dec. 603; Goodrich v. Bodurtha, 6 Gray (Mass.), 323; Fries v. Pennsylvania R. Co., 98 Pa. 142; Smith v. Frankfield, 77 N. Y. 414; Borden Min. Co. v. Barry, 17 Md. 419; Fleming v. Riddick, 5 Gratt. (Va.) 272, 50 Am. Dec. 119; Taylor v. Smith, 4 Ga. 133; Clodfelter v. Hulett, 92 Ind. 426; Edgar v. Greer, 10 Iowa, 279; Atkinson v. Dixon, 96 Mo. 582, 10 S. W. 163. As to effect of appeal, see § 613, *post*.

⁸⁷ Liddell v. Chidester, 84 Ala. 508, 5 Am. St. Rep. 387, 4 South. 426; Gray v. Dougherty, 25 Cal. 266; Sharp v. Swayne, 1 Penne.

But an occasional difficulty may arise in deciding what is a judgment on the merits as the term is generally employed by judges and lawyers. To create such a judgment, it is by no means essential that the controversy between plaintiff and defendant be determined "on the merits," in the moral or abstract sense of those words. It is sufficient that the *status* of the action was such that the parties might have had their lawsuit disposed of according to their respective rights, if they had presented all their evidence, and the court had properly understood the facts and correctly applied the law.⁸⁸ "But if either party fails to present all his proofs, or improperly manages his case, or afterward discovers additional evidence in his behalf, or if the court finds contrary to the evidence, or misapplies the law—in all these cases the judgment, until corrected or vacated in some

(Del.) 210, 40 Atl. 113; *Armstrong v. Manatee Co.*, 49 Fla. 273, 37 South. 938; *Bright v. Kawanakoa*, 15 Hawaii, 622; *Wapello State Sav. Bank v. Colton*, 143 Iowa, 359, 122 N. W. 149; *Beeson v. Shively*, 28 Kan. 574; *Bitzer v. O'Bryan*, 107 Ky. 590, 54 S. W. 951; *Louisiana State Bank v. New Orleans Nav. Co.*, 3 La. Ann. 294; *McClure v. Livermore*, 78 Me. 390, 6 Atl. 11; *Schindel v. Suman*, 13 Md. 310; *Burlen v. Shannon*, 99 Mass. 200, 96 Am. Dec. 733; *Kerrigan v. Chicago etc. Ry. Co.*, 86 Minn. 407, 90 N. W. 976; *Mosby v. Wall*, 23 Miss. 81, 55 Am. Dec. 71; *Bell v. Hoagland*, 15 Mo. 360; *Thompson v. Carrier*, 70 N. H. 259, 47 Atl. 76; *Brackett v. Hoitt*, 20 N. H. 257; *Webb v. Buckelew*, 82 N. Y. 555; *Lorillard v. Clyde*, 122 N. Y. 41, 19 Am. St. Rep. 470, 25 N. E. 292; *Hoover v. King*, 43 Or. 281, 99 Am. St. Rep. 754, 65 L. R. A. 790, 72 Pac. 880; *Lash v. Spayd*, 141 Pa. 360, 21 Atl. 641; *Carmony v. Hooper*, 5 Pa. 305; *Holcomb v. Brickley*, 12 R. I. 255; *McPherson v.*

Swift, 22 S. D. 165, 133 Am. St. Rep. 907, 116 N. W. 76; *Wallace v. Goodlett*, 104 Tenn. 670, 58 S. W. 343; *Weathered v. Mays*, 4 Tex. 387; *Fischbeck v. Mielenz*, 119 Wis. 27, 96 N. W. 426; *Turk v. Shein*, 55 W. Va. 466, 47 S. E. 253; *Hughes v. United States*, 4 Wall. (U. S.) 232, 18 L. Ed. 303; *Ex parte Loung June*, 160 Fed. 251; *Cromwell v. County of Sac*, 94 U. S. 351, 24 L. Ed. 195; *Robinson v. Duleep Singh*, 11 Ch. D. 798, 39 L. T., N. S., 313, 27 Wkly. Rep. 21; *Elliott v. Elliott*, 20 Ont. 134.

⁸⁸ *Hughes v. United States*, 4 Wall. (U. S.) 232, 18 L. Ed. 303; *Lore v. Truman*, 10 Ohio St. 45; *Birch v. Funk*, 2 Met. (Ky.) 544; *Agnew v. McElroy*, 18 Miss. 552, 48 Am. Dec. 772; *Brackett v. Hoitt*, 20 N. H. 257; *Van Vliet v. Olin*, 1 Nev. 495; *Wilbur v. Gilmore*, 21 Pick. (Mass.) 250; *Keene v. Clarke*, 5 Rob. (N. Y.) 38; *Rogers v. Higgins*, 57 Ill. 244; *Hill v. Bryant*, 61 Ark. 203, 32 S. W. 506; *Rodgers v. Levy*, 36 Neb. 601, 54 N. W. 1080.

appropriate manner, is as conclusive upon the parties as though it had settled their controversy in accordance with the principles of abstract justice.”⁸⁹ It does, however, imply that, in order to be conclusive, the judgment should be rendered upon the issues in litigation, and not upon the ground of mere *technical defects*, such as the temporary disability of the plaintiff to sue, or because the action has not accrued, or because of a mere defect in pleadings,⁹⁰ or misjoinder or nonjoinder of plaintiffs.⁹¹ An eminent author has made the following classification of judgments which are not conclusive in a second action on this ground:⁹² First: The dismissal of an action for *want of jurisdiction* is not a judgment on the merits, and cannot prevent the plaintiff from subsequently prosecuting his action in any court authorized to entertain and determine it.⁹³ Nor can a judgment of a court having no jurisdiction to enter it create an estoppel for or against anyone, whether it purports to be on the merits or not.⁹⁴ Freeman

⁸⁹ 1 Freeman, Judgm., § 260. Mr. Freeman adds: “Frequent instances occur tending to convince us of the unwelcome truth that many judgments which in law are regarded as being ‘on the merits’ are in fact repugnant to any disposition of the rights of the parties ‘on the merits,’ as those words are employed in relation to the ordinary affairs of men”; and he gives several useful illustrations from which we select the following: If in an action on a judgment the plea of *null tiel* record is interposed, and the plaintiff fails owing to a defect in the certificate, he is estopped from afterward asserting the judgment, though its validity is free from doubt: Foltz v. Prouse, 15 Ill. 434; Stafford v. Clark, 1 Car. & P. 403, 2 Bing. 377, 130 Eng. Reprint, 352; Morgan v. Plumb, 9 Wend. (N. Y.) 287; People v. Smith, 51 Barb. (N. Y.) 360; Regina v. Yorkshire, 1 Ad. & E., N. S., 625, 113 Eng. Reprint, 1271.

⁹⁰ Smalley v. Edey, 19 Ill. 207; Kendal v. Talbot, 1 A. K. Marsh. (Ky.) 321; Atkins v. Anderson, 63 Iowa, 739, 19 N. W. 323; Philpott v. Brown, 16 Neb. 387, 20 N. W. 288; Taylor v. Matteson, 86 Wis. 113, 56 N. W. 829.

⁹¹ McCall v. Jones, 72 Ala. 368; Hughes v. United States, 4 Wall. (U. S.) 232, 18 L. Ed. 303; Miller v. Manice, 6 Hill (N. Y.), 114; Hill v. Huckabee, 70 Ala. 183; St. Romes v. Levee Steam Cotton Press Co., 127 U. S. 614, 32 L. Ed. 289, 8 Sup. Ct. Rep. 1335.

⁹² 1 Freeman, Judgm., § 263 et seq.

⁹³ Smith v. McNeal, 109 U. S. 426, 27 L. Ed. 986, 3 Sup. Ct. Rep. 319; Roberts v. Hamilton, 56 Iowa, 683, 10 N. W. 236; Smith v. Adams, 24 Wend. (N. Y.) 585; Green v. United States, 18 Ct. of Cl. 93; Keokuk etc. Ry. Co. v. Donnell, 77 Iowa, 221, 42 N. W. 176.

⁹⁴ Blin v. Campbell, 14 Johns. (N. Y.) 432; Offutt v. Offutt, 2 Har. & G.

refers to the following apt illustration. In Massachusetts, a widow may present her petition to the probate court to have her homestead set off from the rest of the estate of her deceased husband. If, however, the heirs dispute her claim, the court is ousted of all further jurisdiction in the matter, and the issue formed between her and the heirs must be tried in some other court. But a widow having presented her petition, and the heirs having filed their opposition, the probate court proceeded to hear the matter as though it had jurisdiction, and after a trial, in which all the parties in interest participated, entered a decree denying the petition, on the ground that the petitioner *had no homestead right*. In proceedings before a court of competent jurisdiction, she afterward sought to assert her claim to the homestead. It was opposed on the ground that by the decree of the probate court her rights had been terminated. But the supreme court, in considering the effect of the decree, said: "It is then further urged that if this be so, yet it is not competent for the tenant, who was the petitioner to the probate court, to set up want of jurisdiction in reply to the plea in bar in this suit, even if it might have availed her in the probate court or on an appeal. But we think this an erroneous view of the matter, and that these judgments of the probate court are to be treated as wholly void. They would have been so if in her favor, and they ought to have no more effect having been against her."^{94a} The second subdivision includes all judgments rendered on the ground that conceding the plaintiff to have a cause of action upon which he is entitled to a remedy, yet he is not entitled to so recover under the *remedy or form of action* which he has chosen.⁹⁵ Third: A judgment given because of a misjoinder or nonjoinder of parties plaintiff or defendant, or because of the want of capacity of a party plaintiff

(Md.) 178; *Schindel v. Suman*, 13 Md. 310; *State v. Odell*, 4 Blackf. (Ind.) 156; *Commonwealth v. Peters*, 12 Met. (Mass.) 387; *Thompson v. State*, 6 Neb. 102.

^{94a} *Mercier v. Chace*, 9 Allen (Mass.), 242.

⁹⁵ *Basom v. Taylor*, 39 Mich. 682; *Kittredge v. Holt*, 58 N. H. 191; *Charles v. Charles*, 13 S. C. 385.

or defendant to sue or to be sued, establishes nothing but such *defect or incapacity*, and cannot defeat a subsequent suit in which the vice causing the former judgment does not exist.⁹⁶ Fourth: A judgment *on demurrer* to the plaintiff's complaint is conclusive of everything necessarily determined by it. If the court decides that plaintiff has not stated facts sufficient to constitute a cause of action, or that his complaint is otherwise liable to any objection urged against it, such decision does not extend to any issue not before the court on the hearing of the demurrer. It leaves the plaintiff at liberty to present his complaint in another action so corrected in form or substance as to be no longer vulnerable to the attack made in the former suit.⁹⁷ Fifth (*premature suits*): That a judgment obtained for the reason that an alleged demand is not yet due is no bar to an action brought on the same demand after it has fallen due is a universally acknowledged rule applicable to every case in which a judgment can be rendered against anyone because he has undertaken to assert a claim which has yet to ripen into a cause of action.⁹⁸ Sixth: Any claim of the

⁹⁶ *McCall v. Jones*, 72 Ala. 368; *Tiffany v. Stewart*, 60 Iowa, 207, 14 N. W. 241; *Smith v. Auld*, 31 Kan. 262, 1 Pac. 626; *Richardson v. Richards*, 36 Minn. 111, 30 N. W. 457; *Weinberger v. Merchants' Ins. Co.*, 41 La. Ann. 31, 5 South. 728; *Tierney v. Abbott*, 46 Wis. 329, 1 N. W. 94; *St. Romes v. Levee Cotton Press Co.*, 127 U. S. 614, 32 L. Ed. 289, 8 Sup. Ct. Rep. 1335; *Robbins v. Wells*, 1 Rob. (N. Y.) 666; *Corl v. Riggs*, 12 Mo. 430; *Wheeler v. Ruckman*, 7 Rob. (N. Y.) 447, 35 How. Pr. 350; *White v. Gaines*, 29 La. Ann. 769.

⁹⁷ *Robinson v. Howard*, 5 Cal. 428; *Gerrish v. Pratt*, 6 Minn. 53; *Nickelson v. Ingram*, 24 Tex. 630; *Birch v. Funk*, 2 Met. (Ky.) 544; *Wells v. Moore*, 49 Mo. 229; *Stowell v. Chamberlain*, 60 N. Y. 272; *Bonnifield v. Price*, 1 Wyo. 223; *Gould v. Evans-*

ville etc. R. R. Co., 91 U. S. 526, 23 L. Ed. 416; *Gilman v. Rives*, 10 Pet. (U. S.) 298, 9 L. Ed. 432. But a judgment upon demurrer may be a judgment on the merits, and no subsequent action can be maintained by the plaintiff if the judgment is against him, on the same facts stated in the former complaint: 1 *Freeman, Judgm.*, § 267. See, also, next section. In some of the "code" states a judgment on the pleadings is a judgment on the merits: *Bailey v. Aetna etc. Co.*, 5 Cal. App. 740, 91 Pac. 416.

⁹⁸ *Krapp v. Eldridge*, 33 Kan. 106, 5 Pac. 372; *Tracy v. Merrill*, 103 Mass. 280; *Maxwell v. Clarke*, 139 Mass. 112, 29 N. E. 224; *Conn v. Bernheimer*, 67 Miss. 498, 7 South. 345; *Brackett v. People*, 115 Ill. 29,

plaintiff which is offered by him, but is ruled out because not admissible under his pleadings, is, *if it were not admissible*, to be afterward treated as though it had not been offered.⁹⁹ Not being involved in the issues, it cannot become *res judicata*, unless, without objection by the defendant or through error of the court, it is allowed and becomes a part of the judgment.^{99a}

§ 596 (613). Effect of nonsuit or discontinuance or appeal.—Another exception to the rule is the judgment of nonsuit or discontinuance, in which we include the judgments of *nolle prosequi* and, in some jurisdictions, of dismissal. A judgment of nonsuit or discontinuance is not such a judgment on the merits as to constitute a bar. In speaking of such a judgment, the supreme court of the United States used this language: “A judgment of nonsuit is only given after the appearance of the defendant when, from any delay or other fault of the plaintiff against the rules of law in any subsequent stage of the case, he has not followed the remedy which he has chosen to assert his claim as he ought to do. For such delinquency or mistake he may be *non pros’d*, and is liable to pay the costs. As nothing positive can be implied from the plaintiff’s error as to the subject matter of his suit, he may reassert it by the same remedy in another suit, if it be appropriate to his cause of action, or by any other which is so, if the first was not”¹⁰⁰ A nonsuit “is like the blowing out of a candle,

3 N. E. 723; *Garrett v. Greenwell*, 92 Mo. 120, 4 S. W. 441; *Dillinger v. Kelley*, 84 Mo. 561.

⁹⁹ *Baker v. Rand*, 13 Barb. (N. Y.) 152; *Harding v. Hale*, 2 Gray (Mass.), 399; *De Graaf v. Wyckoff*, 118 N. Y. 1, 22 N. E. 1118; *Millard v. Missouri etc. R. Co.*, 86 N. Y. 441; *Pruitt v. Muldrick*, 39 Or. 353, 65 Pac. 20; *Taylor v. Matteson*, 86 Wis. 113, 56 N. W. 829.

^{99a} This division is adapted from 1 *Freem. Judgm.*, c. 12.

¹⁰⁰ *Homer v. Brown*, 16 How. (U. S.) 354, 365, 14 L. Ed. 970; *Manhattan Ins. Co. v. Broughton*, 109 U. S. 121, 27 L. Ed. 878, 3 Sup. Ct. Rep. 99; *Louisville, N. A. & C. Ry. Co. v. Wylie*, 1 Ind. App. 136, 27 N. E. 122; *Taylor v. Barron*, 30 N. H. 78, 64 Am. Dec. 281; *Dunham v. Carson*, 37 S. C. 269, 15 S. E. 960; *Lord v. Chadbourne*, 42 Me. 429, 66 Am. Dec. 290; *Smith v. Floyd Co.*, 85 Ga. 420, 11 S. E. 850; *Holland v. Hatch*, 15 Ohio St. 464; *Loeb v. Willis*, 100 N.

which a man at his own pleasure may light again."¹ Under no circumstances will such a judgment be deemed final, whether entered before or at the trial.² That such judgment was entered by the court upon an agreed statement of facts will not give it any force as an estoppel.³ A judgment of nonsuit was entered against plaintiff on a certain count of his complaint for not replying to a special plea within the time required by the court. The effect of the judgment was held to be to turn plaintiff out of court, and to place him, as to such count, as though it had never been filed.⁴ But it has been ruled in a Maine case that the judgment of nonsuit *may* involve a decision on the merits, and *constitute a bar*. It was so held where the decision settled the question of the validity of the note in suit;⁵ and where there is a judgment of dismissal *based on an agreement of the parties*, in the absence of anything in the agreement or judgment to the contrary, such judgment will

Y. 231, 3 N. E. 177; Hayes v. Collins, 114 Mass. 54; Bridge v. Sumner, 1 Pick. (Mass.) 371; Bishop v. McGillis, 82 Wis. 120, 51 N. W. 1075; People v. Vilas, 36 N. Y. 459, 93 Am. Dec. 520; Baudin v. Roliff, 1 Mart. (La.), N. S., 165, 14 Am. Dec. 181; Holmes v. Chicago & A. R. Co., 94 Ill. 439; Mills v. Pettigrew, 45 Kan. 573, 26 Pac. 33; Gates v. McLean, 70 Cal. 42, 11 Pac. 489; Gardner v. Michigan Cent. R. Co., 150 U. S. 349, 37 L. Ed. 1107, 14 Sup. Ct. Rep. 140; Hallum v. Dickinson, 47 Ark. 120, 14 S. W. 477; Spring Valley Coal Co. v. Patting, 210 Ill. 342, 71 N. E. 371; Johnson v. New Orleans, 50 La. Ann. 920, 24 South. 635; Guthiel v. Gilmer, 27 Utah, 496, 76 Pac. 628; Union Bank v. Nelson, 32 Wash. 208, 73 Pac. 372; Gates v. Parmly, 93 Wis. 294, 66 N. W. 253, 67 N. W. 739. See note to Lea v. Lea, 96 Am. Dec. 778.

¹ March on Arbitraments, 215;

cited in Clapp v. Thomas, 5 Allen (Mass.), 158.

² Foster v. Wells, 4 Tex. 101; Pil- low v. Eliot, 25 Tex. Supp. 322; Taylor v. Larkin, 12 Mo. 103, 49 Am. Dec. 119; Greeley v. Smith, 1 Wood. & M. (U. S.) 181, Fed. Cas. No. 5749.

³ Homer v. Brown, 16 How. (U. S.) 354, 14 L. Ed. 970; Bridge v. Sumner, 1 Pick. (Mass.) 371; Morgan v. Bliss, 2 Mass. 111; Derby v. Jacques, 1 Cliff. 425, Fed. Cas. No. 3817; Knox v. Waldoborough, 5 Me. 185.

⁴ Howes v. Austin, 35 Ill. 396. Illustrations might be indefinitely multiplied, and several useful ones will be found collected in 1 Freeman, Judgm., § 261.

⁵ Brett v. Marston, 45 Me. 401. See Ordway v. Railway Co., 69 N. H. 429, 45 Atl. 243; Cartin v. South Bound R. Co., 43 S. C. 221, 49 Am. St. Rep. 829, 20 S. E. 979 (and see p. 831 for note criticising the case).

constitute a bar.⁶ The same is true of judgments on *confession*.⁷ It has been held in some states that a dismissal which is not expressly made "without prejudice" is a bar to a subsequent action.⁸ In like manner a *demurrer* on the merits to the entire cause of action stated constitutes a bar.⁹ "But it is equally well settled that, if the plaintiff fails on demurrer in his first action from the omission of an essential allegation in his declaration which is fully supplied in the second suit, the judgment in the first suit is no bar to the second, although the respective actions were instituted to enforce the same right, for the reason that the merits of the cause, as disclosed in the second declaration, were not heard and decided in the first action."¹⁰ Other

⁶ Van Valkenburgh v. Milwaukee, 43 Wis. 574; Merritt v. Campbell, 47 Cal. 542; Bank of Commonwealth v. Hopkins, 2 Dana (Ky.), 395; Jarboe v. Smith, 10 B. Mon. (Ky.) 257, 52 Am. Dec. 541; Phillpotts v. Blasdel, 10 Nev. 19; Hoover v. Mitchell, 25 Gratt. (Va.) 387; United States v. Parker, 120 U. S. 89, 30 L. Ed. 601, 7 Sup. Ct. Rep. 454; Crossman v. Davis, 79 Cal. 603, 21 Pac. 963; Ford v. Roberts, 14 Colo. 291, 23 Pac. 322.

⁷ Neusbaum v. Keim, 24 N. Y. 325; North v. Mudge, 13 Iowa, 496, 81 Am. Dec. 441; Fletcher v. Holmes, 25 Ind. 458; Dunn v. Pipes, 20 La. Ann. 276; Burgess v. Siligman, 107 U. S. 20, 27 L. Ed. 359, 2 Sup. Ct. Rep. 10; Weaver v. Adams, 132 Pa. 392, 19 Atl. 271.

⁸ Bradley v. Bradley, 160 Mass. 258, 35 N. E. 482; Stults v. Forst, 135 Ind. 297, 34 N. E. 1125.

⁹ Gould v. Evansville & C. R. Co., 91 U. S. 526, 23 L. Ed. 416; Bissell v. Spring Valley, 124 U. S. 225, 31 L. Ed. 411, 8 Sup. Ct. Rep. 495; St. Johnsbury etc. R. Co. v. Hunt, 59 Vt. 294, 7 Atl. 277; Bouchaud v. Dias, 3 Denio (N. Y.), 238; Gray v. Gray, 34

Ga. 499; Nickless v. Pearson, 126 Ind. 477, 26 N. E. 478; Perkins v. Moore, 16 Ala. 17; City Bank v. Walden, 1 La. Ann. 46; Parker v. Spencer, 61 Tex. 155; Wilson v. Ray, 24 Ind. 156; Vanlandingham v. Ryan, 17 Ill. 25; Felt v. Turnure, 48 Iowa, 397; Terry v. Hammonds, 47 Cal. 32; Connecticut Ins. Co. v. Smith, 117 Mo. 261, 38 Am. St. Rep. 656, 22 S. W. 623; Ellis v. Northern Pac. Ry. Co., 80 Wis. 459, 27 Am. St. Rep. 44, 50 N. W. 397; Stein v. McGrath, 128 Ala. 175, 30 South. 792; Brennan v. Berlin Iron Bridge Co., 71 Conn. 479, 42 Atl. 625; Gregory v. Woodworth, 107 Iowa, 151, 77 N. W. 837; Hyatt v. Challiss, 59 Kan. 422, 53 Pac. 467; Willoughby v. Stevens, 132 N. C. 254, 43 S. E. 636; Kleinschmidt v. Binzel, 14 Mont. 31, 43 Am. St. Rep. 604, 35 Pac. 460.

¹⁰ Gould v. Evansville & C. Ry. Co., 91 U. S. 526, 23 L. Ed. 416; Wiggins Ferry Co. v. Ohio & M. Ry. Co., 142 U. S. 396, 35 L. Ed. 1055, 12 Sup. Ct. Rep. 188; Gilman v. Rives, 10 Pet. (U. S.) 298, 9 L. Ed. 432; Aurora City v. West, 7 Wall. (U. S.) 82, 18 L. Ed. 42; Doctor v. Furch, 76 Wis. 153, 44 N. W. 648,

illustrations are given in the notes in which a dismissal not on the merits is no bar.¹¹ In some of the states judgments of dismissal seem to be entered after hearing and determining a cause on its merits, and are equivalent to a general judgment in favor of the defendant. Where this practice prevails, if a judgment of dismissal appears to have been given after the trial and submission of the cause on the merits, it is *res judicata*.¹² A defendant, conceiving that

826; *Commonwealth v. Goddard*, 13 Mass. 455; *Chapin v. Curtis*, 23 Conn. 388; *Gallup v. Lichter*, 4 Colo. App. 296, 35 Pac. 985; *Foster v. Commonwealth*, 8 Watts & S. (Pa.) 77; *Griffin v. Seymour*, 15 Iowa, 30, 83 Am. Dec. 396; *Crumpton v. State*, 43 Ala. 31; *Harding v. State*, 22 Ark. 210; *Campbell v. Hunt*, 104 Ind. 210, 2 N. E. 363, 3 N. E. 879; *Thomas v. Bland*, 91 Ky. 1, 11 L. R. A. 240, 14 S. W. 955; *City of North Muskegon v. Clark*, 62 Fed. 694, 10 C. C. A. 591.

11 This is true where an action is dismissed on the ground of a defective preliminary affidavit or notice: *Stockwell v. Byrne*, 22 Ind. 6; *Rose v. Hawley*, 141 N. Y. 366, 36 N. E. 335; or defective pleading: *Jackson v. Finlay* (Tex. Civ. App.), 40 S. W. 427; or informal bond: *Morton v. Sweetzer*, 12 Allen (Mass.), 134; or for failure to make a demand: *Crosby v. Baker*, 6 Allen (Mass.), 295; or to prosecute the action: *Worst v. Sgiteovich* (Tex. Civ. App.), 46 S. W. 72; or want of jurisdiction: *Estill v. Taul*, 2 Yerg. (Tenn.) 467, 24 Am. Dec. 498; *Weyand v. Atchison, T. & S. F. Ry. Co.*, 75 Iowa, 573, 9 Am. St. Rep. 504, 1 L. R. A. 650, 39 N. W. 899; *Geiser Mfg. Co. v. Berry*, 12 Okl. 183, 70 Pac. 202; *Weigley v. Coffman*, 144 Pa. 489, 27 Am. St. Rep. 667, 22 Atl. 919; *Town of Jericho v. Town of Underhill*, 67 Vt. 85, 48 Am. St. Rep. 804, 30 Atl. 690; or because the debt

was not due: *Estill v. Taul*, 2 Yerg. (Tenn.) 467, 24 Am. Dec. 498; or if for other reasons the action is prematurely brought: *New England Bank v. Lewis*, 8 Pick. (Mass.) 113; *Wood v. Faut*, 55 Mich. 185, 20 N. W. 897; *Rose v. Hawley*, 141 N. Y. 366, 36 N. E. 335; *Chicago & A. E. I. R. Co. v. State*, 153 Ind. 134, 51 N. E. 924; *Slocum v. Wilbour*, 23 R. I. 97, 49 Atl. 489; *Waterhouse v. Levine*, 182 Mass. 407, 65 N. E. 822; *Ryan v. Spieth*, 18 Mont. 45, 44 Pac. 401, 403; or where it fails on account of mistake of name: *Wixon v. Stephens*, 17 Mich. 518, 97 Am. Dec. 205; or default: *Gray v. Dougherty*, 25 Cal. 266; *Agnew v. McElroy*, 18 Miss. 552, 48 Am. Dec. 772; *Perry v. Lewis*, 49 Miss. 443 (but see *Last Chance Min. Co. v. Tyler Min. Co.*, 157 U. S. 683, 39 L. Ed. 859, 15 Sup. Ct. Rep. 733, 18 Morr. Min. Rep. 205); or incapacity of plaintiff: *Rodgers v. Levy*, 36 Neb. 601, 54 N. W. 1080.

12 *Best v. Hoppie*, 3 Colo. 137; *Brothers v. Higgins*, 5 J. J. Marsh. (Ky.) 658; *Granger v. Singleton*, 32 La. Ann. 898; *Bledsoe v. Erwin*, 33 La. Ann. 615; *Amory v. Amory*, 26 Wis. 152. "At common law there is no form of an entry in the books of a judgment dismissing an action. Every judgment against a plaintiff is either upon a *retraxit, non prosequitur, non-suit, nolle prosequi*, discontinuance, or a judgment on an issue found by jury in favor of defendant, or upon de-

the plaintiff has failed to prove his case, may waive a motion for a nonsuit, and proceed to prove his own case, and have judgment on the merits. But if he move for a nonsuit, and the nonsuit be granted, he cannot proceed and have judgment on the merits, because, by reason of the nonsuit, the plaintiff is virtually out of court. A nonsuit granted on the motion of the defendant is equivalent, in its operation on the action, to a dismissal with the consent of the defendant.¹³ In California there has been a full consideration of the effect of the judgment of dismissal by agreement, and it has been compared to that of a *retraxit* at common law equivalent to the open and voluntary renunciation of a suit pending. That the dismissal of an action by agreement is equivalent in its effect to a *retraxit* is now generally conceded;¹⁴ and a *retraxit* has always been deemed a judgment on the merits against the plaintiff, estopping him from subsequently maintaining an action for the cause renounced by his *retraxit*.¹⁵ Where a

murrer. The inducements or preliminary recitals in these several kinds of judgment are variant, but the conclusion in each is always the same; it is as follows: "Therefore it is considered by the court that plaintiff take nothing by his writ, and that the defendant go without day, and recover of plaintiff his costs." Of these several judgments, none but a *retraxit* or one on the merits will bar subsequent actions"; Bond v. McNider, 3 Ired. (N. C.) 440.

¹³ Wood v. Ramond, 42 Cal. 643.

¹⁴ Crossman v. Davis, 79 Cal. 603, 21 Pac. 963; United States v. Parker, 120 U. S. 89, 30 L. Ed. 601, 7 Sup. Ct. Rep. 454; Wohlford v. Compton, 79 Va. 333. This effect was denied to a judgment of "dismissed agreed" in an action of ejectment: Stockton v. Copeland, 30 W. Va. 674, 5 S. E. 143.

¹⁵ Coffman v. Brown, 7 Smedes & M. (Miss.) 125, 45 Am. Dec. 299; Lowry v. McMillan, 8 Pa. 157, 49 Am.

Dec. 501; Cunningham v. Schley, 68 Ga. 105; Harris v. Preston, 10 Ark. 201; Crawford v. Glass, 11 Ired. (N. C.) 118. The following excerpt from Merritt v. Campbell, 47 Cal. 542, gives the views of the California supreme court: "We are not to be understood as holding that a mere dismissal of an action by the plaintiff under the statute, and without any agreement upon his part to do so, is to be held to constitute a bar to its renewal, nor that a judgment of nonsuit, even entered by consent, would have that effect, but only that a judgment of dismissal, when based upon and entered in pursuance of the agreement of the parties, must be understood, in the absence of anything to the contrary expressed in the agreement, and contained in the judgment itself, to amount to such an adjustment of the merits of the controversy, by the parties themselves, through the judgment of the court, as will constitute a de-

bill in chancery is dismissed and the decree is in absolute terms, it is presumed to be upon the merits.¹⁶ But if it is evidently on technical grounds, like defect of pleadings, or want of jurisdiction, or want of an adequate remedy at law, the former decree is not conclusive. Of course, this is clearly so when the decree is in terms "without prejudice."¹⁷ It is an open question whether a mere *appeal from a judgment* prevents its use as evidence to establish the defense *res judicata*. In some of the states it is held that an appeal destroys the effect of the judgment for this purpose,¹⁸ while the contrary view is maintained by equally high authority.¹⁹ In California it has been held that while

fense to another action afterward brought upon the same cause of action."

¹⁶ *Durant v. Essex Co.*, 7 Wall. (U. S.) 107, 19 L. Ed. 154; *Footte v. Gibbs*, 1 Gray (Mass.), 412; *Perine v. Dunn*, 4 Johns. Ch. (N. Y.) 142; *Neafie v. Neafie*, 7 Johns. Ch. (N. Y.) 1, 11 Am. Dec. 380; *Bigelow v. Winsor*, 1 Gray, 299. See *Royston v. Horner*, 75 Md. 557, 24 Atl. 25.

¹⁷ *Taylor v. Barron*, 30 N. H. 78, 64 Am. Dec. 281; *Kendal v. Talbot*, 1 A. K. Marsh. (Ky.) 321; *Perry v. Lewis*, 49 Miss. 443; *Mobile v. Kimball*, 102 U. S. 691, 26 L. Ed. 238; *Shepherd v. Pepper*, 133 U. S. 626, 33 L. Ed. 706, 10 Sup. Ct. Rep. 438; *Footte v. Gibbs*, 1 Gray (Mass.), 412; *House v. Mullen*, 22 Wall. (U. S.) 42, 22 L. Ed. 838; *Thurston v. Thurston*, 99 Mass. 39; *Mey v. Gulliman*, 105 Ill. 272; *Lore v. Truman*, 10 Ohio St. 45; *Walden v. Bodley*, 14 Pet. (U. S.) 156, 10 L. Ed. 398; *Strang v. Moog*, 72 Ala. 460; *Hughes v. United States*, 4 Wall. (U. S.) 232; *Durant v. Essex Co.*, 7 Wall. (U. S.) 107, 19 L. Ed. 154; *Ballentine v. Ballentine* (Pa.), 15 Atl. 859; *Gunn v. Peakes*, 36

Minn. 177, 1 Am. St. Rep. 661, 30 N. W. 466. See, also, *Maxwell v. Clarke*, 139 Mass. 112, 29 N. E. 224; *Hazen v. Lyndonville Nat. Bank*, 70 Vt. 543, 67 Am. St. Rep. 680, 41 Atl. 1046; *Mitchell v. Adams* (Tenn. Ch. App.), 52 S. W. 316. See note to *Lea v. Lea*, 96 Am. Dec. 778.

¹⁸ *Texas Trunk Ry. Co. v. Jackson*, 85 Tex. 605, 22 S. W. 1030; *Murray v. Green*, 64 Cal. 363, 28 Pac. 118; *Naftzger v. Gregg*, 99 Cal. 83, 37 Am. St. Rep. 23, and valuable note 33 Pac. 757; *Southern Ry. Co. v. Brigman*, 95 Tenn. 624, 32 S. W. 762. See *Tampa Waterworks Co. v. City of Tampa*, 124 Fed. 932.

¹⁹ *Smith v. Schreiner*, 86 Wis. 19, 39 Am. St. Rep. 869, 56 N. W. 160; *Parkhurst v. Berdell*, 110 N. Y. 386, 6 Am. St. Rep. 384, 18 N. E. 123; *Burton v. Burton*, 28 Ind. 342; *Faber v. Hovey*, 117 Mass. 107, 19 Am. Rep. 398; *Willard v. Ostrander*, 51 Kan. 481, 37 Am. St. Rep. 294, 32 Pac. 1092; *Reese v. Damato*, 44 Fla. 692, 33 South. 462; *Freem., Judg.*, 4th ed., § 328. See note to *Naftzger v. Gregg*, 37 Am. St. Rep. 29.

the party against whom a judgment has been entered retains the right to appeal therefrom, it cannot be admitted in evidence against him as a bar, under a statute declaring that an action shall be deemed pending from the time of commencement until its final determination upon appeal, or until the time for appeal has passed, unless the judgment is sooner satisfied.²⁰ In Connecticut the operation of an appeal depends upon the character of the jurisdiction of the appellate court. If the latter court has authority to try the case *de novo* and to settle the controversy by a judgment of its own, and to enforce such judgment by its own process, then the judgment of the inferior court is not merely suspended by the appeal; it is vacated and set aside, and can no longer have an effect as an estoppel. But if the appeal is in the nature of a writ of error conferring power on the appellate court to determine such errors as may have occurred at the trial or in the decision of the cause, and giving the court upon such determination no other authority than that of reversing, modifying or affirming the judgment of the inferior court, and of remitting the case back to the tribunal whence it came, that such tribunal may conform its judgments and proceedings to the views of the superior tribunal, then such appeal does not vacate or suspend the judgment appealed from, and the removal of the case to the appellate court would not bar an action upon the judgment.²¹ The effect of a judgment is not limited by the fact that on appeal it was affirmed on an equal division of the judges.²² The mere pendency of a motion for a new

²⁰ *Naftzger v. Gregg*, 99 Cal. 83, 37 Am. St. Rep. 23, 33 Pac. 757. Freeman, in a note appended to this case, says that nowhere, except in California, has the contention ever been made that the mere existence of a right of appeal destroyed the effect of a judgment as *res judicata*. The effect of an appeal duly taken and diligently prosecuted has been considered in many of the states, but upon few

other questions have the courts been so unable to reach harmonious conclusions. The question cannot be decided without working extreme hardship in some instances.

²¹ *Bank of North America v. Wheeler*, 28 Conn. 433, 73 Am. Dec. 683.

²² *Lyon v. Circuit Judge for Ingham County*, 37 Mich. 377; *Durant v. Essex Co.*, 7 Wall. (U. S.) 107, 19 L. Ed. 154.

trial neither destroys nor suspends the effect of a judgment;²³ but the granting of such motion vacates the judgment and the verdict or findings upon which it rested, and neither can any longer be respected as *res judicata*.²⁴

§ 597 (614). **Conclusive only as to matters in issue.**—It is another limitation upon the general doctrine that judgments are conclusive in subsequent actions between the same parties that the issue in the second action must have been a material and necessary issue in the first action, and determined therein. In other words, a judgment is conclusive, either as a plea in bar or as evidence only as to facts directly and distinctly put in issue; and the doctrine of estoppel is limited to those facts. It does not extend to facts which may be in controversy, but which rest in evidence and are merely collateral. Neither does it extend to facts raised incidentally or by immaterial issues, or which are to be inferred by argument from the judgment.²⁵ This limitation rests upon the obvious ground that there should be

²³ Young v. Brehe, 19 Nev. 379, 3 Am. St. Rep. 892, 12 Pac. 564.

²⁴ Edwards v. Edwards, 22 Ill. 121; Sheldon v. Van Vleck, 106 Ill. 45; Weigel v. Green, 221 Ill. 187, 77 N. E. 574; Gulf etc. Ry. Co. v. James, 73 Tex. 12, 15 Am. St. Rep. 743, 10 S. W. 744; Winona v. Minnesota Ry. Const. Co., 27 Minn. 415, 6 N. W. 795, 8 N. W. 148; Freeman on Judgments, § 328.

²⁵ Watts v. Rice, 75 Ala. 289; McCombs v. Wall, 66 Ark. 336, 50 S. W. 876; Shall v. Biscoe, 18 Ark. 142; Gray v. Dougherty, 25 Cal. 266; Dickinson v. Hayes, 31 Conn. 417; Brady v. Pryor, 6 Ga. 691; Wahle v. Wahle, 71 Ill. 510; Des Moines Nat. Bank v. Harding, 86 Iowa, 153, 53 N. W. 99; Widow de St. Romes v. Carondelet Canal etc. Co., 24 La. Ann. 331; Morrison v. Clark, 89 Me. 103, 56 Am. St. Rep.

395, 35 Atl. 1034; Standish v. Parker, 2 Pick. (Mass.) 20, 13 Am. Dec. 393; Gilbert v. Thompson, 9 Cush. (Mass.) 348; Land v. Keirn, 52 Miss. 341; Agnew v. McElroy, 18 Miss. 552, 48 Am. Dec. 772; Fish v. Lightner, 44 Mo. 268; King v. Chase, 15 N. H. 9, 41 Am. Dec. 675; Woodgate v. Fleet, 44 N. Y. 1; King v. Townsend, 141 N. Y. 358, 36 N. E. 513; Bennett v. Holmes, 1 Dev. & B. (18 N. C.) 486; Crofton v. Board of Education, 26 Ohio St. 571; Forecy's Appeal, 106 Pa. 508; Lentz v. Wallace, 17 Pa. 412, 55 Am. Dec. 569; Church v. Chapin, 35 Vt. 223; Henry v. Davis, 13 W. Va. 230; Boutin v. Lindsley, 84 Wis. 644, 54 N. W. 1017; Williams v. Williams, 63 Wis. 58, 53 Am. Rep. 253, 23 N. W. 110. See note to Lea v. Lea, 96 Am. Dec. 779.

no estoppel, unless the party has had his day in court as to the question in controversy. The real difficulty has arisen in determining what is the "matter in issue," within the meaning of the rule. The questions that naturally suggest themselves are ably dealt with by Bigelow, who says: "Is the rule this, that the judgment is conclusive upon every point which by the evidence in the action became necessary to the decision of the case? Or is it this, that it is conclusive only of such matters as, being alleged by the plaintiff as the ground of his action, and controverted by the defendant, are necessary to the decision, in contrast with such matters as *in themselves alone* involved questions foreign to the cause of action but which in the position of the case became necessary to its decision. There is much conflict of authority upon the subject. Without attempting to follow the course of the many cases upon this point, we shall venture to make the suggestion that by the weight of authority the judgment is conclusive upon all issues which have become necessary to the decision of the case, whatever their relation to the cause of action." Some cases hold that in order to make a record evidence to conclude any matter, it should appear from the record itself that the matter was in issue, and that evidence cannot be admitted that under such a record any particular matter came in question;²⁶ while others maintain that a former judgment may be given in evidence, accompanied with such parol proof as is necessary to show the grounds upon which it proceeded, where such grounds, from the form of the issue, do not appear by the record itself; provided that the matters alleged to have been passed upon be such as might legitimately have been given in evidence under the issue joined, and such that, when proved to have been given in evidence, it is manifest by the verdict and judgment that they must have been directly and necessarily in question

²⁶ See *Hannon v. O'Dell*, 71 Conn. 698, 43 Atl. 147; *Whitesell v. Strickler*, 167 Ind. 602, 119 Am. St. Rep. 524, 78 N. E. 845; *Sanderson*

v. Peabody, 58 N. H. 116; *Kerr v. Blair*, 55 Tex. Civ. App. 349, 118 S. W. 791.

and passed upon by the jury.²⁷ Some of the decisions have proceeded on the theory that no matters are to be deemed in issue, except those on which the action proceeds, and which are controverted by the defendant's pleadings. In other words, they hold somewhat strictly to the rule that the *issuable, and not the evidential, facts* are those referred to in the rule. Chief Justice Parker of New Hampshire, in the case next referred to, said: "Any fact attempted to be established by evidence, and controverted by the adverse party, may be said to be in issue in one sense. As, for instance, in an action of trespass, if the defendant alleges and attempts to prove that he was in another place than that where the plaintiff's evidence would show him to have been at a certain time, it may be said that this controverted fact is a matter in issue between the parties. This may be tried, and may be the only matter put in controversy by the evidence of the parties. But this is not the matter in issue within the meaning of the rule. It is that matter upon which the plaintiff proceeds by his action, and which the defendant controverts by his pleadings, which is in issue. The declarations and pleadings may show specifically what this is, or they may not. If they do not, the party may adduce other evidence to show what was in issue and thereby make the pleadings as if they were special. But facts offered in evidence to establish the matters in issue are not themselves in issue within the meaning of the rule, although they may be controverted on the trial." Thus, in the leading case in New Hampshire sustaining this view, from which the above extract has been quoted, it was held that the validity of a mortgage offered as evidence of the plaintiff's title in trover was not in issue, although it was shown by parol that it was the only question submitted to the jury, and that they found the mortgage fraudulent.²⁸ While there is agreement in the view that mere collateral facts, although

²⁷ Wood v. Jackson, 8 Wend. (N. Y.) 9, 22 Am. Dec. 603.

²⁸ King v. Chase, 15 N. H. 9, 41 Am. Dec. 675, which has been criti-

cised in Big. Estop., 5th ed., 158. See, also, Smith v. McCool, 16 Wall. (U. S.) 560, 21 L. Ed. 324; Jackson v. Lodge, 36 Cal. 28.

controverted and used in evidence, are not included within the rule,²⁹ yet the weight of authority is to the effect that "every point which has been either expressly or by necessary implication in issue, which must necessarily have been decided in order to support the judgment or decree is concluded."³⁰ A judgment is conclusive upon *every matter* actually and *necessarily decided* in the former suit, though not then directly the point in issue. If the facts involved in the second suit are so cardinal that without them the former decision cannot stand, they must now be taken as conclusively settled.³¹ This rests on the principle that a judg-

²⁹ Manny v. Harris, 2 Johns. (N. Y.) 24, 3 Am. Dec. 386; Coit v. Tracy, 8 Conn. 268, 20 Am. Dec. 110; Wood v. Jackson, 8 Wend. (N. Y.) 9, 22 Am. Dec. 603; Beebe v. Bull, 12 Wend. (N. Y.) 504, 27 Am. Dec. 150; Garrott v. Johnson, 11 Gill & J. (Md.) 173, 35 Am. Dec. 272; Blackmore v. Gregg, 10 Watts (Pa.), 222, 36 Am. Dec. 171; Nason v. Blaisdell, 12 Vt. 165, 36 Am. Dec. 331; Garwood v. Garwood, 29 Cal. 514; King v. Chase, 15 N. H. 9, 41 Am. Dec. 675, and note; Lea v. Lea, 99 Mass. 493, 96 Am. Dec. 772, and note. See § 604, *post*.

³⁰ Board of Supervisors of Iowa County v. Mineral Point R. Co., 24 Wis. 93; Wood v. Jackson, 8 Wend. (N. Y.) 9, 22 Am. Dec. 603; Burlen v. Shannon, 99 Mass. 200, 96 Am. Dec. 733; Hunter v. Davis, 19 Ga. 413; Huntley v. Holt, 59 Conn. 102, 21 Am. St. Rep. 71, 22 Atl. 34; White v. Sherman, 168 Ill. 589, 61 Am. St. Rep. 132, 48 N. E. 128; Agnew v. Montgomery, 72 Neb. 9, 99 N. W. 820; Widow de St. Romes v. Carondelet Canal & N. Co., 24 La. Ann. 331; Nesbit v. Independent District of Riverside, 144 U. S. 610, 36 L. Ed. 562, 12 Sup. Ct. Rep. 746; Henry v. Davis, 13 W. Va. 230.

See note to Lea v. Lea, 96 Am. Dec. 777.

³¹ Freem. Judg., 4th ed., § 256; Chamberlain v. Gaillard, 26 Ala. 504; People v. Wilson, 6 Cal. App. 122, 91 Pac. 661; Kerr v. Burns, 42 Colo. 285, 93 Pac. 1120; Fowler v. Davis, 1 Ga. App. 549, 57 S. E. 939; Freeman v. Bass, 34 Ga. 355, 89 Am. Dec. 255; Campbell v. Wilson, 195 Ill. 284, 63 N. E. 103; Roberts v. Leutzke, 39 Ind. App. 577, 78 N. E. 635; Montgomery v. Alden, 133 Iowa, 675, 119 Am. St. Rep. 648, 108 N. W. 234; Bleakley v. Barclay, 75 Kan. 462, 10 L. R. A., N. S., 230, 89 Pac. 906; Vincent v. Blanton, 134 Ky. 590, 135 Am. St. Rep. 424, 121 S. W. 466; Froelicher v. Southern Marine Wks., 121 La. 451, 46 South. 570; Stouffer v. Wolfkill, 114 Md. 603, 80 Atl. 300; McChrystal v. Clisbee, 190 Mass. 120, 5 Ann. Cas. 769, 3 L. R. A., N. S., 702, 76 N. E. 511; Kennedy v. London etc. Ins. Co., 157 Mich. 411, 122 N. W. 134; McClean v. Hughes, 102 Minn. 174, 112 N. W. 1013; Thornton v. Natchez, 88 Miss. 1, 41 South. 498; Nave v. Adams, 107 Mo. 414, 28 Am. St. Rep. 421, 17 S. W. 958; Becker v. Linton, 80 Neb. 655, 127 Am. St. Rep. 795, 114 N. W.

ment necessarily affirming or denying a fact is conclusive of its existence whenever it becomes a matter in issue between the same parties or between parties in privity with them.³² It follows logically that the facts found in a verdict or judgment *must be facts material to the issue*.³³ This remains true, even though the judgment in express terms finds a fact immaterial to the issue;³⁴ and the same is true as to the special findings of a jury on the trials of issues, when such findings are upon facts not essential to their verdict.³⁵

928; Gulling v. Washoe County Bank, 29 Nev. 257, 89 Pac. 25; Annan v. Hill Union Brewing Co., 59 N. J. Eq. 414, 46 Atl. 563; Lewy v. Wolfman, 110 N. Y. Supp. 256; Gates v. Preston, 41 N. Y. 113; Gardner v. Buckbee, 3 Cow. (N. Y.) 120, 15 Am. Dec. 256; Bouchaud v. Dias, 3 Denio (N. Y.), 238; Roanoke Rapids Power Co. v. Roanoke etc. Power Co., 152 N. C. 472, 68 S. E. 190; Hazzard v. Nottingham, Tapp. (Ohio) 114; County Commrs. v. State, 19 Okl. 375, 91 Pac. 699; White v. Ladd, 41 Or. 324, 93 Am. St. Rep. 732, 68 Pac. 739; Wetherald v. Van Stavoren, 125 Pa. 535, 17 Atl. 450; Probate Court v. Williams, 30 R. I. 144, 19 Ann. Cas. 554, 73 Atl. 382; Tilghman Lumber Co. v. Matheson, 88 S. C. 432, 70 S. E. 1033; Love v. McGill, 41 Tex. Civ. App. 471, 91 S. W. 246; Holbrook v. Quinlan (Vt.), 80 Atl. 339; Cabot v. Washington, 41 Vt. 168; Meeker v. Winyer, 48 Wash. 27, 92 Pac. 883; Gerbig v. Bell, 143 Wis. 157, 126 N. W. 871; United States v. Sommers, 171 Fed. 57, 96 C. C. A. 299; Reg. v. Hartington Middle Quarter, 4 El. & B. 780, 119 Eng. Reprint, 288.

³² Gould v. Sternberg, 128 Ill. 510, 15 Am. St. Rep. 138, 21 N. E. 628 (a judgment abating a nuisance to a public highway is conclusive

of the existence both of the highway and of the nuisance); Brant v. Plumer, 64 Iowa, 23, 19 N. W. 842 (a judgment for the defendant in an action for obstructing a watercourse, if based upon the ground that there was no watercourse to be obstructed, is in subsequent actions conclusive of the non-existence of such watercourse): Hahn v. Miller, 68 Iowa, 745, 28 N. W. 51; but if the judgment had been for the plaintiff, it would necessarily have been conclusive in other actions of the existence of the watercourse and of its obstruction: Byrne v. Minneapolis etc. Ry. Co., 38 Minn. 212, 8 Am. St. Rep. 668, 36 N. W. 339; McLeod v. Lee, 17 Nev. 103, 28 Pac. 124. For other illustrations, see 1 Freeman, Judgm., § 526.

³³ Tams v. Lewis, 42 Pa. 402; Hibshman v. Dulleban, 4 Watts (Pa.), 183.

³⁴ Hardy v. Mills, 35 Wis. 141; People v. Johnson, 38 N. Y. 63, 97 Am. Dec. 770; Woodgate v. Fleet, 44 N. Y. 1; Stokes v. Stokes, 172 N. Y. 327, 65 N. E. 176. See note to Lea v. Lea, 96 Am. Dec. 780.

³⁵ Burlen v. Shannon, 99 Mass. 200, 96 Am. Dec. 733, and note; Gilbert v. Thompson, 9 Cush. (Mass.) 348; Hawks v. Truesdell, 99 Mass. 557.

But an issue that has once been properly determined cannot be retried in a collateral action between the same parties, even though the evidence upon which the case was decided was sent up with the record.³⁶ Generally, if the issues in the second action are necessarily different from those in the first, and the cause of action or defense alleged therein may coexist with the matters determined in the former suit, the judgment therein is not conclusive of the second;³⁷ but one cannot, by tendering an immaterial issue in the second action, avoid the effect of an issue determined against him in the former suit.³⁸ There is one class of actions in which a former judgment is conclusive, though the issues in the first action are different from those in the second; but where this is so, it is the law of election between inconsistent remedies, rather than the law of estoppel, which controls. Thus one defeated in an action wherein he elected to pursue a particular remedy may afterward be denied a remedy open to him in the first place, had he then chosen to adopt it, if the facts essential to support the second action are necessarily inconsistent with those relied upon in the first.³⁹

§ 598 (615). As affected by form of action.—In his great work on Obligations, Pothier puts it that “*res judi-*

³⁶ Franklin County v. German Savings Bank, 142 U. S. 93, 35 L. Ed. 948, 12 Sup. Ct. Rep. 147.

³⁷ Wilson v. Devine, 80 Cal. 385, 22 Pac. 224; McIntyre v. Storey, 80 Ill. 127; Leonard v. Whitney, 109 Mass. 265; Lake Shore etc. Ry. Co. v. People, 46 Mich. 193, 9 N. W. 249; Scully v. Lowenstein, 56 Miss. 652; Fairchild v. Lynch, 99 N. Y. 359, 20 N. E. 20; Bowen v. Mandeville, 95 N. Y. 237; Palmer v. Hussey, 87 N. Y. 303; Sheble v. Strong, 128 Pa. 315, 18 Atl. 397; Hosford v. Wynn, 26 S. C. 130, 1 S. E. 497; Fishburne v. Ferguson, 85 Va. 321,

7 S. E. 361; Keator v. St. John, 42 Fed. 585; Gilmer v. Morris, 30 Fed. 476; Geneva Nat. Bank v. Independent School Dist., 25 Fed. 629.

³⁸ Montgomery v. Harrington, 58 Cal. 270.

³⁹ 1 Freeman, Judgm., § 256; Thwing v. Great Western Ins. Co., 111 Mass. 93; Washburn v. Great Western Ins. Co., 114 Mass. 175; Thomas v. Joslin, 36 Minn. 1, 1 Am. St. Rep. 624, 29 N. W. 344; Steinbach v. Relief Fire Ins. Co., 77 N. Y. 498, 33 Am. Rep. 655; Sykes v. Gerber, 98 Pa. 179; Patterson v. Wold, 33 Fed. 791.

cata is not changed by a change in the form of the action.”⁴⁰ Although it must appear that the issue is the same, before a judgment in one suit can operate as a bar in the second action, it is equally well settled that the *form and object of the two actions need not be the same*.⁴¹ It is sufficient if the grievance complained of is the same; if the same cause of action was litigated and adjudicated in the former suit.⁴² Thus, when there is a right to one action in tort

⁴⁰ Pothier, *Oblig.*, pt. 4, c. 3; *Eastman v. Cooper*, 15 Pick. (Mass.) 276, 26 Am. Dec. 600. A recovery in *assumpsit* is a good bar to an action of *debt* brought upon the same contract: *Slade's Case*, 4 Coke, 94 B, 76 Eng. Reprint, 1074; a judgment in *trespass* will be a good bar to an action for the same taking in *trover*: 1 Stark. Ev., 4th Am. ed., 198; and a judgment in *trespass de bonis asportatis* to an action of *assumpsit* for the same goods: *Rice v. King*, 7 Johns. (N. Y.) 20.

⁴¹ *White v. Martin*, 1 Port. (Ala.) 215, 26 Am. Dec. 365; *Smith v. Cowell*, 41 Colo. 178, 92 Pac. 20; *Schroers v. Fisk*, 10 Colo. 599, 16 Pac. 285; *Lingle v. Chicago*, 221 Ill. 519, 77 N. E. 924; *Moore v. Williams*, 131 Ill. 589, 22 Am. St. Rep. 563, 24 N. E. 619; *United Oil & Gas Co. v. Ellsworth*, 43 Ind. App. 670, 88 N. E. 362; *Lieb v. Lichtenstein*, 121 Ind. 483, 23 N. E. 284; *In re Brown*, 139 Iowa, 219, 117 N. W. 260; *Owens v. Rawleigh*, 6 Bush (Ky.), 656; *McNeely v. Hyde*, 46 Ia. Ann. 1083, 15 South. 167; *Sewell v. Scott*, 35 La. Ann. 553; *Harryman v. Roberts*, 52 Md. 64; *Murphy v. De France*, 101 Mo. 151, 13 S. W. 756; *Mitchell v. Chisholm*, 57 Minn. 148, 58 N. W. 873; *Sanderson v. Peabody*, 58 N. H. 116; *North River Meadow Co. v. Christ Church*, 22 N. J. L. 424, 53 Am. Rep. 258; *O'Donoghue v. Smith*, 184 N. Y. 365, 77 N. E.

621; *McArthur v. Griffith*, 147 N. C. 545, 61 S. E. 519; *Edwards v. Baker*, 99 N. C. 258, 6 S. E. 255; *Hellebush v. Richter*, 37 Ohio St. 222; *Bell v. McCulloch*, 31 Ohio St. 397; *Pratt v. Ratliff*, 10 Okl. 168, 61 Pac. 523; *Marsh v. Pier*, 4 Rawle (Pa.), 273, 26 Am. Dec. 131; *Bugg v. Norris*, 4 Yerg. (Tenn.) 326; *McCord-Collins Commerce Co. v. Levi*, 21 Tex. Civ. App. 109, 50 S. W. 606; *Seattle Nat. Bank v. School Dist. No. 40*, 20 Wash. 368, 55 Pac. 317; *Andrews Bros. Co. v. Youngstown Coke Co.*, 86 Fed. 585, 30 C. C. A. 293; *Lawrence v. Vernon*, 3 Sum. (U. S.) 20, Fed. Cas. No. 8146; *Hitchin v. Campbell*, 2 W. Black. 778, 96 Eng. Reprint, 457; *Ferrer's Case*, 6 Coke, 7, 77 Eng. Reprint, 263; *Taylor v. Hortop*, 33 U. C. Q. B. 462.

⁴² *Attorney General v. Chicago etc. Co.*, 112 Ill. 520; *Day v. Vallette*, 25 Ind. 42, 87 Am. Dec. 353; *Goodenow v. Litchfield*, 59 Iowa, 226, 9 N. W. 107, 13 N. W. 86; *McNeely v. Hyde*, 46 La. Ann. 1083, 15 South. 167; *Perry v. Lewis*, 49 Miss. 443; *Agnew v. McElroy*, 18 Miss. 552, 48 Am. Dec. 772; *Spear v. Tidball*, 40 Neb. 107, 58 N. W. 708; *Doty v. Brown*, 4 N. Y. 71, 53 Am. Dec. 350; *Ahl v. Goodhart*, 161 Pa. 455, 29 Atl. 82. See note to *Lea v. Lea*, 96 Am. Dec. 787. A common test in determining whether the former action was for the same

or on contract, the judgment in one will constitute a bar to the other proceeding.⁴³ So if the *claim of the plaintiff* has been *litigated in a former action, as a defense* between the same parties, the former judgment is conclusive. Thus, where want of consideration was proved as a defense to a promissory note given for goods sold, the defendant was thereby held precluded from proving false representations in a subsequent action brought by him,⁴⁴ and where one, as defendant, attempts to prove that work sued for is of no value, he cannot, as plaintiff, prove damages for unskilled performance of the work.⁴⁵ If a plaintiff fails to show all the damages that he has suffered, he cannot recover for those omitted in a second suit.⁴⁶ As respects the rule under consideration, the *courts of law and chancery* stand on the same footing; and where the same issues have been litigated between the same parties or their privies in the one court, they cannot be litigated in the other.⁴⁷ Thus,

cause has been, whether the action would be supported by, and would necessarily require, exactly the same evidence: See note to *Guest v. Warren*, 26 Eng. L. & Eq. 383. As to *mandamus*, see *Hoffman v. Silverthorn*, 137 Mich. 60, 100 N. W. 183. As to *forcible entry*, see *Johnson v. Gordon* (Ky.), 118 S. W. 372. As to *habeas corpus*, see *People v. Lamb*, 118 N. Y. Supp. 389. As to *certiorari*, see *City of Chicago v. Fitzmaurice*, 138 Ill. App. 239. As to *interpleader*, see *McMurray v. Sisters of Charity*, 68 N. J. L. 312, 53 Atl. 389.

⁴³ *Smith v. Way*, 9 Allen (Mass.), 472.

⁴⁴ *Burnett v. Smith*, 4 Gray (Mass.), 50.

⁴⁵ *Merriam v. Woodcock*, 104 Mass. 326.

⁴⁶ *Stevens v. Pierce*, 151 Mass. 207, 23 N. E. 1006.

⁴⁷ *Peet v. Hatcher*, 112 Ala. 514, 57 Am. St. Rep. 45, 21 South. 711;

Harris v. Townsend, 52 Ark. 411, 13 S. W. 283; *Hempstead v. Watkins*, 6 Ark. 317, 42 Am. Dec. 696; *Wolverton v. Baker*, 86 Cal. 591, 25 Pac. 54; *Smith v. Cowell*, 41 Colo. 178, 92 Pac. 20; *Hayes v. Frohock*, 56 Fla. 794, 47 South. 343; *Claffin Co. v. De Vaughn*, 106 Ga. 282, 32 S. E. 108; *Baldwin v. McCrea*, 38 Ga. 650; *Menke v. Barnhart*, 137 Ill. App. 223; *Hofmann v. Burris*, 110 Ill. App. 348; *Cech v. Cedar Rapids*, 147 Iowa, 247, 126 N. W. 166; *Moy v. Moy*, 111 Iowa, 161, 82 N. W. 481; *Abbott v. Traylor*, 11 Bush (Ky.), 335; *Morgan v. Patton*, 4 T. B. Mon. (Ky.) 453; *Alley v. Chase*, 83 Me. 537, 22 Atl. 393; *Cowan v. Wheeler*, 25 Me. 267, 43 Am. Dec. 283; *Trayhern v. Colburn*, 66 Md. 277, 7 Atl. 459; *Saco Brick Co. v. J. P. Eustice Mfg. Co.*, 207 Mass. 312, 93 N. E. 629; *Wyandotte Public Schools v. Harding*, 157 Mich. 86, 121 N. W. 296; *Houston v. Royston*, 1 Smedes & M.

where a surety makes his defense at law, which proves insufficient, he cannot on the same state of facts defend in equity;⁴⁸ and where a mortgage is held void in a suit to foreclose, the judgment is a bar in an action of ejectment founded on the same mortgage.⁴⁹ But if a party has rights which are *not cognizable in the one court*, but which may be heard in the other, the failure in one forum does not constitute a bar in the other.⁵⁰ If, however, the same question may be properly tried in a state or a federal court, the determination in one is binding in the other.⁵¹ If proper parties join issue upon a question of law or of fact, before a competent court, they must abide by the decision. Hence it was held in Louisiana that a party who had proceeded by rule or motion, and had in that manner had a complete hearing on the merits, resulting in a discharge of the rule, was barred from obtaining an injunction in an action brought for that purpose, unless he could show other facts than those existing at the time of discharge-

(Miss.) 238; *Hutchinson v. Patterson*, 226 Mo. 174, 126 S. W. 403; *Hall v. Dodge*, 38 N. H. 346; *Hollister v. Barkley*, 11 N. H. 501; *Phillips v. Pullen*, 45 N. J. Eq. 830, 18 Atl. 849; *Putnam v. Clark*, 34 N. J. Eq. 532; *Robbins v. Collier*, 3 N. M. 231 (342), 5 Pac. 538; *Orcutt v. Orms*, 3 Paige Ch. (N. Y.) 459; *Starr v. Starr*, 1 Ohio, 321; *Randolph v. Hudson*, 12 Okl. 516, 74 Pac. 946; *Megahey v. Farmers' etc. Sav. Fund etc. Assn.*, 215 Pa. 351, 64 Atl. 546; *Fidelity Ins. etc. Co. v. Fridenberg*, 175 Pa. 500, 52 Am. St. Rep. 851, 34 Atl. 848; *Forsythe v. McCreight*, 10 Rich. Eq. (S. C.) 308; *Tatte v. Hunter*, 3 Strob. Eq. (S. C.) 136; *Greenfield v. Frierson*, 7 Heisk. (Tenn.) 633; *Pierson v. Catlin*, 18 Vt. 77; *Tilson v. Davis*, 32 Gratt. (Va.) 92; *Pleasants v. Clements*, 2 Leigh (Va.), 474; *Bunch v. Pierce County*, 53 Wash. 298, 101 Pac. 874; *Bruce v. Foley*,

18 Wash. 96, 50 Pac. 935; *Carberry v. West Virginia etc. R. Co.*, 44 W. Va. 260, 28 S. E. 694; *Western Min. etc. Co. v. Virginia Cannel Coal Co.*, 10 W. Va. 250; *Tilton v. Cofield*, 93 U. S. 163, 23 L. Ed. 858; *Miles v. Caldwell*, 2 Wall. (U. S.) 35, 17 L. Ed. 755; *Parker v. Kane*, 22 How. (U. S.) 1, 16 L. Ed. 286; *Hopkins v. Lee*, 6 Wheat. (U. S.) 109, 5 L. Ed. 218.

⁴⁸ *Dunham v. Downer*, 31 Vt. 249.

⁴⁹ *Smith v. Kernochen*, 7 How. (U. S.) 198, 12 L. Ed. 666; *Adams v. Barnes*, 17 Mass. 365; *Betts v. Starr*, 5 Conn. 550, 13 Am. Dec. 94.

⁵⁰ *Dunham v. Downer*, 31 Vt. 249; *Gray v. Tyler*, 40 Wis. 579.

⁵¹ *Russell & Co. v. Lamb*, 49 Fed. 770; *Simmons v. Saul*, 138 U. S. 439, 34 L. Ed. 1054, 11 Sup. Ct. Rep. 369; *State v. Trammel*, 106 Mo. 510, 17 S. W. 502; *Colt v. Colt*, 48 Fed. 385.

ing the rule.⁵² The rule has been well summed up that "when one is barred in *any action*, real or personal, by a judgment on demurrer, confession, verdict, etc., he is barred as to that or the like action of the like nature for the same thing forever."⁵³ Owing to the peculiar respect which the early English law paid to the tenure by which real estate was held, the same conclusive effect was not given to judgments in actions for *ejectment* as in other cases.⁵⁴ At common law, a judgment in ejectment is not, in any case, conclusive upon *the title* of either of the parties.⁵⁵ "It is always in the power of the party failing, whether claimant or defendant, to bring a new action. The structure of the record also renders it impossible to plead the former recovery in bar to the second ejectment; for the plaintiff in the suit is only a fictitious person, and as the demise term, etc., may be laid in many different ways, it cannot be made to appear that the second ejectment is brought upon the same title as the first."⁵⁶ But now in some of the states there are *statutes* having special regulations as to the granting of new trials in such actions, and, except in this respect, they are governed by the same rules as to the binding effect of judgments as other actions.⁵⁷ Where the common-law form of ejectment is abolished, and the action is commenced by the parties in their own names, the judgment is an estoppel,—a valid bar to any subsequent action,—unless the privilege of commencing another

⁵² *Trescott v. Lewis*, 12 La. Ann. 197. See, also, *Brown v. Moran*, 42 Me. 44.

⁵³ 1 *Freeman*, Judgm., § 255; *Westcott v. Brock*, 2 Colo. 335; *Geisritter v. Sevier*, 33 Ark. 522.

⁵⁴ *Miles v. Caldwell*, 2 Wall. (U. S.) 35, 17 L. Ed. 755.

⁵⁵ *Mitchell v. Robertson*, 15 Ala. 412; *Hinton v. McNeil*, 5 Ohio, 509, 24 Am. Dec. 315; *Pollard v. Baylors*, 6 Munf. (Va.) 433; *Holmes v. Carondelet*, 38 Mo. 551; *Smith v.*

Sherwood, 4 Conn. 276, 10 Am. Dec. 143; *Moran v. Jessup*, 15 U. C. Q. B. 612; *Clubine v. McMullen*, 11 U. C. Q. B. 250.

⁵⁶ *Adams*, *Ejectment*, 351. See, also, 1 *Freeman*, Judgm., § 295.

⁵⁷ *Miles v. Caldwell*, 2 Wall. (U. S.) 35, 17 L. Ed. 755; *Dawley v. Brown*, 79 N. Y. 390; *Amesti v. Castro*, 49 Cal. 325; *Hodges v. Eddy*, 53 Vt. 434; *Cadwallader v. Harris*, 76 Ill. 370; *Kinter v. Jinks*, 43 Pa. 445.

is given by statute.⁵⁸ Technically and substantially, under the form of procedure in which the action to recover real estate is conducted in the name of the real claimant, who need not depend for his success on anything but his *title*, we no longer have an action of ejectment.⁵⁹ “We can see no reason why a judgment upon a matter in regard to realty, once put in issue, litigated, and determined, whether it be title, right to present possession, or something else, should not be conclusive, as well as when it relates to personalty. No principle of the common law would be violated by such a result. Nor would it be contrary to any principle of public policy. The form of the complaint in an action to recover real estate may be adapted to the estate sought to be recovered, and the facts desired to be put in issue.”^{59a} A judgment in ejectment, like every other final adjudication, bars only the causes of action, and matters of defense put in issue in the former suit, or which, if not put in issue, were of such a nature that the neglect to put them in issue was an irrevocable confession of their nonexistence. It is not the fact that the land sought to be recovered in two actions is the same that creates an estoppel, but the fact that the issues are the same.^{59b}

§ 598a. Established rules for the administration of estoppel by judgment.—It will be convenient here to recapitulate some of the rules already dealt with, and to refer to others hereinafter considered. The excellent collection by Judge Sanborn calls for reproduction in its en-

⁵⁸ Beebe v. Elliott, 4 Barb. (N. Y.) 457; Sheridan v. Andrews, 3 Lans. (N. Y.) 129; Campbell v. Hall, 16 N. Y. 575; Castle v. Noyes, 14 N. Y. 329; Oetgen v. Ross, 54 Ill. 79; Doyle v. Hallam, 21 Minn. 515; Parks v. Moore, 13 Vt. 183, 37 Am. Dec. 589; Hodges v. Eddy, 52 Vt. 434; Sturdy v. Jackaway, 4 Wall. (U. S.) 174, 18 L. Ed. 387; Miles v. Caldwell, 2 Wall. (U. S.) 35, 17 L.

Ed. 755; Fitch v. Cornell, 1 Saw. 156, Fed. Cas. No. 4834.

⁵⁹ 1 Freeman, Judgm., § 299. See note to Caperton v. Schmidt, 85 Am. Dec. 208, where the subject is fully treated and the laws of the various states discussed.

^{59a} Caperton v. Schmidt, 26 Cal. 479, 85 Am. Dec. 187.

^{59b} 1 Freeman, Judgm., § 299.

tirety, and furnishes a ready reference for the student:

1. Where the second suit is upon the same cause of action, and between the same parties as the first, the judgment in the former is conclusive in the latter as to every question which was or might have been presented and determined in the former.
2. When the second suit is upon a different cause of action, but between the same parties, as the first, the judgment in the former action operates as an estoppel in the latter as to every point and question which was actually litigated and determined in the first action, but it is not conclusive as to other matters which might have been, but were not, litigated or decided.⁶⁰
3. Where the record is such that there is or may be a material issue, question, or matter in the second suit upon a different cause of action which may not have been raised, litigated, and decided in the former action, the judgment therein does not constitute an estoppel from litigating this issue, question, or matter, unless by pleading or proof the party asserting the estoppel establishes the fact that the issue, question, or matter in dispute was actually and necessarily litigated and determined in the former action.⁶¹
4. A former judgment, based upon a general finding for the defendant, which does not disclose which one of several defenses therein was sustained, constitutes an estoppel of the plaintiff therein from maintaining a second suit against the same defendant upon different causes of action in which the same defenses are interposed and the same issues are presented that were made in the earlier action, unless the party denying the estoppel makes it appear by pleading or proof that some new and material issue, question, or matter is involved in the second action, which was not or

⁶⁰ *Linton v. National Life Ins. Co.*, 104 Fed. 584, 44 C. C. A. 54; *Board of Commrs. v. Platt*, 79 Fed. 587, 25 C. C. A. 87, 49 U. S. App. 216; *Board of Commrs. v. Sutliff*, 97 Fed. 270, 38 C. C. A. 167; *Southern Pac. R. Co. v. United States*, 168

U. S. 1, 42 L. Ed. 355, 18 Sup. Ct. Rep. 18; *Southern Minnesota Ry. Extens. Co. v. St. Paul & S. C. R. Co.*, 55 Fed. 690, 5 C. C. A. 249.

⁶¹ *Russell v. Place*, 94 U. S. 606, 24 L. Ed. 214.

may not have been litigated or decided in the first action.⁶² 5. Where the same issues are made and the same defenses are interposed in both actions, and there is no pleading or proof that any new determining issue, question, or matter is or may be involved in the second action, it is not material upon which defense or issue the former judgment was based, because an opposite judgment cannot be rendered without relitigating at least one defense and issue determined in the former action, and overruling the decision upon that defense which was there rendered.⁶³

§ 599 (616). **Extrinsic evidence to identify the issue.**—This falls within the third class referred to in the preceding section, and it frequently happens that it cannot be determined from the records alone whether the issues in the two actions are the same. It would be repugnant to a familiar rule of evidence to receive parol proof to contradict the record, by allowing evidence that a claim was or was not determined in the former suit, if the record shows the contrary.⁶⁴ Thus, if the complaint in the prior action declares upon special facts as a cause of action, parol proof is inadmissible to show that the subject determined was a different one.⁶⁵ But if there is any *uncertainty in the record* as to whether the precise question was raised and determined in the former controversy, “as, for example, if it appear that several distinct matters may have been liti-

⁶² Bissell v. Spring Valley Tp., 124 U. S. 225, 31 L. Ed. 411, 8 Sup. Ct. Rep. 495; Pittsburgh, C. C. & St. L. Ry. Co. v. Keokuk & H. Bridge Co., 107 Fed. 781, 46 C. C. A. 639.

⁶³ Aetna Life Ins. Co. v. Board of Commrs., 117 Fed. 82, 54 C. C. A. 468.

⁶⁴ Armstrong v. St. Louis, 69 Mo. 309, 33 Am. Rep. 499; Gray v. Dougherty, 25 Cal. 266; Trimmier v. Thomson, 19 S. C. 247; Fromlet v. Poor, 3 Ind. App. 425, 29 N. E. 1081;

Rubel v. Title G. & T. Co., 199 Ill. 110, 64 N. E. 1033; Guttermann v. Schroeder, 40 Kan. 507, 20 Pac. 230. See note to Lea v. Lea, 96 Am. Dec. 785; also valuable note to Fahey v. Esterley Machine Co., 44 Am. St. Rep. 562. So if the *names* of the *parties* are the same, this is *prima facie* evidence of identity of parties: Ritchie v. Carpenter, 2 Wash. 512, 26 Am. St. Rep. 877, 28 Pac. 380.

⁶⁵ Campbell v. Butts, 3 N. Y. 173.

gated, upon one or more of which judgment may have been passed, without indicating which of them was thus litigated and upon which the judgment was rendered, the whole subject matter of the action will be at large, and open to a new contention, unless this uncertainty be removed by extrinsic evidence showing the precise point involved and determined. To apply the judgment and give effect to the adjudication actually made, when the record leaves the matter in doubt, such evidence is admissible.”⁶⁶

§ 600 (617). **Same, continued.**—Mr. Justice Miller has thus stated the prevailing doctrine: “Whenever the form of the issue in the trial relied on as an estoppel is so vague that it does not determine what questions of fact were submitted to the jury under it, it is competent to prove by parol testimony what question or questions of fact were before the jury and were necessarily passed on by them.”⁶⁷

⁶⁶ Greenwood v. Warren, 120 Ala. 71, 23 South. 686; Stevens v. Curtiss, 3 Conn. 260; Storrs v. Robinson, 74 Conn. 566, 51 Atl. 516; Draper v. Medlock, 122 Ga. 234, 2 Ann. Cas. 650, 69 L. R. A. 483, 50 S. E. 113; Herschbach v. Cohen, 207 Ill. 517, 99 Am. St. Rep. 233, 69 N. E. 932; Chicago Theological Seminary v. People, 189 Ill. 439, 59 N. E. 977; State v. Meek, 112 Iowa, 338, 84 Am. St. Rep. 342, 51 L. R. A. 414, 84 N. W. 3; Waterhouse v. Levine, 182 Mass. 407, 65 N. E. 822; Bond v. Markstrum, 102 Mich. 11, 60 N. W. 282; Estes v. Farnham, 11 Minn. 423; Morgan v. Mitchell, 52 Neb. 667, 72 N. W. 1055; Taylor v. Hutchinson, 61 N. J. L. 440, 39 Atl. 664; Fahey v. Esterley Mach. Co., 3 N. D. 220, 44 Am. St. Rep. 554, 55 N. W. 580; Hartman v. Pittsburgh Inclined Plane Co., 23 Pa. Super. Ct. 360; Selbie v. Graham, 18 S. D. 365, 100 N. W. 755; Borches v. Arbuckle, 111 Tenn. 498, 78 S. W. 266; Aiken

v. Peck, 22 Vt. 255; Aetna Life Ins. Co. v. Board of Commrs., 117 Fed. 82, 54 C. C. A. 468; Russell v. Place, 94 U. S. 606, 24 L. Ed. 214. Identity of parties is as essential to an estoppel by *res adjudicata* as identity of cause of action. So where the record does not disclose *identity of parties*, they may be shown by parol evidence: Tarlton v. Johnson, 25 Ala. 300, 60 Am. Dec. 515; Gray v. Gillilan, 15 Ill. 453, 60 Am. Dec. 761; note to Fahey v. Esterley Machine Co., 44 Am. St. Rep. 562. See, also, Judge Sanborn's remarks in Fowler v. Stebbins, 136 Fed. 365, 69 C. C. A. 209.

⁶⁷ Miles v. Caldwell, 2 Wall. 35, 17 L. Ed. 755; Davis v. Brown, 94 U. S. 423, 24 L. Ed. 204; Jepson v. International Alliance, 17 R. I. 471, 23 Atl. 15; Cook v. Burnley, 45 Tex. 97; Gray v. Dougherty, 25 Cal. 266; Leopold v. City of Chicago, 150 Ill. 568, 37 N. E. 892; Humpfner v. Osborne Co., 2 S. D. 310, 50 N. W. 88;

The *opinion of the court* rendering the former judgment, printed in the authorized reports of decisions of the state, as well as the statement of the case, may be received in evidence to show the issue determined.⁶⁸ It is almost needless to say it cannot be received to contradict the record.⁶⁹ The necessity for locating the precise point or question litigated calls for the requisite information. In considering this question the distinction between the effect of the judgment as a bar or estoppel against the prosecution of a second action upon the same claim or demand, and its effect as an estoppel in another action between the same parties upon a different cause of action, should not be lost sight of. "In the former case the judgment, if

Post v. Smilie, 48 Vt. 185; Doty v. Brown, 4 N. Y. 71, 53 Am. Dec. 350; Wright v. Salisbury, 46 Mo. 26; Long v. Baugas, 2 Ired. (N. C.) 290, 38 Am. Dec. 694; McTighe v. McLane, 93 Ala. 626, 11 South. 117; Emery v. Fowler, 39 Me. 326, 63 Am. Dec. 627; Munroe v. Meech, 94 Mich. 596, 54 N. W. 290; White v. Chase, 128 Mass. 158; Appeal of Buckingham, 60 Conn. 143, 22 Atl. 509; Indianapolis etc. R. Co. v. Clark, 21 Ind. 150; Reast v. Donald, 84 Tex. 648, 19 S. W. 795; Warwick v. Underwood, 3 Head (Tenn.), 238, 75 Am. Dec. 767; Crum v. Boss, 48 Iowa, 433; King v. Chase, 15 N. H. 9, 41 Am. Dec. 675; Supples v. Cannon, 44 Conn. 424. See note to Lea v. Lea, 96 Am. Dec. 786. See the late cases: Barthell v. Hermanson (Iowa), 138 N. W. 1108; Cote v. New England Nav. Co., (Mass.), 99 N. E. 972; Yore v. Yore, 240 Mo. 451, 144 S. W. 847; Person v. Roberts, 159 N. C. 168, 74 S. E. 322; Humboldt Exp. Co. v. Fritsch, 134 N. Y. Supp. 747, 150 App. Div. 90; Lynch v. Rogers, 134 N. Y. Supp. 1071, 150 App. Div. 311; Turner v. Fleming (Okl.), 130 Pac. 551; Kauf-

man v. Klain, 69 Wash. 113, 124 Pac. 391; J. B. Sparrow Theatrical etc. Co. v. Mack, 195 Fed. 474, 115 C. C. A. 384.

⁶⁸ Hood v. Hood, 110 Mass. 463. See, also, Gilcreast v. Bartlett, 74 N. H. 29, 64 Atl. 767; Strong v. Grant, 2 Mackey (D. C.), 218; Pepper v. Donnelly, 87 Ky. 259, 8 S. W. 441; Legrand v. Rixey's Admr., 83 Va. 862, 3 S. E. 864; Gentry v. Pacific Livestock Co., 45 Or. 233, 77 Pac. 115. In Appeal of Buckingham, 60 Conn. 143, 22 Atl. 509, the court held that the admission of the opinion was hearsay, and "violated the fundamental rules of evidence." This case is opposed to the weight of authority. In Wisconsin, the statute, Rev. Stats. 1898, § 2410, provides that the opinion of the supreme court shall constitute a part of the record: Town of Fulton v. Pomeroy, 111 Wis. 663, 87 N. W. 831.

⁶⁹ The subject is admirably treated in Robinson v. New York etc. R. Co., 64 Hun, 41, 18 N. Y. Supp. 728. See, also, cases cited to preceding section.

rendered upon the merits, constitutes an absolute bar to a subsequent action. . . . But where the second action between the same parties is upon a different claim or demand, the judgment in the prior action operates as an estoppel only as to those matters in issue or points controverted, upon the determination of which the finding or verdict was rendered. In all cases, therefore, where it is sought to apply the estoppel of a judgment rendered upon one cause of action to matters arising in a suit upon a different cause of action, the inquiry must always be as to the point or question actually litigated and determined in the original action, not what might have been thus litigated and determined. Only upon such matters is the judgment conclusive in another action."⁷⁰ In such case, where the judgment may have proceeded upon either or any of two or more distinct facts, the party desiring to avail himself of the judgment as conclusive evidence upon some particular fact must show affirmatively that it went upon that fact, or else the question is open for a new contention.^{70a} So, in order to obtain the benefit of the prior adjudication of a fact, it is entirely reasonable to exact from the party asking its benefit clear proof that such adjudication has been made.^{70b} Hence the importance of the opinion arises. And this is not inconsistent with the settled rule that general expressions in an opinion, which are not essential to dispose of a case, are not permitted to control the judgment in subsequent suits.⁷¹ But *in no case can proof be admitted* to show what was determined, *unless the fact is such as might have been given in evidence* under the pleadings.⁷² When extrinsic evidence is proper to as-

⁷⁰ *Cromwell v. County of Sac*, 94 U. S. 351, 24 L. Ed. 195. See *Lewis v. Pier Co.*, 125 N. Y. 341, 26 N. E. 201; *Bell v. Merrifield*, 109 N. Y. 202, 4 Am. St. Rep. 436, 16 N. E. 55. See, also, § 602, *post*.

^{70a} *Lewis v. Pier Co.*, 125 N. Y. 348, 26 N. E. 301.

^{70b} *Bell v. Merrifield*, *supra*.

⁷¹ *Harriman v. Northern Securities Co.*, 197 U. S. 244, 49 L. Ed. 739, 25 Sup. Ct. Rep. 493; *Carroll v. Carroll*, 16 How. (U. S.) 275, 14 L. Ed. 936; *Cohens v. Virginia*, 6 Wheat. (U. S.), 264, 5 L. Ed. 257.

⁷² *Briggs v. Wells*, 12 Barb. (N. Y.) 567; *Gay v. Welles*, 7 Pick. (Mass.) 217.

certain the issue tried and determined in the former suit, such evidence must be submitted to the jury with proper instructions. And only such *issues* as have been *actually tried and determined*, and on which the judgment was rendered, or such issues as by reasoning are essential to and *necessarily involved* in the former verdict and judgment, are to be considered as conclusively determined between the parties.⁷³ The *testimony of jurors* on the former trial is admissible, where extrinsic evidence of the identity of the cause of action is proper; but their testimony should be confined to the points in controversy on the former trial, the testimony given by the parties and the questions submitted to the jury; and should not be received as to the nature of their secret deliberations;⁷⁴ nor to contradict the record;⁷⁵ nor to show what matters were considered by them.⁷⁶

§ 601 (618). Proof that issues are the same—Burden.—The two classes of cases in which extrinsic evidence is admissible for the purpose of showing what matters are *res judicata* are: 1. All those cases in which from the record alone no intimation is given whether a particular matter has been determined or not; 2. All those cases in which from the record it appears that a particular question was probably determined. As a general rule, the *onus* of establishing an estoppel is by the law cast upon him who invokes it.⁷⁷ It has been pointed out that as to those in the sec-

⁷³ *Cromwell v. County of Sac*, 94 U. S. 351, 24 L. Ed. 195; *Foye v. Patch*, 132 Mass. 105. It should appear that the facts alleged to have been determined were necessary to the issue: *Irish American Bank v. Ludlum*, 56 Minn. 317, 57 N. W. 927. See note to *Fahey v. Esterly Machine Co.*, 44 Am. St. Rep. 562.

⁷⁴ *Packet Co. v. Sickles*, 5 Wall. (U. S.) 580, 18 L. Ed. 550. The tes-

timony of an attorney has also been received as to such facts: *Susquehanna Ins. Co. v. Mardorf*, 152 Pa. 22, 25 Atl. 234. See note to *Fahey v. Esterly Machine Co.*, 44 Am. St. Rep. 562-572.

⁷⁵ *Stapleton v. King*, 40 Iowa, 278.

⁷⁶ *Crum v. Boss*, 48 Iowa, 433.

⁷⁷ 1 *Freeman, Judgm.*, § 276.

ond class, there have been decisions which seem to throw the burden upon the party bringing the second action to show that they are not the same.⁷⁸ These decisions, however, seem to limit the cases in which the party bringing the second action has the burden to those where his complaint or declaration is framed in such a manner that the causes of action may be the same as those in the first suit. In some states, in cases where several issues are made by the pleadings, and evidence is given upon all those issues, and a general verdict is obtained, the presumption is, that it is conclusive that *all the issues* were found in favor of the prevailing party. Whoever denies this must rebut that presumption, if he can, by showing that the finding and judgment were upon a particular issue.⁷⁹ But the weight of authority is with the general rule that the *onus* is on the party setting up the former judgment to prove it. The test of the identity of causes of action, for the purpose of determining the question of *res adjudicata*, is the identity of the facts essential to the maintenance of the actions. It is of the essence of estoppel by judgment that it be made certain that the precise facts were determined by the former judgment. If there is any uncertainty as to the matter formerly adjudicated, the burden of showing it with sufficient certainty by the record or extrinsically is upon the party who claims the benefit of

⁷⁸ 1 Freeman, Judgm., § 276. The learned author refers to Bagot v. Williams, 3 Barn. & C. 235, 107 Eng. Reprint, 721, which was followed in Agnew v. McElroy, 10 Smedes & M. (18 Miss.) 552, 48 Am. Dec. 772, where the court said: "A party who brings a second action must not leave it to nice investigation to see whether the two causes are the same. He ought to show beyond doubt that the second is a different cause of action from the first, in which he failed."

⁷⁹ Hall v. Zeller, 17 Or. 381, 21 Pac. 192; White v. Simonds, 33 Vt.

178, 78 Am. Dec. 620; Rockwell v. Langley, 19 Pa. 502; Day v. Vallette, 25 Ind. 42, 87 Am. Dec. 353; Hollis v. Morris, 2 Harr. (Del.) 123; Moore v. Moore, 12 Ky. Law Rep. 324, 14 S. W. 339; State v. Morton, 18 Mo. 53. See, also, State v. Superior Court, 62 Wash. 556, 114 Pac. 427. In Massachusetts it has been held that a general verdict in favor of a party presenting several claims or defenses is not of itself conclusive upon any of them: Sawyer v. Woodbury, 7 Gray (Mass.), 499, 66 Am. Dec. 518.

the former judgment.⁸⁰ When it appears that there were *several issues* in the former action, it should be shown by extrinsic evidence that the point claimed to have been adjudicated was in fact determined, unless this appears from the record. In such cases a *particular ground of adjudication cannot be inferred*.⁸¹ Thus, where, in an action for *divorce* for cruelty, there was a denial of the charge, as well as a plea of former judgment of divorce, and the action was dismissed by the court, it was held in a subsequent action that the court could not, without proof, infer on what ground the judgment had proceeded.⁸² The same principle was applied by the supreme court of the United States in a *patent* case where the patent alleged to be infringed contained two distinct claims; it was held that a patent might be valid as to one claim and invalid as to the other; and the former judgment was held to be no bar, as it had not appeared on which claim the recovery was had.⁸³ So, where *various matters of defense* are set up in the answer, some in abatement and others in bar, and there is a general judgment of dismissal, the judgment will not be held a bar to future proceedings, unless there is extrinsic evidence to show the ground of the decision.⁸⁴ But if in such a case there are *special findings* in favor of the

⁸⁰ Prall v. Prall, 58 Fla. 496, 50 South. 867, which contains a fine compendium of the law of *res judicata* in such cases, by Whitfield, C. J.; Fulton v. Gesterding, 47 Fla. 150, 36 South. 56; Harrison v. Remington Paper Co., 140 Fed. 385, 5 Ann. Cas. 314, 3 L. R. A., N. S., 954, 72 C. C. A. 405; Powell v. Smith, 123 Wis. 510, 3 Ann. Cas. 773, 102 N. W. 1; Draper v. Medlock, 122 Ga. 234, 2 Ann. Cas. 650, 69 L. R. A. 483, 50 S. E. 113; Russell v. Place, 94 U. S. 606, 24 L. Ed. 214; De Solar v. Hanscome, 158 U. S. 216, 39 L. Ed. 956, 15 Sup. Ct. Rep. 816; Thompson v. N. T. Bushnell Co., 80 Fed. 332; Rogers v. Higgins, 57 Ill. 244.

⁸¹ Washington A. & G. Packet Co. v. Sickles, 24 How. (U. S.) 333, 16 L. Ed. 650, 5 Wall. (U. S.) 580, 18 L. Ed. 550; Chase v. Walker, 26 Me. 555; Waterhouse v. Levine, 182 Mass. 407, 65 N. E. 822; Slater v. Skirving, 51 Neb. 108, 66 Am. St. Rep. 444, 70 N. W. 493.

⁸² Burlen v. Shannon, 99 Mass. 200, 96 Am. Dec. 733.

⁸³ Russell v. Place, 94 U. S. 606, 24 L. Ed. 214. The same principle was applied in a case relating to municipal bonds: Nesbit v. Independent District of Riverside, 144 U. S. 610, 36 L. Ed. 562, 12 Sup. Ct. Rep. 746.

⁸⁴ Foster v. The Richard Busteed, 100 Mass. 409, 1 Am. Rep. 125.

defendant on all the issues, such findings and judgments are conclusive as to each question and on the merits.⁸⁵ In those cases where the record gives no intimation whether a particular matter has been determined or not, it is clearly incumbent upon the party alleging that a question has been settled by a former adjudication to support his allegation by evidence *aliunde* and by a *preponderance of the proof*.⁸⁶ In an action where the effect of a decision upon demurrer was under consideration, it was held that, "where the parties and the cause of action are the same, the *prima facie* presumption is that the questions presented for decision were the same, unless it appears that the merits of the controversy were not involved in the issue."⁸⁷ But if there is any uncertainty in the record, the whole subject is open to litigation, unless the uncertainty is removed by extrinsic evidence showing the precise point involved and determined.⁸⁸ To apply the judgment, and give effect to the adjudication actually made, when the record leaves the matter in doubt, such evidence is admissible, and the burden rests upon the party who claims the former judgment as an estoppel.⁸⁹

⁸⁵ The 420 Mining Co. v. Bullion Min. Co., 3 Saw. (U. S.) 634, Fed. Cas. No. 4989, 11 Morr. Min. Rep. 608; Sheldon v. Edwards, 35 N. Y. 279. See note to Fahey v. Esterly Machine Co., 44 Am. St. Rep. 562-572.

⁸⁶ Cook v. Burnley, 45 Tex. 97; Agnew v. McElroy, 18 Miss. 552, 48 Am. Dec. 772; King v. Townshend, 14 N. Y. 358, 36 N. E. 513; Phillips v. Berick, 16 Johns. (N. Y.) 136, 8 Am. Dec. 299; Russell v. Place, 94 U. S. 606, 24 L. Ed. 214; Dygert v. Dygert, 4 Ind. App. 276, 29 N. E. 490; Kleinschmidt v. Binzel, 14 Mont. 31, 43 Am. St. Rep. 604, 35 Pac. 460; Freem. Judg., 4th ed., § 276. See notes to Lea v. Lea, 96 Am. Dec. 786; Fahey v. Esterly Machine Co., 44 Am. St. Rep. 564.

⁸⁷ Gould v. Evansville & C. Ry.

Co., 91 U. S. 526, 23 L. Ed. 416. For full discussion, see note to Fahey v. Esterly Machine Co., 44 Am. St. Rep. 566.

⁸⁸ Russell v. Place, 94 U. S. 606, 24 L. Ed. 214; De Sollar v. Hanscome, 158 U. S. 216, 39 L. Ed. 956, 15 Sup. Ct. Rep. 816; McCombs v. Wall, 66 Ark. 336, 50 S. W. 876; Solly v. Clayton, 12 Colo. 30, 20 Pac. 351; Fulton v. Gesterding, 47 Fla. 150, 36 South. 56; Draper v. Medlock, 122 Ga. 234, 2 Ann. Cas. 650, 69 L. R. A. 483, 50 S. E. 113; Sawyer v. Nelson, 160 Ill. 629, 43 N. E. 728; Lewis v. Ocean & Nav. Pier Co., 125 N. Y. 341, 26 N. E. 301; Fahey v. Esterly Mach. Co., 3 N. D. 220, 44 Am. St. Rep. 554, 55 N. W. 580.

⁸⁹ Hanchey v. Coskrey, 81 Ala. 149, 1 South. 259; McCombs v. Wall, 66 Ark. 336, 50 S. W. 876; Drayer v.

§ 602 (619). **Effect of judgment where cause of action is different.**—It is necessary to bear constantly in mind that, “to make a matter *res adjudicata*, there must be a concurrence,—1. Of identity of the subject matter; 2. Of the cause of action; 3. Of persons and parties; and 4. In the quality of the persons for or against whom the claim is made.”⁹⁰ “While a concurrence of these identities usually attends when one case is determined by the decision in another, yet nothing is indispensable to impart a conclusive effect to a former judgment, as will be manifest by reference to a few of the reported cases, except identity of issues or issues involved. If any question of fact has been necessarily and directly drawn in question and determined by a final judgment, such determination of it is generally conclusive in a subsequent action between the same parties and those in privity with them, whether the form or subject matter of the two actions be the same or different. On the other hand, if two actions are upon different causes, a judgment in one cannot affect the other, though the subject matter of each is the same.”⁹¹ The principle is recognized

Medlock, 122 Ga. 234, 2 Ann. Cas. 650, 69 L. R. A. 483, 50 S. E. 113; Smalley v. Edey, 19 Ill. 207; Hoffman v. Silverthorn, 137 Mich. 60, 100 N. W. 183; Kleinschmidt v. Binzel, 14 Mont. 31, 43 Am. St. Rep. 604, 35 Pac. 460; Anderson v. Kreidler, 56 Neb. 171, 76 N. W. 581; Morgan v. Burr, 58 N. H. 470; Marculescu v. Fox, 69 Misc. Rep. 359, 125 N. Y. Supp. 825; Bennett v. Holmes, 18 N. C. 486; Cummings v. Colgrove, 25 Pa. 150; Sanford v. King, 19 S. D. 334, 103 N. W. 28; Harris v. Mason, 120 Tenn. 668, 25 L. R. A., N. S., 1011, 115 S. W. 1146; Martin v. Weyman, 26 Tex. 460; Grunert v. Spalding, 104 Wis. 193, 80 N. W. 589; Soderberg v. Armstrong, 116 Fed. 709; O'Neill v. Leight, 3 U. C. Q. B. 70. See note on “Burden of Proof of *Res Judicata* or Estoppel

by Judgment,” to Draper v. Medlock, 2 Ann. Cas. 655.

⁹⁰ 1 Freem. Judgm., § 252.

⁹¹ 1 Freem. Judgm., § 252. See Water etc. Co. v. City of Hutchinson, 160 Fed. 41, in which this subject is well dealt with. The authorities abundantly support the proposition that, when judgment goes for the defendant in an action on express contract on the ground that the contract had not been completed by the plaintiff, “such judgment is not a bar to a second action to recover the reasonable value of the same services”: Rossman v. Tilleny, 80 Minn. 160, 81 Am. St. Rep. 247, 83 N. W. 42; Arthur Fritsch Foundry etc. Co. v. Goodwin Mfg. Co., 100 Mo. App. 414, 74 S. W. 136; Henrietta Nat. Bank v. Barnett (Tex. Civ. App.), 25 S. W. 456; Kirkpat-

and supported in most of the American cases that a decision upon any material point is conclusive, though the subject matter of the two suits is different.⁹² There is a material difference between the effect of a judgment as an estoppel against a prosecution of a second action upon the same claim, and its effect as an estoppel in another action between the same parties upon a different claim or cause of action. In the former case, as we have already seen, a judgment on the merits is an absolute bar, concluding parties and privies, not only as to the material facts proven, but as to the material facts which might have been proven.⁹³ "Thus," says Mr. Justice Field,⁹⁴ "for example, a judgment rendered upon a promissory note is conclusive as to the validity of the instrument and the amount due upon it, although it be subsequently alleged that perfect defenses actually existed, of which no proof was offered, such as forgery, want of consideration, or payment. If such defenses were not presented in the action, and established by competent evidence, the subsequent allegation of their existence is of no legal consequence. The judgment is as conclusive, so far as future proceedings at law are con-

rick v. McElroy, 41 N. J. Eq. 539, 7 Atl. 647; Marsh v. Masterton, 101 N. Y. 401, 5 N. E. 59; Buddress v. Schafer, 12 Wash. 310, 41 Pac. 43; City of Davenport v. Allen, 120 Fed. 172. The fact that a party through mistake attempts to exercise a right to which he is not entitled, or has made choice of a supposed remedy that never existed, and pursued it until the court adjudged that it never existed, should not, and does not, preclude him from afterward pursuing a remedy for relief, to which in law and good conscience he is entitled: Wm. W. Bierce Lumber Co. v. Hutchins, 205 U. S. 340, 51 L. Ed. 828, 27 Sup. Ct. Rep. 524; Barnsdall v. Waltemeyer, 142 Fed. 415, 73 C. C. A. 515; Fuller-Warren Co. v.

Harter, 110 Wis. 80, 84 Am. St. Rep. 867, 53 L. R. A. 603, 85 N. W. 698; Rowell v. Smith, 123 Wis. 510, 3 Ann. Cas. 773, 102 N. W. 1.

⁹² Spencer v. Dearth, 43 Vt. 98; Betts v. Starr, 5 Conn. 550, 13 Am. Dec. 94, and note; Doty v. Brown, 4 N. Y. 71, 53 Am. Dec. 350; Williams v. Fitzhugh, 44 Barb. (N. Y.) 321; Walker v. Chase, 53 Me. 258; Cromwell v. County of Sac, 94 U. S. 351, 24 L. Ed. 195; Rucker v. Steelman, 97 Ind. 222; Flanagan v. Thompson, 9 Fed. 177, 4 Hughes, 421; Sketchley v. Smith, 78 Iowa, 542, 43 N. W. 524.

⁹³ See § 600, *ante*.

⁹⁴ Cromwell v. County of Sac, 94 U. S. 351, 24 L. Ed. 195.

cerned, as though the defenses never existed. The language, therefore, which is so often used, that a judgment estops not only as to every ground of recovery or defense actually presented in the action, but also as to every ground which might have been presented, is strictly accurate when applied to the demand or claim in controversy. Such demand or claim, having passed into judgment, cannot again be brought into litigation between the parties in proceedings at law upon any ground whatever." But where the second action is founded on a different claim, the judgment in the prior action operates as an estoppel only as to those matters in issue or points controverted, upon the determination of which the finding or verdict was rendered. In such cases, the inquiry must be as to the point or *question actually litigated* in the original action, not what might have been litigated and determined.⁹⁵ In a case in the

⁹⁵ *Lillis v. Emigrant Ditch Co.*, 95 Cal. 553, 30 Pac. 1108; *Kilander v. Hoover*, 111 Ind. 10, 11 N. E. 796; *Goodenow v. Litchfield*, 59 Iowa, 226, 9 N. W. 107, 13 N. W. 86; *Furneaux v. First Nat. Bank*, 39 Kan. 144, 7 Am. St. Rep. 541, 17 Pac. 854; *Foye v. Patch*, 132 Mass. 105; *Vaughan v. Morrison*, 55 N. H. 580; *Bernard v. Mayor etc. of Hoboken*, 27 N. J. L. 412; *Burwell v. Cannaday*, 3 Jones (N. C.), 165; *Danziger v. Williams*, 91 Pa. 234; *Bridger v. Asheville Ry. Co.*, 27 S. C. 456, 13 Am. St. Rep. 653, 3 S. E. 860; *Pitts v. Oliver*, 13 S. D. 561, 79 Am. St. Rep. 907, 83 N. W. 591; *McKissick v. McKissick*, 6 Humph. (Tenn.) 75; *Montpelier Sav. Bank etc. Co. v. School District*, 115 Wis. 622, 92 N. W. 439; *Last Chance Min. Co. v. Tyler Min. Co.*, 157 U. S. 683, 39 L. Ed. 859, 15 Sup. Ct. Rep. 733, 18 Morr. Min. Rep. 205; *Cromwell v. County of Sac*, 94 U. S. 351, 24 L. Ed. 195; *Davis v. Brown*, 94 U. S. 423, 24 L. Ed. 204; *Nesbit v. Inde-*

pendent Dist. of Riverside, 144 U. S. 610, 36 L. Ed. 562, 12 Sup. Ct. Rep. 746. See note to *Lea v. Lea*, 96 Am. Dec. 784, as to the subject of this section. The cases are so numerous that we select the following from among the latest in addition to those above cited as containing much useful matter: *Crausby v. Crausby*, 164 Ala. 471, 51 South. 529; *Pulaski County v. Hill*, 97 Ark. 450, 134 S. W. 973; *McKinnon v. Johnson*, 59 Fla. 332, 52 South. 288; *Connolly v. Dammann*, 232 Ill. 175, 83 N. E. 531; *Brush v. Rich*, 83 Kan. 531, 112 Pac. 158; *Fuson v. Stewart*, 137 Ky. 748, 126 S. W. 1097; *Weil v. Leopold Weil Bldg. etc. Co.*, 126 La. 938, 53 South. 56; *Corey v. Independent Ice Co.*, 106 Me. 485, 76 Atl. 930; *Le Roy v. Collins*, 165 Mich. 380, 130 N. W. 635; *Brannock v. Magoon*, 141 Mo. App. 316, 125 S. W. 535; *Stern v. Rosenthal*, 71 Misc. Rep. 422, 128 N. Y. Supp. 711; *Gillam v. Edmonson*, 154 N. C. 127, 69 S. E. 924; *Mahoning Valley R. Co. v. Van Alstine*, 77

supreme court of the United States in which this subject was actually discussed, the plaintiff had been defeated in a former action on certain municipal bonds, in which action it was determined that the bonds in question were void, as against the county, in the hands of those who were not purchasers before due for value. In a second action by the same plaintiff on other bonds of the same series, it was held that the former judgment did not preclude the plaintiff from proving that he was, as to the bonds in suit, a *bona fide* holder.⁹⁶ So, also, the omission of the indorser of a series of notes, when sued upon one or more of them, to assert a defense equally available as against all of them does not preclude him from relying upon such defense when sued upon other notes of the same series.⁹⁷ The only matter essential to making a former judgment on the merits conclusive between the same parties is, that the question to be determined in the second action is the same question *judicially* settled in the first. A judgment is conclusive not only as to the subject matter in suit, but as to all other suits which, though concerning other subject matters, involve the same questions of controversy.⁹⁸ If an instru-

Ohio St. 395, 14 L. R. A., N. S., 893, 83 N. E. 601; Roney v. Westlake, 216 Pa. 374, 116 Am. St. Rep. 772, 9 Ann. Cas. 184, 65 Atl. 807; Stockley v. Cissna, 119 Tenn. 135, 104 S. W. 792; Texas etc. R. Co. v. Scoggin, 42 Tex. Civ. App. 335, 95 S. W. 651; Savage v. Tacoma, 61 Wash. 1, 112 Pac. 78; Troxell v. Delaware etc. R. Co., 185 Fed. 540.

⁹⁶ Cromwell v. County of Sac, 94 U. S. 351, 24 L. Ed. 195. But where the actions are upon different notes or causes of action, and the *same* points are in issue and determined, the judgment in the former case is conclusive: Bouchaud v. Dias, 3 Denio (N. Y.), 238; French v. Howard, 14 Ind. 455; Williamsburgh Sav. Bank v. Town of Solon, 136 N. Y. 465, 32 N. E. 1058. The same rule applies in

actions of *trespass* where the causes of action are different, but the questions of title are the same: Shettlesworth v. Hughey, 9 Rich. (S. C.) 387. Where in an action to recover *possession of land*, the plaintiff litigates his claim for rents and profits, he is precluded from suing for rent: Stewart v. Dent, 24 Mo. 111. A judgment in an action for an installment of a salary after discharge, on the ground that the discharge was wrongful, is *res judicata* on that point in an action for another installment: Allen v. International Text Book Co., 201 Pa. 579, 88 Am. St. Rep. 834, 51 Atl. 323.

⁹⁷ Davis v. Brown, 94 U. S. 423, 24 L. Ed. 204; Russell v. Place, 94 U. S. 606, 24 L. Ed. 214.

⁹⁸ Gardner v. Buckbee, 3 Cow. (N. Y.) 120, 15 Am. Dec. 256; Bouchaud

ment has been judicially construed, this construction must be adopted in every other controversy between the parties in which the effect of the same instrument is brought in question.⁹⁹ The former judgment does not constitute an estoppel as to matters *occurring subsequent* thereto which give the plaintiff a new title or right of action.¹⁰⁰

§ 603 (620). Effect of judgment—General issue.—There has long been controversy as to the effect which should be given to a former judgment, when it is offered in evidence under *the general issue*, but is not pleaded as an estoppel. In England, although the former judgment may be relevant and as such may be offered in evidence between the same parties or their privies, it is not conclusive, unless pleaded as an estoppel or unless the party giving it in evidence had no opportunity of pleading it as an estoppel.¹ While there

v. Dias, 3 Denio (N. Y.), 238; *Babcock v. Camp*, 12 Ohio St. 11.

⁹⁹ *Stewart v. Stebbins*, 30 Miss. 66; *Bloodgood v. Grasey*, 31 Ala. 575; *Tioga R. R. Co. v. Bloss & C. R. R. Co.*, 20 Wall. (U. S.) 137, 22 L. Ed. 331; *Lorillard v. Clyde*, 122 N. Y. 41, 19 Am. St. Rep. 470, 25 N. E. 292.

¹⁰⁰ *Barrows v. Kindred*, 4 Wall. (U. S.) 399, 18 L. Ed. 383; *Hawley v. Simons*, 102 Ill. 115; *People's Sav. Bank v. Hodgdon*, 64 Cal. 95, 27 Pac. 938; *McLane v. Bovee*, 35 Wis. 27; *McKissick v. McKissick*, 6 Humph. (Tenn.) 75; *Gluckauf v. Reed*, 22 Cal. 468; *Ramsey Bldg. Soc. v. Lawton*, 49 Minn. 362, 51 N. W. 1163; *Dwyer v. Goran*, 29 Iowa, 126; *Neafe v. Neafe*, 7 Johns. Ch. (N. Y.) 1, 11 Am. Dec. 380; *Stone v. St. Louis Stamping Co.*, 155 Mass. 267, 29 N. E. 623; *Perkins v. Parker*, 10 Allen (Mass.), 22; *Morse v. Marshall*, 97 Mass. 519; *People v. Mercein*, 3 Hill (N. Y.), 399, 38 Am. Dec. 644; *Caperton v. Schmidt*, 26

Cal. 479, 85 Am. Dec. 187, and note. See, also, *State v. Bechdel*, 37 Minn. 360, 5 Am. St. Rep. 854, 34 N. W. 334. A suit for *taxes* for one year is no bar to a suit for taxes for another year: *Keokuk & W. Ry. Co. v. Missouri*, 152 U. S. 301, 38 L. Ed. 450, 14 Sup. Ct. Rep. 592; a decree that an assessment for one year is illegal is not *res judicata* as to the legality of assessment of another year: *Gittings v. Mayor etc. of City of Baltimore*, 95 Md. 419, 52 Atl. 937, 54 Atl. 253; and a former judgment in an action for *nuisance* is not conclusive evidence of the plaintiff's rights in a subsequent action for the continuance of the same nuisance: *Parker v. Standish*, 3 Pick. (Mass.) 288; *Richardson v. Boston*, 19 How. (U. S.) 263, 15 L. Ed. 639; *Byrne v. Minneapolis & St. L. Ry. Co.*, 38 Minn. 212, 8 Am. St. Rep. 668, 36 N. W. 339.

¹ *Vooght v. Winch*, 2 Barn. & Ald. 662, 106 Eng. Reprint, 507; *Outram v. Morewood*, 3 East, 346, 102 Eng.

has been much conflict of opinion on this subject in the United States, the weight of authority seems to reject the English view that a former judgment may be properly admitted in evidence, and yet that it is a mere fact or argument which the jury may adopt or disregard, as they choose.² The prevailing view in this country is that, if under the pleadings proof of the former judgment is received, it should have effect as a *conclusive determination* of the rights of the parties.³ In some of the cases cited to this last proposition it is put that when the judgment not

Reprint, 630; Hannaford v. Hunn, 2 Car. & P. 148; Magrath v. Hardy, 4 Bing. N. C. 782, 132 Eng. Reprint, 990; Doe v. Huddart, 2 Crompt. M. & R. 316, 5 Tyr. 846, 4 D. P. C. 437; Dimes v. Grand Junction Canal Co., 9 Q. B. 469, 115 Eng. Reprint, 1353; Clink v. Thurston, 47 Cal. 21; Fanning v. Hibernia Ins. Co., 37 Ohio St. 344. In the celebrated case against the Duchess of Kingston, a case more frequently cited, we think, than any other ever decided in an English court, a former adjudication is spoken of as being "as a plea, a bar; and as evidence, conclusive." Whether the judge writing the opinion in this case understood that a former adjudication was "as evidence conclusive," though not pleaded as an estoppel, or whether he intended the language employed by him should be applicable only to those cases in which the conclusive effect of a former judgment was invoked by the pleadings, is unknown; but it is probable that he designed merely to state to what extent a former adjudication might prevail, if properly insisted upon, by a party entitled to its benefits, and that he had no intention of pointing out the *means* essential to securing those benefits: 1 Freeman, Judgm., § 284.

² Marsh v. Pier, 4 Rawle (Pa.), 273, 26 Am. Dec. 131; Cist v. Zeigler,

16 Serg. & R. (Pa.) 282, 16 Am. Dec. 573; Betts v. Starr, 5 Conn. 550, 13 Am. Dec. 94.

³ Cannon v. Brame, 45 Ala. 262; Flandreau v. Downey, 23 Cal. 354; Bethlehem v. Watertown, 51 Conn. 490; Little v. Barlow, 37 Fla. 232, 53 Am. St. Rep. 249, 20 South. 240; Dardin v. Ogletree, Dudley (Ga.), 240; Union Pac. Ry. Co. v. Chicago etc. Ry. Co., 57 Ill. App. 430; Gavin v. Graydon, 41 Ind. 559; Larum v. Wilmer, 35 Iowa, 244; George v. Gillespie, 1 G. Greene (Iowa), 421; Beall v. Pearre, 12 Md. 550; Walker v. Chase, 53 Me. 258; Foye v. Patch, 132 Mass. 105; Offutt v. John, 8 Mo. 120, 40 Am. Dec. 125; Garton v. Botts, 73 Mo. 274; Taylor v. Dustin, 43 N. H. 493; Krekeler v. Ritter, 62 N. Y. 372; Marston v. Swett, 66 N. Y. 206, 23 Am. Rep. 43; Stancill v. James, 126 N. C. 190, 35 S. E. 245; Finley v. Hanbest, 30 Pa. 190; Westcott v. Edmunds, 68 Pa. 34; Shafer v. Stonebraker, 4 Gill & J. (Md.) 345; Bradford v. Burgess, 20 R. I. 290, 38 Atl. 975; Jones v. Weathersbee, 4 Strob. (S. C.) 50, 51 Am. Dec. 653; Warwick v. Underwood, 3 Head (Tenn.), 238, 75 Am. Dec. 767; Rio Grande Western R. Co. v. Telluride Power Trans. Co., 23 Utah, 22, 63 Pac. 995; Southern Pac. R. Co. v. United States, 168 U. S. 1, 42 L. Ed. 355, 18 Sup.

having been specially pleaded is relied on as an adjudication of certain facts and not as a bar, it is conclusive as evidence of the facts established thereby.⁴ This controversy is not likely to be continued in those jurisdictions where the reformed procedure is adopted, and where a former judgment must be *pleaded as a new matter* in order to admit proof thereof. The majority of the states will probably adopt the same rule. But where the common-law system of pleading is retained, a judgment will, no doubt, at some not far distant day of the future, whenever received in evidence, be carried into effect irrespective of the question whether it was admitted under the general issue or in support of a special plea.⁵

§ 604 (621). Matters which might have been litigated in a former suit.—It is a rule which, with some limitations, has been often recognized that the courts will not permit

Ct. Rep. 18; *Bird v. Randall*, 3 Burr. 1345, 97 Eng. Reprint, 866, 1 W. Bl. 373, 96 Eng. Reprint, 210; *Kingston's Case*, 20 How. St. Tr. 355.

⁴ See in addition to the cases cited in previous note: *Bell v. Raymond*, 18 Conn. 91; *Lyttle v. Chicago etc. R. Co.*, 75 Minn. 330, 77 N. W. 975. In *Stearns v. Shepard etc. Lumber Co.*, 91 App. Div. 49, 86 N. Y. Supp. 391, *Ingraham, J.*, said: "This adjudication not having been pleaded, it was not competent as a bar or an estoppel in this action, but as said by the court of appeals in *Krekeler v. Ritter*, 62 N. Y. 372, 'as evidence of a fact in issue it was competent, although not pleaded like any other evidence, whether documentary or oral. A party is never required to disclose his evidence by his pleadings. The evidence was competent to disprove a material allegation of the complaint traversed by the answer. As evidence it was conclusive as an adjudication of the same fact in an action

between the same parties. . . . The court properly held that the matter adjudicated between the parties in another action might be given in evidence.'" In *Stouffer v. Harlan*, 84 Kan. 307, 114 Pac. 385, a suit to quiet title, defendants answered, claiming absolute ownership and possession. The reply set up a judgment between the same parties in a former action in which it was held that the defendants were not the absolute owners, but were mortgagees in possession, and that plaintiff's remedy was to redeem. It was held that the reply brought upon the record the former judgment in its entirety, for all purposes, notwithstanding some of its provisions favored defendants, and that the issues were thereby broadened sufficiently to authorize the court, in determining the rights of the parties under the former judgment, to give effect to all its provisions.

⁵ 1 Freeman, *Judgm.*, § 284.

the same parties to open the same subject of litigation in respect to matter which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they had from negligence, inadvertence or even accident omitted part of their case. The plea of *res judicata* applies, except in special cases, not only to points upon which the court is actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time.⁶ It has

⁶ Henderson v. Henderson, 3 Hare, 115, 67 Eng. Reprint, 313; Farquharson v. Seton, 5 Russ. 45, 38 Eng. Reprint, 944; Partridge v. Osborne, 5 Russ. 195, 38 Eng. Reprint, 1000; Chamley v. Lord Dunsany, 2 Sch. & L. 718; Kaehler v. Dobberpuhl, 60 Wis. 256, 18 N. W. 841; Pennock v. Kennedy, 153 Pa. 579, 26 Atl. 217; Danahey v. Prentiss, 22 Wis. 311; Aetna L. Ins. Co. v. Board of Commrs., 117 Fed. 82, 54 C. C. A. 468; Rucker v. Langford, 138 Cal. 611, 71 Pac. 1123; Board of Commrs. v. Johnson, 31 Colo. 184, 71 Pac. 1106; Sutton v. Hancock, 118 Ga. 436, 45 S. E. 504; Downey v. People, 205 Ill. 230, 68 N. E. 807; Dixon v. Caster, 65 Kan. 739, 70 Pac. 871; Moran v. Viero, 117 Ky. 195, 77 S. W. 668; Simpson v. Hart, 1 Johns. Ch. (N. Y.) 91; Le Guen v. Gouverneur, 1 Johns. Cas. (N. Y.) 436, 1 Am. Dec. 121; Des Moines & Ft. D. Ry. Co. v. Bullard, 89 Iowa, 749, 56 N. W. 498; Embury v. Conner, 3 N. Y. 511, 53 Am. Dec. 325; Bates v. Spooner, 45 Ind. 489. See note to Borngesser v. Harrison, 78 Am. Dec. 760. For the rule where the cause of action is different, see § 597, *ante*. If the plaintiff fails to give any evidence of certain items of an account he will be precluded from

proving the same in a subsequent action: Guernsey v. Carver, 8 Wend. (N. Y.) 492, 24 Am. Dec. 60; Borngesser v. Harrison, 12 Wis. 544, 78 Am. Dec. 757; Bendernagle v. Cocks, 19 Wend. (N. Y.) 207, 32 Am. Dec. 448; Avery v. Fitch, 4 Conn. 362; Lucas v. Le Compte, 42 Ill. 303; Memmer v. Carey, 30 Minn. 458, 15 N. W. 877; Oliver v. Holt, 11 Ala. 574, 46 Am. Dec. 288; Ingraham v. Hall, 11 Serg. & R. (Pa.) 78 (see discussion on divisible contracts in Badger v. Titcomb, 15 Pick. (Mass.) 409, 26 Am. Dec. 611; Cummington v. Wareham, 9 Cush. (Mass.) 585). A plaintiff cannot sever a book account and bring separate actions for the several portions and in such cases a judgment for some of the items is a bar to another action for other items: Lucas v. LeCompte, 42 Ill. 303; Pittman v. Chrisman, 59 Miss. 124; Bolen Coal Co. v. Whittaker Brick Co., 52 Kan. 747, 35 Pac. 810. This rule is upon the theory that when the dealings are continuous and nothing appears to show that the parties supposed the several items were to constitute separate transactions or causes of actions, the court would presume the claim to be entire and indivisible: Magruder v. Randolph, 77 N. C. 79. A different

even been held that a judgment in favor of a physician for professional services is a bar to a subsequent action by the defendant for malpractice in rendering such services, although the question of malpractice was not raised or litigated in the first action.⁷ But this seems to be an application of the principle under discussion which can hardly be sustained.⁸ The courts appear to lean to the rule that

rule applies where the transactions or sales are separate and independent of each other: *American S. Machine Co. v. Thornton*, 28 Minn. 418, 10 N. W. 425; *Terrerri v. Jutte*, 159 Pa. 244, 28 Atl. 225; *Secor v. Sturgis*, 16 N. Y. 548; *Schmidt v. Zahensdorf*, 30 Iowa, 498. The same rule applies if one sues for only part of an *indivisible claim*: *Miller v. Covert*, 1 Wend. (N. Y.) 487; *Smith v. Jones*, 15 Johns. (N. Y.) 229; *Hill v. Joy*, 149 Pa. 243, 24 Atl. 293; *Willard v. Sperry*, 16 Johns. (N. Y.) 121; *Bowe v. Minnesota Milk Co.*, 44 Minn. 460, 47 N. W. 151; *Baker v. Stinchfield*, 57 Me. 363; *Beronio v. Southern Pac. Ry. Co.*, 86 Cal. 415, 21 Am. St. Rep. 57, 24 Pac. 1093; *Burford v. Kersey*, 48 Miss. 642; *Wickersham v. Whedon*, 33 Mo. 561; *Bassett v. Connecticut River Co.*, 150 Mass. 178, 22 N. E. 890; *Thislor v. Miller*, 53 Kan. 515, 42 Am. St. Rep. 302, 36 Pac. 1060 (action against an officer for wrongful seizure of animals); *Hodge v. Shaw*, 85 Iowa, 137, 39 Am. St. Rep. 290, 52 N. W. 8 (where there is permanent obstruction of a right of way, one suit for *trespass* bars others); *Sullivan v. Baxter*, 150 Mass. 261, 22 N. E. 895 (as to judgment for conversion). But part of a claim may be withdrawn, and as to such part of the judgment it is not *res judicata*: *Busch v. Jones*, 94 Mich. 223, 53 N. W. 1051. The rule also applies if an action is brought for less than the whole amount due: *Bowden v. Horne*,

7 Bing. 716, 131 Eng. Reprint, 277; *Olmstead v. Bach*, 78 Md. 132, 44 Am. St. Rep. 273, 22 L. R. A. 74, 27 Atl. 501. If, in an—*action on a note and mortgage*, judgment is rendered on the note alone, the plaintiff is precluded from claiming any lien in a subsequent action: *Johnson v. Murphy*, 17 Tex. 216; and if a plaintiff by mistake takes *judgment* by default for less than his claim, he is barred from suing for the balance: *Footman v. Stetson*, 32 Me. 17, 52 Am. Dec. 634. As to matters expressly withheld from adjudication, see *Empire City Sav. Bank v. Moorhead*, 119 N. Y. Supp. 653; *Dettering v. Nordstrom*, 148 Fed. 81, 78 C. C. A. 157; *McComb v. Frink*, 149 U. S. 629, 37 L. Ed. 876, 13 Sup. Ct. Rep. 993. As to matters *neither pleaded nor tried*, see *Fuller v. Metropolitan Ins. Co.*, 68 Conn. 55, 57 Am. St. Rep. 84, 35 Atl. 766; *West & Co. v. Octoraro Water Co.*, 159 Fed. 528; *Bagley v. General Fire Exting. Co.*, 150 Fed. 284, 80 C. C. A. 172; *Leonard v. Simplex etc. Heating Co.*, 145 Fed. 946; *Walar v. Rechnitz*, 126 App. Div. 424, 110 N. Y. Supp. 777.

⁷ *Gates v. Preston*, 41 N. Y. 113; *Blair v. Bartlett*, 75 N. Y. 150, 31 Am. Rep. 455.

⁸ *Resseque v. Byers*, 52 Wis. 650, 38 Am. Rep. 775, 9 N. W. 779; *Bodurtha v. Phelon*, 13 Gray (Mass.), 413; *O'Connor v. Varney*, 10 Gray (Mass.), 231; *Bascom v. Manning*, 52 N. H. 132; *Barker v. Cleveland*,

there shall be included in the conclusive effect of every final adjudication every matter *material* to the disposition of the controversy *as made by the pleadings*, when the cause is submitted for decision.⁹ They declare that a party will not be allowed to bring another action, because in the first he gave no evidence of his demand;¹⁰ that he will not be permitted to reserve, or from any cause not to produce, part of his evidence; and that the judgment will be conclusive as to every matter which he could have proved in the first suit, and which was not proved nor withdrawn.¹¹ If the determination of a question is necessarily involved in the judgment, it is immaterial whether it was actually litigated or not.¹² It is clear that much of the difficulty experienced in reconciling cases, apparently in conflict, arises from the failure to discriminate between the uses to which the judgment offered in evidence may be applied—as a bar or an estoppel—and also between the matter which might have been litigated under the issues or in exercise of the party's rights of action in respect to different claims. It is not believed that there are any cases going to the extent that, because in the prior action a different question from that actually determined might have arisen and been litigated, therefore, such possible question is to be considered as excluded from consideration in a second action between the same parties on a different demand, although loose remarks looking in that direction may be found in some opinions. On principle, a point not in litigation in one action cannot be received as conclusively settled in any subsequent action upon a different cause, because it might have been determined in the first action.¹³ Some of the

19 Mich. 230; *Mondel v. Steele*, 8 Mees. & W. 858, 1 D. (N. S.) 1, 10 L. J. Ex. 426; *Rigge v. Burbridge*, 15 Mees. & W. 598, 15 L. J. Ex. 309, 4 D. & L. 1; *Davis v. Hedges*, L. R. 6 Q. B. 687.

⁹ *Freeman*, Judgm., § 272.

¹⁰ *Ramsey v. Herndon*, 1 McLean, 450, Fed. Cas. No. 11,546.

¹¹ *Baker v. Rand*, 13 Barb. (N. Y.) 152; *Fisk v. Miller*, 20 Tex. 579; *Tate's Exr. v. Hunter*, 3 Strob. Eq. (S. C.) 136; *Barrett v. Failing*, 8 Or. 152.

¹² *Barker v. Cleveland*, 19 Mich. 230.

¹³ *Cromwell v. County of Sac*, 94 U. S. 351, 24 L. Ed. 195.

more modern decisions seem to call for the establishment of the actual litigation of the matter, and its actual consideration by the court by the light of evidence concerning it.¹⁴ A general finding and judgment against a party for the recovery of money or of property seem to draw into the judgment, and to conclude, all questions which might arise in determining the right of recovery against that party; but, when an outside or collateral issue only is involved, to make the decision upon that conclusive, it should appear that this very question was involved and actually decided somewhere in the proceedings.¹⁵ A defendant, when sued, ought *not to be compelled to litigate an independent claim* which he may have against the plaintiff, and which he may prefer to have heard in another forum.¹⁶ It was so held even where, in an action for the price of a horse, the defendant set up breach of warranty, but failed to appear

¹⁴ Johnson v. Vance, 86 Cal. 110, 24 Pac. 862; Hollister v. Lefevre, 35 Conn. 456; Burton v. McMillan, 52 Fla. 228, 11 L. R. A., N. S., 159, 42 South. 879; Goddard v. Landes, 250 Ill. 457, 95 N. E. 477; Grim v. Griffith, 34 Ind. App. 559, 73 N. E. 197; McCullough v. Connelly, 137 Iowa, 682, 15 L. R. A., N. S., 823, 114 N. W. 301; Stroup v. Pepper, 69 Kan. 241, 76 Pac. 825; White v. Townsend, 142 Ky. 555, 134 S. W. 876; Cox v. Von Ahlefeldt, 105 La. 543, 30 South. 175; Hamlin v. New York etc. R. Co., 176 Mass. 514, 57 N. E. 1006; McLaughlin v. Betcher, 87 Minn. 1, 91 N. W. 14; State v. Hunter, 98 Mo. 386, 11 S. W. 756; O'Meara v. McDermott, 43 Mont. 189, 115 Pac. 912; Hearn v. Boston etc. R. Co., 67 N. H. 320, 29 Atl. 970; Barber v. Ellingwood, 137 App. Div. 704, 122 N. Y. Supp. 369; Baker v. Williams Banking Co., 42 Or. 213, 70 Pac. 711; In re Roney, 227 Pa. 127, 75 Atl. 1061; State v. State Treasurer, 68 S. C. 411, 47 S. E. 683; Kam-

mann v. Barton, 23 S. D. 442, 122 N. W. 416; Harris v. Mason, 120 Tenn. 668, 25 L. R. A., N. S., 1011, 115 S. W. 1146; Brown v. Reed, 20 Tex. Civ. App. 74, 48 S. W. 537; Stowell v. Hastings, 59 Vt. 494, 59 Am. Rep. 748, 8 Atl. 738; Max Meadows Land etc. Co. v. McGavock, 96 Va. 31, 36 S. E. 460; McGee v. Wineholt, 23 Wash. 748, 63 Pac. 571; Renick v. Ludington, 20 W. Va. 511; Grunert v. Spalding, 104 Wis. 193, 80 N. W. 589; In re St. Louis etc. Oil & Gas Co., 168 Fed. 934; Nottawasaga v. Railroad Co., 16 Ont. App. 52.

¹⁵ Fayerweather v. Ritch, 88 Fed. 713; Cromwell v. County of Sac. *supra*.

¹⁶ Stark v. Starr, 94 U. S. 477, 24 L. Ed. 276; Phillips v. Berick, 16 Johns. (N. Y.) 136, 8 Am. Dec. 299; Bendernagle v. Cocks, 19 Wend. (N. Y.) 207, 32 Am. Dec. 448; New Orleans etc. R. Co. v. Castello, 50 Ala. 12; Corby v. Taylor, 35 Mo. 447; Eastman v. Porter, 14 Wis. 39.

at the hearing, and judgment was rendered against him; he was held not precluded from suing on the warranty in another action.¹⁷ It is the general rule that, when a defendant has a *counterclaim*, he is not compelled to plead and prove the same as defendant, but may assert his claim in a separate action.¹⁸ And when one had a counterclaim which could not have been pleaded as a defense in an action on a note, it was held that he might prove the same in an action on the judgment rendered upon such note.¹⁹ But, of course, if he does litigate his claim in the same action, he is bound by the result.²⁰ The same rule applies if the court erroneously excludes evidence,²¹ or if new evidence which would change the result has been discovered,²² for the judgment, unless reversed or vacated, remains a bar. The *rule applies to defendants as well as plaintiffs*. Defendants are presumed to have presented all the evidence and all their grounds of defense, for actions cannot be tried piecemeal. Thus, if the defendant on a promissory note neglects to offer proof of want of consideration or of forgery, the judgment is as conclusive in future proceedings as if the defense had never existed.²³ A judgment is conclusive against all defenses which might have been set up before it was rendered, and this is true for the purposes of every subsequent

¹⁷ *Burwell v. Knight*, 51 Barb. (N. Y.) 267; *Fairfield v. McNany*, 37 Iowa, 75; *Robbins v. Harrison*, 31 Ala. 160.

¹⁸ *Mondel v. Steele*, 8 Mees. & W. 858, 15 L. J. Ex. 309, 4 D. & L. 1; *Davis v. Hedges*, L. R. 6 Q. B. 687; *Bascom v. Manning*, 52 N. H. 132; *Burnett v. Smith*, 4 Gray (Mass.), 50; *Gillespie v. Torrance*, 25 N. Y. 306, 82 Am. Dec. 355; *Indiana etc. Ins. Co. v. Stratton*, 4 Ind. App. 566, 31 N. E. 380; *Black v. Miller*, 75 Mich. 323, 42 N. W. 837; *Uppfalt v. Woermann*, 30 Neb. 189, 46 N. W. 419; *Seventh Day Adv. Assn. v. Fisher*, 95 Mich. 274, 54 N. W. 274; *Dewsnap v. Davidson*, 18 R.

I. 98, 26 Atl. 902; *Riley v. Hale*, 158 Mass. 240, 33 N. E. 491. See note to *Van Epps v. Harrison*, 40 Am. Dec. 326.

¹⁹ *Dudley v. Stiles*, 32 Wis. 371.

²⁰ *Thompson v. Schuster*, 4 Dak. 163, 28 N. W. 858; *Simes v. Zane*, 24 Pa. 242; *Nave v. Wilson*, 33 Ind. 294.

²¹ *Beall v. Pearre*, 12 Md. 550; *Burnett v. Smith*, 4 Gray (Mass.), 50; *Grant v. Button*, 14 Johns. (N. Y.) 377; *Smith v. Whiting*, 11 Mass. 445.

²² *Flint v. Bodge*, 10 Allen (Mass.), 128.

²³ *Cromwell v. County of Sac*, 94 U. S. 351, 24 L. Ed. 195.

suit between the same parties and their privies, whether founded upon the same or a different cause of action.²⁴ Thus, after final judgment in attachment, a release alleged to have been given after the attachment and before the return day of the writ is not available as a defense in an action on the bond given to release the property from attachment. Such defense was within the knowledge of the defendant, and should have been pleaded in the suit on the attachment, and he is concluded by the judgment therein.²⁵ "It follows, also, from the authorities considered, that a valid judgment for the plaintiff sweeps away every defense that should have been raised against the action; and this, too, for the purposes of every subsequent suit, whether

²⁴ *Brown v. Tillman*, 121 Ala. 626, 25 South. 836; *Briggs v. Manning*, 80 Ark. 304, 97 S. W. 289; *McPherson v. Alta Irr. District*, 14 Cal. App. 353, 112 Pac. 193; *Mattair v. Card*, 19 Fla. 455; *Stewart v. Ellis*, 130 Ga. 685, 61 S. E. 597; *Barksdale v. Greene*, 29 Ga. 418; *Harvey v. Aurora etc. R. Co.*, 186 Ill. 283, 57 N. E. 857; *Kelly v. Donlin*, 70 Ill. 378; *Howe v. Lewis*, 121 Ind. 110, 22 N. E. 978; *Turner v. Allen*, 66 Ind. 252; *Fulliam v. Drake*, 105 Iowa, 615, 75 N. W. 479; *Hackworth v. Zollars*, 30 Iowa, 433; *Upton's Committee v. Handley (Ky.)*, 123 S. W. 1188; *Brigot's Heirs v. Brigot*, 49 La. Ann. 1428, 22 South. 641; *Shaffer v. Scuddy*, 14 La. Ann. 575; *White v. Savage*, 94 Me. 138, 47 Atl. 138; *Footman v. Stetson*, 32 Me. 17, 52 Am. Dec. 634; *State v. Brown*, 64 Md. 199, 1 Atl. 54, 6 Atl. 172; *Burden v. Shannon*, 99 Mass. 200, 96 Am. Dec. 733; *Harrington v. Huff etc. Co.*, 155 Mich. 139, 118 N. W. 924; *Bazille v. Murray*, 40 Minn. 48, 41 N. W. 238; *Mosby v. Wall*, 23 Miss. 81, 55 Am. Dec. 71; *Randall v. Snyder*, 214 Mo. 23, 127 Am. St. Rep. 653, 112 S. W. 529; *Bergeron v.*

Dartmouth Sav. Bank, 62 N. H. 655; *Brinkerhoff v. Ransom*, 57 N. J. Eq. 312, 41 Atl. 725; *El Capitan Land etc. Co. v. Lees*, 13 N. M. 407, 86 Pac. 924; *Foulke v. Thalmessinger*, 158 N. Y. 725, 53 N. E. 1125; *Pearl v. Wells*, 6 Wend. (N. Y.) 291, 21 Am. Dec. 328; *Lee v. McKoy*, 118 N. C. 518, 24 S. E. 210; *Mengert v. Brinkerhoff*, 67 Ohio St. 472, 66 N. E. 530; *Morrill v. Morrill*, 20 Or. 96, 23 Am. St. Rep. 95, 11 L. R. A. 155, 25 Pac. 362; *Allen v. International Text-book Co.*, 201 Pa. 579, 88 Am. St. Rep. 834, 51 Atl. 328; *Tucker v. Carr*, 20 R. I. 477, 78 Am. St. Rep. 893, 40 Atl. 1; *Crenshaw v. Julian*, 26 S. C. 283, 4 Am. St. Rep. 719, 2 S. E. 133; *Howard v. Huron*, 6 S. D. 180, 26 L. R. A. 498, 60 N. W. 803; *Evans v. International Trust Co. (Tenn. Ch. App.)*, 59 S. W. 373; *Harkness v. Hutcherson*, 90 Tex. 383, 38 S. W. 1120; *Everill v. Swann*, 20 Utah, 56, 57 Pac. 716; *Weed v. Hunt*, 81 Vt. 302, 70 Atl. 564; *State v. Fairley*, 45 Wash. 52, 87 Pac. 1052; *State v. Boner*, 57 W. Va. 81, 49 S. E. 944.

²⁵ *Tucker v. Carr*, *supra*.

founded on the same or a different cause. Nor will equity relieve the defendant from a judgment on any ground of which he should have availed himself in the action at law."²⁶ Where, however, the defendant was in no position to raise the defense, the judgment against him is not *res judicata*.²⁷ So in actions affecting the *title to land*, the defendant must bring forward all the defenses or claims of title on which he intends to rely. He cannot reserve defenses to be tried in another suit;²⁸ and where a defendant in a suit on one of a *series of notes* given for the purchase price of property defeats recovery under a plea of failure of consideration, he is precluded from making the same defense in a subsequent action on other notes of the series,²⁹ because he had a remedy by seeking the cancellation of all the notes in the first suit. Where, in an action to recover possession of real property, the complaint tenders an issue on the title of the plaintiff, basing his right to the possession upon such title, a judgment in his favor upon the merits is conclusive upon the question of title at that time between the parties and their privies, and in a subsequent action between them, to determine adverse claim to the premises, will be a bar to any claim of title by the defendant under a deed executed to him prior to the former action. It is immaterial whether, in the first action, the defendant pleaded and presented his claim of title under such deed; the judgment is conclusive in the second action upon the question of title, not only as to every matter which was offered and received to defeat plaintiff's claim, but also as to any other admissible matter which might have been offered for that purpose.³⁰

²⁶ Bigelow on Estoppel, cited in Kelly v. Donlin, 70 Ill. 378.

²⁷ Carmer v. Still, 53 Misc. Rep. 443, 103 N. Y. Supp. 247.

²⁸ Dodd v. Scott, 81 Iowa, 319, 25 Am. St. Rep. 492, 10 L. R. A. 360, 46 N. W. 1057; Dowell v. Applegate, 152 U. S. 327, 38 L. Ed. 463, 14 Sup. Ct. Rep. 611; Napper v.

Fitzpatrick, 139 Mich. 139, 102 N. W. 642.

²⁹ Hoover v. Kilander, 135 Ind. 600, 34 N. E. 697.

³⁰ Bazille v. Murray, 40 Minn. 48, 41 N. W. 238. See, also, McCray v. Freeman, 17 Tex. Civ. App. 268, 43 S. W. 37. In Boisseau v. Dugger, 88 Va. 963, 14 S. E. 760, Fauntleroy,

§ 605 (622). **Same, continued.**—There has been some controversy whether this rule applies to the *defense of payment*. Some authorities hold that, if the plaintiff neglects to make proper credits in taking judgment, the defendant is not precluded in another action from proving the facts. But the clear weight of authority is that in such cases the judgment is a bar, and that an action will not lie to recover money paid under such circumstances.³¹ “It is clear that, if there be a *bona fide* legal process under which money is recovered, although not actually due, it cannot be recovered back, inasmuch as there must be some end of litigation.”³² A learned author thus states the rule as to the conclusive effect of judgments upon the matters in issue: “A judgment or decree is conclusive upon all causes of action and all matters of defense presented by the pleadings and not withdrawn before or during the trial, except, *first*, where the plaintiff claims on several and distinct causes of action, in which case he may, according to some of the authorities, maintain a second action upon any one of those causes upon which he can show that he offered no evidence at the trial of the former case; *second*, where the defendant pleads a matter as a defense which he might have successfully employed as a cause of action against the

J., expressed himself thus strongly: “There would never be an end of litigation, and judicial proceedings are a farce, if a party who is a defendant to a suit to set aside a deed of trust can contest the case to the uttermost, with every opportunity to present every claim or defense he can, and after the supreme court of appeals declares the deed of trust fraudulent and void, and remands the case, he comes in by a cross-bill, and says: ‘I had an interest in some of the notes secured by way of collateral, and I did not disclose that interest to the court, but I now claim that the said void and fraudulent deed of trust, so de-

clared by the final judgment of the ultimate court in the commonwealth, ought to be equitably enforced for my benefit.’”

³¹ Wright v. Leclair, 3 Iowa, 221; Fuller v. Eastman, 81 Me. 284, 17 Atl. 67; Williams v. Jones, 10 Smedes & M. (Miss.) 108; Tilton v. Gordon, 1 N. H. 33; Swensen v. Cresop, 28 Ohio St. 668; Davis v. Murphy, 2 Rich. (S. C.) 560, 45 Am. Dec. 749; Kirklan v. Brown, 4 Humph. (Tenn.) 174, 40 Am. Dec. 635.

³² Duke de Cadaval v. Collins, 4 Ad. & E. 867, 111 Eng. Reprint, 1006; Cromwell v. County of Sac, 94 U. S. 351, 24 L. Ed. 195.

plaintiff, in which case it appears that the right to such cause of action is not lost to the defendant, unless he followed up his pleading by offering evidence upon it in the former suit. With the possible exception here stated, a judgment is conclusive upon all the material issues made by the pleadings, and also upon all material allegations of matters of claim or of defense which the party against whom such allegation is made does not choose to controvert."³³ Although the courts very generally recognize the rule stated at the beginning of the last section, with the limitations which have been referred to, and have often stated very broadly the doctrine that the judgment is not only conclusive as to the matters actually contested, but as to those matters which might have been contested,³⁴ yet it must be borne in mind that the rule refers only to those issues which were within the issues before the court, and so might have been determined.³⁵ A very old New Hampshire case says that no legal question is more fully settled and at rest than that the merits of a judgment recovered in a court of competent jurisdiction, whilst unreversed, is conclusive as to the subject matter of it, to every intent and purpose, and cannot be re-examined in a new action founded on evidence, which would have made a defense to the original suit. This is to be regarded as a first principle, which cannot now be shaken, even to do what seems to be consistent with justice in a particular case, without endangering the best interests of society. There would be no termination of suits if parties who were sued on contracts were permitted to lie by and suffer a judgment by default,

³³ Freem. Judg., 4th ed., § 272.

³⁴ *Hamilton v. Quimby*, 46 Ill. 90; *Shaffer v. Scuddy*, 14 La. Ann. 575; *Fischli v. Fischli*, 1 Blackf. (Ind.) 360, 12 Am. Dec. 251; *Sayre v. Harpold*, 33 W. Va. 553, 11 S. E. 16; *Denver Water Co. v. Middaugh*, 12 Colo. 434, 13 Am. St. Rep. 234, 21 Pac. 565.

³⁵ *Fairchild v. Lynch*, 99 N. Y. 359,

2 N. E. 20; *Nesbit v. Independent District*, 144 U. S. 610; *People v. Hathaway*, 206 Ill. 42, 68 N. E. 1053; *Spinney v. Miller*, 114 Iowa, 210, 89 Am. St. Rep. 351, 86 N. W. 317; *McIntire v. Linehan*, 178 Mass. 263, 59 N. E. 767; *Huffman v. Knight*, 36 Or. 581, 60 Pac. 207; *Cassill v. Morrow*, 13 S. D. 109, 82 N. W. 418.

and then institute suits to recover back payments made on the contract on which judgment had been so rendered, and which might and ought to have been used as a defense in the original action.³⁶

§ 606 (623). **Judgments in rem as evidence.**—A judgment *in rem* has been defined to be the judgment of a court of exclusive, or at least peculiar, jurisdiction, declaratory either of the nature and condition of some particular thing, or of the condition and *status* of some particular person.³⁷ It is an adjudication pronounced upon the status of some particular subject matter, by a tribunal having competent authority for that purpose. It differs from a judgment *in personam* in this: that the latter judgment is in form, as well as substance, between the parties claiming the right; and that it is so *inter partes* appears by the record itself. A judgment *in rem* is founded on a proceeding instituted not against the person as such, but against or upon the thing or subject matter itself whose state or condition is to be determined. It is a proceeding to determine the state or condition of the thing itself; and the judgment is a solemn declaration of the *status* of the thing, and it *ipso facto* renders it what it declares it to be.³⁸ The most concise definition anywhere given of a judgment *in rem* is that “it is an adjudication upon the *status* of some particular subject matter, by a tribunal having competent authority for that purpose,” depending for its effect on this principle, that it is “a solemn declaration proceeding from an accredited quarter concerning the *status* of the thing adjudicated upon, which *very declaration operates accordingly upon the status of the thing adjudicated upon*, and *ipso facto* renders it such as it is thereby declared to be.”³⁹

³⁶ Tilton v. Gordon, 1 N. H. 33.

³⁷ 2 Phillips on Evidence, 5.

³⁸ Woodruff v. Taylor, 20 Vt. 65.
See, also, Chief Justice Marshall's definition in Mankin v. Chandler, 2 Brock. 125, Fed. Cas. No. 9030.

³⁹ 2 Smith's Lead. Cas. 585, 586, 6th Am. ed., 660; State v. Central Pac. R. Co., 10 Nev. 87; Lord v. Chadbourne, 42 Me. 429, 66 Am. Dec. 290. See, also, luminous definitions in Cross v. Armstrong, 44 Ohio St.

Judgments *in rem*, it is well known, are not, as the name implies, confined to adjudications *against things*. They are rendered in many instances where the prior proceedings are entirely *in personam*, as in cases establishing or dissolving marriages. Neither are they, as is frequently stated, always binding on *the whole world*, for decrees of divorce rendered in one of these United States have frequently been disregarded in the other states. The distinguishing characteristic of judgments *in rem* is, that wherever their obligation is recognized and enforced as against any person, it is equally recognized and enforced as against *all persons*. Such a judgment is an adjudication against some person or thing, or upon the *status* of some subject matter, which, wherever and whenever binding upon *any* person is equally binding upon *all* persons.⁴⁰ The late learned author of "Judgments," to whose work we are indebted for authoritative extracts, gives his own statement of what will call such a judgment into being, in these words: "We therefore suggest that a judgment is *in rem* whenever the process and proceedings are such as to warn all persons that the court may render judgment affecting certain property and their interests therein, and that they must, at or within a time specified, appear before the court if they wish to protect those interests from judicial condemnation. The fact that, under the mode of serving process provided by law, some claimant or even all claimants of the property do not receive *actual* notice of the proceeding will not prevent the judgment from operating *in rem*, if the mode adopted was reasonable under the circumstances, and calculated to give notice to the claimants, and the process was such as that the claimants, had it been seen by them, should have known therefrom that their interests were or might be imperiled, and that they might be heard for the preservation of such interests." It will at once be seen there is a marked distinction between the

613, 10 N. E. 160; Freeman v. Alderson, 119 U. S. 185, 30 L. Ed. 372, 7

Sup. Ct. Rep. 165; The Sabine, 101 U. S. 384, 25 L. Ed. 982.

⁴⁰ 2 Freeman, Judgm., § 606.

class of judgments heretofore discussed, that is, judgments *in personam*, and those of which we have given the above definitions, judgments *in rem*. Actions of this class, strictly considered, are proceedings against property alone, which is treated as responsible for the claims asserted by the libelants or plaintiffs.⁴¹ Among the judgments generally designated as judgments *in rem* are those for the condemnation of property as forfeited,⁴² adjudications on the subject of prizes or enforcement of *maritime liens*,⁴³ judgments for *divorce*,⁴⁴ and grants of probate and *administration*.⁴⁵ A *bankruptcy* adjudication, at least when there is any notice to the parties interested to show cause against it, and possibly when granted upon the debtor's petition, though without notice, operates *in rem*, and while it remains in force conclusively establishes, as against all persons, the *status* of the debtor, to wit, that he is a bankrupt or insolvent, as he has been adjudged to be, and that he did commit the act of bankruptcy, or was in the condition of insolvency upon which the adjudication was founded.⁴⁶ So the judgment granting the bankrupt or insolvent a dis-

⁴¹ Freeman v. Alderson, 119 U. S. 185, 30 L. Ed. 372, 7 Sup. Ct. Rep. 165. For various definitions of judgments *in rem*, see note to *Duchess of Kingston's Case*, 2 Smith's Lead. Cas. 810; *Freem. Judg.*, 4th ed., § 606; *Black, Judg.*, 2d ed., § 792. For numerous illustrations of the subjects in this section, see *Brown on Jurisdiction*. See, also, note to *Street v. Augusta Ins. etc. Co.*, 75 Am. Dec. 720.

⁴² *Scott v. Shearman*, 2 W. Black. 977, 96 Eng. Reprint, 575; *Cooke v. Sholl*, 5 Term Rep. 255, 101 Eng. Reprint, 143.

⁴³ *Le Caux v. Eden*, 2 Doug. 594, 99 Eng. Reprint, 375; *Williams v. Armroyd*, 7 Cranch (U. S.), 423, 3 L. Ed. 392; *Gelston v. Hoyt*, 3 Wheat. (U. S.) 246, 315, 4 L. Ed. 381.

⁴⁴ *Rex v. Grondon*, 1 Cowp. 315, 98 Eng. Reprint, 1105.

⁴⁵ *Allen v. Dundas*, 3 Term Rep. 125, 100 Eng. Reprint, 490; *Bogardus v. Clark*, 4 Paige Ch. (N. Y.) 623; *Vanderpoel v. Van Valkenburgh*, 6 N. Y. 190.

⁴⁶ *Brown v. Smart*, 69 Md. 320, 14 Atl. 468, 17 Atl. 1101; *Baker v. Kunkel*, 70 Md. 392, 17 Atl. 383; *Shawhan v. Wherritt*, 7 How. (U. S.) 627, 12 L. Ed. 847; *Lamp Chimney Co. v. Brass etc. Co.*, 91 U. S. 656, 23 L. Ed. 336; *Lewis v. Sloan*, 68 N. C. 557; *Mount v. Manhattan Co.*, 41 N. J. Eq. 211, 3 Atl. 726. See, also, *Dedrick v. Farmers' Bank*, 75 Kan. 187, 121 Am. St. Rep. 414, 88 Pac. 883; *Manson v. Williams*, 213 U. S. 453, 53 L. Ed. 869, 29 Sup. Ct. Rep. 519.

charge is also *in rem*, and binding upon all persons over whose demands the court had power to act.⁴⁷ Certain proceedings affecting public rights, such as the laying out or altering of public highways, or establishing the boundary lines between adjoining towns, are *in rem*, and binding upon all persons.⁴⁸ A judgment of *naturalization* is a judgment *in rem* in so far as it establishes the *status* of the person naturalized to be that of a citizen of the United States.⁴⁹ Judgments in *attachment* and garnishment are also sometimes classified as *judgments in rem*.⁵⁰ They are not strictly actions *in rem*, but are frequently spoken of as actions *quasi in rem*, because, though brought against persons, they only seek to subject certain property of those persons to the discharge of the claims asserted. They differ, among other things, from actions which are strictly *in rem* in that the interest of the defendant is alone sought to be affected, that citation to him is required and that judgment therein is only conclusive between the parties.⁵¹ It is a rule, peculiar to proceedings strictly *in rem* that in such proceedings all persons are deemed parties, and those claiming hostile rights are bound to come in and assert such right, and, if they fail so to do, they are conclusively bound by the judgment. As we have shown in the former part of this section, the effect of such a judgment, while commonly stated to be conclusive upon "the whole world," is really not so, but its conclusive nature is confined to those persons who, having or claiming an interest in the proceeding *in rem*, were entitled to appear in such proceeding and assert their right and interest.⁵² Thus, the sentence of a

⁴⁷ Rayl v. Lapham, 27 Ohio St. 452; Thornton v. Hogan, 63 Mo. 143; Sheets v. Hawk, 14 Serg. & R. (Pa.) 173, 16 Am. Dec. 486.

⁴⁸ Pitman v. Town of Albany, 34 N. H. 577; Millcreek Township v. Reed, 29 Pa. 195.

⁴⁹ State v. Penney, 10 Ark. 621; McCarthy v. Marsh, 5 N. Y. 263; State v. Hoeflinger, 35 Wis. 393.

⁵⁰ Woodruff v. Taylor, 20 Vt. 65;

Cooper v. Reynolds, 10 Wall. (U. S.) 308, 19 L. Ed. 931; Maxwell v. Stewart, 22 Wall. (U. S.) 77, 22 L. Ed. 564; Megee v. Beirne, 39 Pa. 50; Moore v. Chicago, R. I. & P. R. Co., 43 Iowa, 385, garnishment.

⁵¹ Freeman v. Alderson, 119 U. S. 185, 30 L. Ed. 372, 7 Sup. Ct. Rep. 165.

⁵² McCann v. Ellis, 172 Ala. 60, 55 South. 303; In re Blake, 157

court of admiralty, having jurisdiction, decreeing a ship to be a lawful prize, is conclusive upon all the world as to the facts found, until reversed, where such facts are plainly stated on the face of the sentence.⁵³ As has been stated, the conclusiveness of the judgment in such cases must be confined to those persons who, from their interest in the subject of the proceeding *in rem*, were entitled to appear in such proceeding, and assert their interest in the thing condemned;⁵⁴ nor is such a decree conclusive of any fact, not necessary to be found.⁵⁵ It is clear that, if the court has

Cal. 448, 108 Pac. 287; Torrey v. Bruner, 60 Fla. 365, 53 South. 337; Nat. Bank of St. Joseph v. Peters, 51 Kan. 62, 32 Pac. 637; Bauduc v. Nicholson, 4 La. 81; Cecil v. Cecil, 19 Md. 72, 81 Am. Dec. 626; Morin v. St. Paul etc. R. Co., 33 Minn. 176, 22 N. W. 251; Meriwether v. Block, 31 Mo. App. 170; Sorensen v. Sorensen, 68 Neb. 483, 94 N. W. 540, 98 N. W. 837, 100 N. W. 930, 103 N. W. 455; State v. Central Pac. R. Co., 10 Nev. 47; Noble v. Thompson Oil Co., 79 Pa. 354, 21 Am. Rep. 66; Ex parte Kenmore Shoe Co., 50 S. C. 140, 27 S. E. 682; Pearce v. Leitch, 43 Tex. Civ. App. 398, 96 S. W. 1094; Holly River Coal Co. v. Howell, 36 W. Va. 489, 15 S. E. 214; Goodrich v. Ferris, 145 Fed. 844; Ballantyne v. Mackinnon, [1896] 2 Q. B. 455, 75 L. T. 95, 45 Wkly. Rep. 70.

⁵³ Gelston v. Hoyt, 13 Johns. (N. Y.) 561, 3 Wheat. (U. S.) 246, 4 L. Ed. 381; Risley v. Phenix Bank, 83 N. Y. 318, 38 Am. Rep. 421; Croudson v. Leonard, 4 Cranch (U. S.), 434; Williams v. Armroyd, 7 Cranch (U. S.), 423, 3 L. Ed. 392, where it was so held in a prize case, although avowedly contrary to the law of nations; Steph. Ev., art. 42; 2 Smith's Lead. Cas. 851.

⁵⁴ If parties had no interest they

are not prejudiced by a judgment *de terris*: Lerch v. Snyder, 112 Pa. 161, 4 Atl. 336. In Tilt v. Kelsey, 207 U. S. 43, 52 L. Ed. 95, 28 Sup. Ct. Rep. 1, the United States supreme court pronounced the true rule to be as stated by Mr. Justice Holmes, in Brigham v. Fayerweather, 140 Mass. 411, 5 N. E. 265, viz.: "We may lay on one side, then, any argument based on the misleading expression that all the world are parties to a proceeding *in rem*. This does not mean that all the world are entitled to be heard, and as strangers in interest are not entitled to be heard, there is no reason why they should be bound by the findings of fact, although bound to admit the title or status which the judgment establishes."

⁵⁵ Maley v. Shattuck, 3 Cranch (U. S.), 458, 2 L. Ed. 498; Sorenson v. Sorenson, 68 Neb. 483, 94 N. W. 540, 98 N. W. 837, 100 N. W. 930, 103 N. W. 455. A mere finding of the court in such proceedings as to a fact which is not essential or necessary to the determination of the question as to whether the judgment *in rem* ought to be pronounced is not, although contained in such judgment entry, conclusive as a judgment *in rem* upon the facts so found. Such judgments are conclu-

no *jurisdiction* over the subject matter, its decree has no conclusive effect, even collaterally. Thus, where a court proceeded to seize and confiscate the property of a corporation, under the statute which only authorized the condemnation of the property of natural persons, the decree is not evidence, or of any validity.⁵⁶ When no *notice* is given to the parties interested in the *res*, against which proceedings are instituted, the judgment affords no evidence of any personal obligation or liability of such parties, however conclusive it may be as to the title of the property affected. In other words, adjudications which stand merely as proceedings *in rem* cannot, as a general rule, be made the foundation of ulterior proceedings *in personam*, so as to conclude a party upon the facts involved.⁵⁷ It is on this principle that in attachment proceedings, although constructive notice may be given by publication or otherwise, the judgment may be conclusive as to the title of property seized, yet it is not a judgment on which execution can be issued for the money, or on which an action can be based.⁵⁸ The general principle is stated with substantial correctness by Stephen: "Statements contained in judgments as to the facts upon which the judgment is based are deemed to be irrelevant as between strangers, or as between a party, or privy, and a stranger, except in the case of judgments of courts of admiralty condemning a ship as prize," and some other judgments of a kindred nature.⁵⁹

§ 607 (624). Same—Judgment of divorce.—"A sentence of divorce has or may have a dual nature. A judg-

sive only of such matters as are necessary to sustain the judgment: *McCann v. Ellis*, 172 Ala. 60, 55 South. 303.

⁵⁶ *Risley v. Phenix Bank*, 83 N. Y. 318, 38 Am. Rep. 421; *Thompson v. Whitman*, 18 Wall. (U. S.) 457, 21 L. Ed. 897; *Cheriot v. Foussat*, 3 Binn. (Pa.) 220.

⁵⁷ *Salem v. Eastern R. Co.*, 98 Mass. 431, 96 Am. Dec. 650; *Rand v. Hanson*, 154 Mass. 87, 26 Am. St. Rep. 210, 12 L. R. A. 574, 28 N. E. 6; *Pennoyer v. Neff*, 95 U. S. 714, 24 L. Ed. 565.

⁵⁸ *Jones v. Spencer*, 15 Wis. 583; *Greenl. Ev.*, § 542.

⁵⁹ *Stephen, Ev.*, art. 42; *Brigham v. Fayerweather*, *supra*.

ment of divorce is a decree *in rem*, so far as it fixes the *status* of the parties by dissolving their marital obligation. But so far as it disposes of any other matter than the marriage relation, it is *in personam*."⁶⁰ The English courts have held that no foreign court has power, so far as any consequences in England are concerned, to annul a marriage solemnized in England between English subjects.⁶¹ A decree of divorce granted in the state to which the parties *bona fide* removed to reside there is binding, even though for some cause not recognized as sufficient in the state where they were married.⁶² In this country, the chief conflict of opinion has arisen respecting *judgments in sister states*, rendered without personal service. It is generally conceded that, if a party goes to another state *for the mere purpose of obtaining a divorce* and seeks to gain a residence for that purpose, no jurisdiction is gained, and the judgment is not conclusive for any purpose on the other party. Such a judgment is a fraud upon the court.⁶³ It

⁶⁰ Freem. Judgm., 4th ed., § 584; Black, Judgm., 2d ed., § 803. See notes to *Hanover v. Turner*, 7 Am. Dec. 206; *Tolen v. Tolen*, 21 Am. Dec. 747; *Boykin v. Rain*, 65 Am. Dec. 355-361; *Berry v. Kansas City etc. R. Co.*, 39 Am. St. Rep. 371; *Street v. Augusta Ins. etc. Co.*, 75 Am. Dec. 722; *Tremblay v. Aetna Life Ins. Co.*, 94 Am. St. Rep. 553; *Felt v. Felt*, 83 Am. St. Rep. 616; *Forrest v. Fey*, 109 Am. St. Rep. 254; *Bater v. Bater*, 4 Am. & Eng. Ann. Cas. 864.

⁶¹ *Briggs v. Briggs*, 5 Pr. Div. 163; *Tovey v. Lindsay*, 1 Dow, 117, 3 Eng. Reprint, 643; *In re Wilson's Trusts*, 35 L. J. Ch. 243; *Tayl. Ev.*, 10th ed., § 1726.

⁶² *Tolen v. Tolen*, 2 Blackf. (Ind.) 407, 21 Am. Dec. 742, and note; *Harding v. Alden*, 9 Greenl. (Me.) 140, 23 Am. Dec. 549; *Shaw v. Shaw*, 98 Mass. 158; *Hood v. Hood*, 11

Allen (Mass.), 196, 87 Am. Dec. 709; *Barber v. Root*, 10 Mass. 260; *State v. Armington*, 25 Minn. 29; *Payson v. Payson*, 34 N. H. 518; *Fellows v. Fellows*, 8 N. H. 160; *Hunt v. Hunt*, 72 N. Y. 217, 28 Am. Rep. 129; *Pawling v. Willson*, 13 Johns. (N. Y.) 192; *Vischer v. Vischer*, 12 Barb. (N. Y.) 640; *Cheely v. Clayton*, 110 U. S. 701, 28 L. Ed. 298, 4 Sup. Ct. Rep. 328.

⁶³ *Hanover v. Turner*, 14 Mass. 27, 7 Am. Dec. 203; *Chase v. Chase*, 6 Gray (Mass.), 157; *Sewall v. Sewall*, 122 Mass. 156, 23 Am. Rep. 299; *Reed v. Reed*, 52 Mich. 117, 50 Am. Rep. 247, 17 N. W. 720; *Colburn v. Colburn*, 70 Mich. 647, 38 N. W. 607; *Neff v. Beauchamp*, 74 Iowa, 92, 36 N. W. 905; *Flower v. Flower*, 42 N. J. Eq. 152, 7 Atl. 669; *Tipton v. Tipton*, 87 Ky. 243, 8 S. W. 440; *Ditson v. Ditson*, 4 R. I. 87; *Hood v. State*, 56 Ind. 263, 26 Am. Rep. 21.

has been held in some jurisdictions that a decree of divorce, obtained in another state, in conformity to the laws of that state, without obtaining jurisdiction of the person of the defendant by personal service of process within the jurisdiction of such state, or by appearance, can only fix and determine the *status of the party within its own jurisdiction*.⁶⁴ Thus, it was held in New York that a divorce, obtained in another state by publication of summons, had no validity against a defendant actually domiciled in New York, and that it constituted no defense in an action for bigamy.⁶⁵

§ 608 (625). Same, continued.—When the parties in fact reside in different states, it is evident that neither party can obtain the redress authorized by law, unless the state courts can render a decree which will be binding on

⁶⁴ *People v. Baker*, 76 N. Y. 78, 32 Am. Rep. 274; *O'Dea v. O'Dea*, 101 N. Y. 23, 4 N. E. 110; *Jones v. Jones*, 108 N. Y. 415, 2 Am. St. Rep. 447, 15 N. E. 707; *Gregory v. Gregory*, 78 Me. 187, 57 Am. Rep. 792, 3 Atl. 280; *Flower v. Flower*, 42 N. J. Eq. 152, 7 Atl. 669; *De Meli v. De Meli*, 120 N. Y. 485, 17 Am. St. Rep. 652, 24 N. E. 996; *Haddock v. Haddock*, 201 U. S. 562, 5 Ann. Cas. 1, 50 L. Ed. 867, 26 Sup. Ct. Rep. 525.

⁶⁵ *People v. Baker*, 76 N. Y. 78, 32 Am. Rep. 274. The decisions in *Hammond v. Hammond*, 103 App. Div. 437, 93 N. Y. Supp. 1, and *Calahan v. Calahan*, 65 Misc. Rep. 172, 121 N. Y. Supp. 39, indicate that the recognition of decrees obtained on constructive service depends upon (1) the domicile of the plaintiff; (2) the domicile of the defendant; (3) the matrimonial domicile. "If the plaintiff only is domiciled in the state where the decree is granted, then it will not be recognized here. If the plaintiff and defendant are both

domiciled there, the decree is valid, even if the defendant may be actually present here. And the presumption is that the domicile of the husband is that of the wife, unless she is living apart from him under a decree of separation, or unless his conduct is such as to entitle her to a limited or absolute divorce, or unless an agreement exists between them permitting the wife to select her own domicile, or except in a very limited class of cases where his conduct is unreasonable. If the plaintiff is domiciled there, and the matrimonial domicile is there also, the decree is valid, even though the defendant is domiciled here. This matrimonial domicile may be distinct from the present domicile of both husband and wife. Presumptively it is identical with the domicile of the husband. But where the wife has acquired a separate domicile, it is the place where they last lived together as husband and wife with the intent of making that place their fixed home."

the nonresident defendant; and there arises a necessity for some means by which the courts may compel the nonresident defendant to submit his claims to a continuance of the marriage relation to their jurisdiction. The means usually provided by statute consist of some constructive service of process, as by the publication of the summons for a specific time in some public journal.⁶⁶ The cases cited in the previous section proceed upon the theory that the marriage relation is not a *res* within the state of the party invoking the jurisdiction of a court to dissolve it so as to authorize the court to bind the absent party by substituted service without the jurisdiction.⁶⁷ But the view generally prevails in this country that the courts of the actual domicile of a married person may render a judgment which has the effect of a decree *in rem*, so far as it affects the matrimonial *status*.⁶⁸ But it does not necessarily follow that such a decree, based upon constructive

⁶⁶ 2 Freeman, Judgm., § 584.

⁶⁷ Jones v. Jones, 108 N. Y. 415, 2 Am. St. Rep. 447, 15 N. E. 707; Haddock v. Haddock, 201 U. S. 562, 5 Ann. Cas. 1, 50 L. Ed. 867, 26 Sup. Ct. Rep. 525, full discussion.

⁶⁸ Thompson v. Thompson, 91 Ala. 591, 11 L. R. A. 443, 8 South. 419; Thompson v. State, 28 Ala. 12; In re James, 99 Cal. 374, 37 Am. St. Rep. 60, 33 Pac. 1122; Estate of Newman, 75 Cal. 213; 7 Am. St. Rep. 146, 16 Pac. 887; Dunham v. Dunham, 162 Ill. 589, 35 L. R. A. 70, 44 N. E. 841; Forrest v. Fey, 218 Ill. 165, 109 Am. St. Rep. 249, and note, 1 L. R. A., N. S., 740, 75 N. E. 789; Wilcox v. Wilcox, 10 Ind. 436; Tolen v. Tolen, 2 Blackf. (Ind.) 407, 21 Am. Dec. 742; Van Orsdal v. Van Orsdal, 67 Iowa, 35, 24 N. W. 579; Roe v. Roe, 52 Kan. 724, 39 Am. St. Rep. 367, 35 Pac. 808; Hawkins v. Ragsdale, 80 Ky. 353, 44 Am. Rep. 483; Harding v. Alden, 9 Me. 140, 23 Am. Dec. 549; Loker v. Gerald, 157 Mass. 42,

34 Am. St. Rep. 252, 16 L. R. A. 497, 31 N. E. 709; Thurston v. Thurston, 58 Minn. 279, 59 N. W. 1017; Jones v. Jones, 67 Miss. 195, 19 Am. St. Rep. 299, 6 South. 712; Gould v. Crow, 57 Mo. 200; Eldred v. Eldred, 62 Neb. 613, 87 N. W. 340; Frary v. Frary, 10 N. H. 61, 32 Am. Dec. 395; Hammond v. Hammond, 103 App. Div. 437, 93 N. Y. Supp. 1; Bidwell v. Bidwell, 139 N. C. 402, 111 Am. St. Rep. 797, 2 L. R. A., N. S., 324, 52 S. E. 55; Doerr v. Forsythe, 50 Ohio St. 726, 40 Am. St. Rep. 703, 35 N. E. 1055; Mansfield v. McIntyre, 10 Ohio, 27; Ditson v. Ditson, 4 R. I. 87; Hull v. Hull, 2 Strob. Eq. (S. C.) 174; Thoms v. King, 95 Tenn. 60, 31 S. W. 983; Jones v. Jones, 60 Tex. 451; Douglas v. Teller, 53 Wash. 695, 102 Pac. 761; Hubbell v. Hubbell, 3 Wis. 662, 62 Am. Dec. 702; Pennoyer v. Neff, 95 U. S. 714, 24 L. Ed. 565; 2 Bish. Mar., Div. & Sep., § 152 et seq.; Freem., Judg. 4th ed., § 584.

notice alone, is conclusive evidence against the right of the defendant to *alimony*, *dower* or other action asserting claim to property.⁶⁹ Generally, the usual rule as to the conclusiveness of judgments between parties obtains; and the decree is conclusive as to the facts found or necessary to be found at the hearing.⁷⁰ The whole of the law relating to the extraterritorial effect of a decree of divorce rendered upon constructive service and its recognition under the "full faith and credit provision" of the constitution has been fully considered by the United States supreme court in a well-known and discussed case,⁷¹ important alike for its decision and the dissenting opinions accompanying it. The effect of that case is well described in a valuable work of legal reference.⁷² It is there pointed out that under

⁶⁹ *Cook v. Cook*, 56 Wis. 195, 43 Am. Rep. 706, 14 N. W. 33, 443; *Wright v. Wright*, 24 Mich. 180; *Mansfield v. McIntyre*, 10 Ohio, 27; *Webster v. Webster*, 54 Iowa, 153, 6 N. W. 170; *Beard v. Beard*, 21 Ind. 321; *Turner v. Turner*, 44 Ala. 437; *Gould v. Crow*, 57 Mo. 200; *Prosser v. Warner*, 47 Vt. 667, 19 Am. Rep. 132; *Reel v. Elder*, 62 Pa. 308, 1 Am. Rep. 414; *Garner v. Garner*, 56 Md. 127.

⁷⁰ *Vance v. Vance*, 17 Me. 203; *Thurston v. Thurston*, 99 Mass. 39; *Brown v. Brown*, 37 N. H. 536, 75 Am. Dec. 154; *Prescott v. Fisher*, 22 Ill. 390; *Lewis v. Lewis*, 106 Mass. 309; *Bradshaw v. Heath*, 13 Wend. (N. Y.) 407; *McFarlane v. Cornelius*, 43 Or. 513, 73 Pac. 325, 74 Pac. 468; *Gill v. Read*, 5 R. I. 343, 73 Am. Dec. 73; *Blain v. Blain*, 45 Vt. 538; *Amory v. Amory*, 26 Wis. 152. See note to *Boykin v. Rain*, 65 Am. Dec. 361. As to the *cause of divorce*: *Slade v. Slade*, 58 Me. 157; to the *existence of the marriage*: *Mayhew v. Mayhew*, 3 Maule & S. 266, 105 Eng. Reprint, 611; the *dissolution of*

the marriage: *Hood v. Hood*, 11 Allen (Mass.), 196, 87 Am. Dec. 709; the *right to a divorce* upon the facts presented: *Fera v. Fera*, 98 Mass. 155; *Slade v. Slade*, 58 Me. 157; *Thurston v. Thurston*, 99 Mass. 39. But *not* as to third persons as to questions other than the status of the parties, for example, as to the *fact of the marriage*: *Gouraud v. Gouraud*, 3 Redf. Sur. (N. Y.) 262; *Freem. Judg.*, 4th ed., §§ 154, 313; or of *guilty conduct*: *Gill v. Read*, 5 R. I. 343, 73 Am. Dec. 73; *Needham v. Bremner*, 12 Jur., N. S., 434, L. R. 1 C. P. 583, 1 H. & R. 731, 35 L. J. C. P. 313, 14 L. T. 437. On decree against plaintiff in suit for divorce as bar to subsequent divorce action, see note to *Prall v. Prall*, 26 L. R. A., N. S., 577.

⁷¹ *Haddock v. Haddock*, 201 U. S. 562, 50 L. Ed. 867, 26 Sup. Ct. Rep. 525, 5 Ann. Cas. 1.

⁷² Note on "Extraterritorial Effect of a Decree of Divorce Rendered upon Constructive Service," appended to the case of *Joyner v. Joyner*, 18 L. R. A., N. S., 647.

that decision, with some few exceptions, the question as to the recognition in one state of a decree of divorce rendered in another upon constructive service of process without appearance by the defendant does not involve any consideration of the full faith and credit clause, but rests entirely upon principles of comity of which the courts of each state are the final arbiters. The illustration of a Georgia case following the United States supreme court decision is in point. In that case⁷³ the court, while conceding that a Kansas decree in favor of the husband, having been rendered upon constructive service of process against the wife, who still retained her domicile in Georgia, was not within the "full faith and credit provision," nevertheless held that it was entitled to recognition in Georgia upon principles of comity, in view of the circumstances, apparently, that the wife had actual notice through the mail of the proceedings in time to have enabled her to appear, notwithstanding that the divorce was granted for a cause not allowed by the law of Georgia. In the dissenting opinion in the supreme court case above referred to, Mr. Justice Holmes said that he was unable to reconcile with the requirements of the constitution, article 4, section 1, the notion of a judgment being valid and binding in the state where it is rendered, and yet depending for recognition to the same extent in other states upon the comity of those states. The legal practitioner is referred to both the majority and the dissenting opinions in that case, as they cover a valuable reference to the effect of the decrees in the various states. "Upon the theory," says the author of the article in the reference work referred to,⁷⁴ "that a divorce suit is a suit *in rem*, the due process provision is fully satisfied by a constructive or substituted service, even as against a non-

⁷³ Joyner v. Joyner, 131 Ga. 217, 127 Am. St. Rep. 220, 18 L. R. A., N. S., 247, 62 S. E. 182. See, also, Smith v. Smith, 43 La. Ann. 1140, 10 South. 248; Felt v. Felt, 59 N. J. Eq. 606, 83 Am. St. Rep. 612, and note, 47 L. R. A. 546, 45 Atl. 105,

49 Atl. 1071; Toncray v. Toncray, 123 Tenn. 476, Ann. Cas. 1912B, 284, 34 L. R. A., N. S., 1106, 131 S. W. 977.

⁷⁴ Note to Joyner v. Joyner, 18 L. R. A., N. S., 647.

resident, and in that event it should be regarded as sufficient not only to uphold the jurisdiction of the court to determine the *status* of the parties in the state where the court is sitting, but also to establish their status in other states under the operation of the full faith and credit provision. All considerations of logic and legal consistency, as well as practical morality and expediency, seem to unite in demanding that a divorce rendered in one of the states of the Union shall, upon a given state of facts, be valid in all the states or in none of them."⁷⁵ With this proposition no fault can be found, except that its force would be increased if it were shorn of the last five words.

§ 609 (626). Judgments in probate—Conclusive effect of—Proof of death, etc.—In determining the effect of judgments of probate courts, as conducted in this country, the same general principles which govern in other courts are applicable. A grant of *probate* or of administration is, in the nature of a decree *in rem*, and actually invests the executor or administrator with the character which it declares to belong to him.⁷⁶ Actions or proceedings to set aside wills or to test their validity are also generally *in rem*,⁷⁷ while suits for their construction are *in personam*.⁷⁸ Where the decree is of the nature of a proceeding *in rem*,

⁷⁵ In Bishop, Mar. Div. & Sep., published in 1891, he says: "The present clear American doctrine, made conclusive by decisions of the court of ultimate resort, accepts *ex parte* divorces pronounced by the court of the applicant's domicile, in full compliance with the local law after its constructive notice to the absent defendant, as adequate everywhere to dissolve or otherwise ascertain the marriage status."

⁷⁶ Smith's Lead. Cas., 6th Am. ed., 669; Noel v. Wells, 1 Dev. L. (N. C.) 235; Fry v. Taylor, 1 Head (Tenn.), 594; Holliday v. Ward, 19 Pa. 485, 57 Am. Dec. 671; Schultz v. Schultz,

10 Gratt. (Vt.) 358, 60 Am. Dec. 335; Norvell v. Lessueur, 33 Gratt. (Va.) 222; Steele v. Renn, 50 Tex. 467, 32 Am. Rep. 605; Moore v. Tanner's Admr., 5 T. B. Mon. (Ky.) 42, 27 Am. Dec. 35; Cecil v. Cecil, 19 Md. 72, 81 Am. Dec. 626; Archer v. Mosse, 2 Vern. 8, 23 Eng. Reprint, 618; Gingell v. Horne, 9 Sim. 539, 59 Eng. Reprint, 466; Allen v. Dundas, 3 Term Rep. 125, 100 Eng. Reprint, 490.

⁷⁷ Patton v. Allison, 7 Humph. (Tenn.) 320; Miller v. Foster, 76 Tex. 479, 13 S. W. 529.

⁷⁸ Brown v. Brown, 86 Tenn. 277, 6 S. W. 869, 7 S. W. 640.

and relates to those matters of exclusive jurisdiction, as in the *settlement of estates*, the judgment is binding on all the world.⁷⁹ Thus, it has been held inadmissible after the probate of a will to show that the testator was mad or that the will was forged, as those are matters which should have been urged in opposition to the grant of probate;⁸⁰ nor is it admissible to show that the testator made a subsequent will and appointed another executor;⁸¹ nor that the will was not executed according to the law of the country where the testator was domiciled;⁸² nor can it be collaterally impeached on other grounds;⁸³ nor can it be shown, after letters of administration have been granted, that an administrator had not been legally appointed, and was not a competent person;⁸⁴ nor will collateral inquiry be made into the legality of the appointment of a guardian.⁸⁵ The probate

⁷⁹ *Simmons v. Saul*, 138 U. S. 439, 34 L. Ed. 1054, 11 Sup. Ct. Rep. 369; *Canjolle v. Ferrie*, 13 Wall. (U. S.) 465, 20 L. Ed. 507; *Harris v. Colquit*, 44 Ga. 663; *Stiles v. Burch*, 5 Paige (N. Y.), 132; *Womack v. Womack*, 23 La. Ann. 351; *Byrne v. Hume*, 84 Mich. 185, 47 N. W. 679; *Rudy v. Ulrich*, 69 Pa. 177, 8 Am. Rep. 238; *Ward v. State*, 40 Miss. 108; *Judd v. Ross*, 146 Ill. 40, 34 N. E. 631; *Cummings v. Cummings*, 123 Mass. 270; *Mooney v. Hines*, 160 Mass. 469, 36 N. E. 484; *Simpson v. Norton*, 45 Me. 281; *State v. McGlynn*, 20 Cal. 233, 81 Am. Dec. 118; *Mulcahey v. Dow*, 131 Cal. 73, 63 Pac. 158; *Gates v. Treat*, 17 Conn. 388; *Sanborn v. Perry*, 86 Wis. 361, 56 N. W. 337; *Hutton v. Williams*, 60 Ala. 107; *Johnson v. Beazley*, 65 Mo. 250, 27 Am. Rep. 276; *Jones v. Chase*, 55 N. H. 234; *Roderigas v. East River Sav. Inst.*, 63 N. Y. 460, 20 Am. Rep. 555; *Cecil v. Cecil*, 19 Md. 72, 81 Am. Dec. 626; *Wall v. Wall*, 123 Pa. 545, 10 Am. St. Rep. 549, 16 Atl. 598; *Corrigan v. Jones*, 14 Colo. 311, 23 Pac. 913; *Lawrence*

v. Englesby, 24 Vt. 42; *Blake v. Butler*, 10 R. I. 133; *Turner v. Malone*, 24 S. C. 398; *Kurtz v. St Paul & D. Ry. Co.*, 61 Minn. 18, 63 N. W. 1. See notes to *Street v. Augusta Ins. etc. Co.*, 75 Am. Dec. 722; *Young v. Byrd*, 46 Am. St. Rep. 466; *Sly v. Hunt*, 21 L. R. A. 680-689.

⁸⁰ *Noell v. Wells*, 1 Lev. 235, 83 Eng. Reprint, 385; *Mutual L. Ins. Co. v. Tisdale*, 91 U. S. 238, 23 L. Ed. 314; 2 *Smith's Lead. Cas.* 827 (star page); *Sly v. Hunt*, 159 Mass. 151, 38 Am. St. Rep. 403, 21 L. R. A. 680, 34 N. E. 187. Same as to judgment settling probate of will: *Miller v. Foster*, 76 Tex. 479, 13 S. W. 529.

⁸¹ *Moore v. Tanner*, 5 T. B. Mon. (Ky.) 42, 27 Am. Dec. 35.

⁸² *Whicker v. Hume*, 7 H. L. Cas. 124, 11 Eng. Reprint, 50.

⁸³ *Vanderpoel v. Van Valkenburgh*, 6 N. Y. 190.

⁸⁴ *Lawrence v. Englesby*, 24 Vt. 42.

⁸⁵ *Farrar v. Olmstead*, 24 Vt. 123.

of a will establishes its *status*; and the *status* thus established adheres to the will as a fixture, and the judgment or decree in the premises, unless avoided in some mode prescribed by law, binds and concludes the whole world.⁸⁶ If probate is granted of a will, then that conclusively establishes, in all courts, that the will was executed according to the law of the country where the testator was domiciled.⁸⁷ The letters issued to an executor or administrator prove that the authority incident to the office has devolved upon the person therein named; that he is the executor or administrator, and that the preliminary proceedings have been regularly taken;⁸⁸ and in actions respecting the settlement of the estate of the deceased, they are conclusive evidence of the right of the administrator to sue for and receive whatever was due to the deceased.⁸⁹ But such letters are *not conclusive proof of the death of the alleged decedent*, even between parties and privies;⁹⁰ nor are they evidence of death in an action brought by a plaintiff individually on an insurance policy on the life of the one claimed to be deceased.⁹¹ With respect to the validity of claims allowed by the probate court, while the form of the order differs from an ordinary judgment on which execution may issue, yet it is in all essentials an adjudication as to the validity and amount of the claim, and is to that extent a judgment and binding upon the estate, and the representatives of the estate, the executor and administrator.⁹² A judgment of

⁸⁶ Deslonde v. Darrington's Heirs, 29 Ala. 95; Woodruff v. Taylor, 20 Vt. 65; Ballou v. Hudson, 13 Gratt. (Va.) 672; State v. McGlynn, 20 Cal. 233, 81 Am. Dec. 118.

⁸⁷ Wicker v. Hume, 7 H. L. Cas. 124, 11 Eng. Reprint, 50.

⁸⁸ Mutual L. Ins. Co. v. Tisdale, 91 U. S. 238, 23 L. Ed. 314.

⁸⁹ Mutual L. Ins. Co. v. Tisdale, 91 U. S. 238, 23 L. Ed. 314.

⁹⁰ Thompson v. Donaldson, 3 Esp. 63, 6 R. R. 812; Moons v. De Bernales, 1 Russ. 301, 38 Eng. Reprint, 117; Cunningham v. Smith, 70 Pa.

450; Tisdale v. Connecticut M. L. Ins. Co., 26 Iowa, 170, 96 Am. Dec. 136; English v. Murray, 13 Tex. 366. See note to Carroll v. Carroll, 19 Am. Rep. 148. But they are conclusive in a collateral proceeding: French v. Frazier, 7 J. J. Marsh. (Ky.) 425; Lancaster v. Washington Life Ins. Co., 62 Mo. 121; or where no plea in abatement is filed: Newman v. Jenkins, 10 Pick. (Mass.) 515.

⁹¹ Mutual L. Ins. Co. v. Tisdale, 91 U. S. 238, 23 L. Ed. 314.

⁹² Bentley v. Brown, 123 Ind. 552, 24 N. E. 507. See, also, Phelan v.

allowance of a claim entered by a probate court possesses the same conclusive force as the judgments of other tribunals.⁹³ A decree of a probate court settling an executor's final account and discharging him from his trust, after due legal notice, is conclusive until reversed, in the absence of fraud; and it will be presumed that it was founded on proper evidence, and that every prerequisite to a valid discharge was complied with.⁹⁴

§ 610 (627). Same—Jurisdiction.—As in the case of other judgments, the *jurisdiction of the court is essential to the validity* of the judgments of courts of probate. It is not to be inferred that they are so far conclusive that they cannot be directly attacked. And, as a rule, they are not open to collateral attack when the record asserts the jurisdictional facts.⁹⁵ The validity of orders and decrees

Fitzpatrick, 84 Wis. 240, 54 N. W. 614; City of La Porte v. Organ, 5 Ind. App. 369, 32 N. E. 342.

⁹³ Moody v. Peyton, 135 Mo. 482, 58 Am. St. Rep. 604, 36 S. W. 621. See, also, James v. Gibson, 73 Ark. 440, 84 S. W. 485; Ford v. First Nat. Bank, 201 Ill. 120, 66 N. E. 316; Sherman v. Abell, 46 Vt. 547.

⁹⁴ Stubblefield v. McRaven, 5 Smedes & M. (Miss.) 130, 43 Am. Dec. 502. See, also, Hatcher v. Dillard, 70 Ala. 343; Floyd v. Newton, 97 Ark. 459, 134 S. W. 934; Reynolds v. Brumagim, 54 Cal. 254; State v. Barnett, 2 Marv. (Del.) 115, 42 Atl. 420; Carter v. Anderson, 4 Ga. 516; Strawn v. Academy, 240 Ill. 111, 88 N. E. 460; State v. Kelso, 94 Ind. 587; Kows v. Mowery, 57 Iowa, 20, 10 N. W. 283; United States Fidelity etc. Co. v. Martin, 143 Ky. 241, 136 S. W. 200; Rabasse's Succession, 50 La. Ann. 746, 23 South. 910; Ensign v. Barker, 191 Mass. 323, 77 N. E. 719; Kittson v. St. Paul Trust Co., 76 Minn.

325, 81 N. W. 7; Goodman v. Griffith, 155 Mo. App. 574, 134 S. W. 1051; Hurlburt v. Wheeler, 40 N. H. 73; In re Heath, 52 N. J. Eq. 807, 33 Atl. 46; Weintraub v. Siegel, 133 App. Div. 677, 118 N. Y. Supp. 261; Crawford v. Zeigler, 84 Ohio St. 224, 95 N. E. 743; Bellinger v. Thompson, 26 Or. 320, 37 Pac. 714, 40 Pac. 229; Hano Co. v. Hano, 224 Pa. 212, 73 Atl. 341; Doringh's Petition, 20 R. I. 459, 40 Atl. 4; Cooper v. Burton, 7 Baxt. (Tenn.) 406; Watkins v. Sansom, 22 Tex. Civ. App. 178, 54 S. W. 1096; Ehrngren v. Gronlund, 19 Utah, 411, 57 Pac. 268; Harris v. Harris, 82 Vt. 199, 72 Atl. 912; Carter v. Skillman, 108 Va. 204, 60 S. E. 775; Vaughn v. Walsh, 122 Wis. 486, 100 N. W. 840; Newman v. Moody, 19 Fed. 858.

⁹⁵ Barclift v. Treece, 77 Ala. 528. See, also, Irwin v. Scriber, 18 Cal. 499; Moore v. Ingram, 46 Colo. 204, 102 Pac. 1070; Robinson v. Epping, 24 Fla. 237, 4 South. 812; Murphy v. Creighton, 45 Iowa, 179; Record

made by courts exercising jurisdiction over the estates of decedents, minors, and incompetent persons is dependent on their having jurisdiction over the persons and subject matters affected thereby, and whenever the statute requires a particular notice to be given, and the omission to give it is conceded, the order or decree based thereon must be treated as void.⁹⁶ It is a well-settled rule that, if the appointment of an administrator or the probate of a will is secured by *fraud*, *mistake* or collusion, the facts may be proved in a direct proceeding in the same court to set aside the judgment.⁹⁷ It is a general rule that the probate or surrogate courts have no authority to grant administration, except upon the estates of deceased persons, and hence that the *letters are a nullity if the person is alive*.⁹⁸ Free-

v. Howard, 58 Me. 225; Connors v. Cunard Steamship Co., 204 Mass. 310, 134 Am. St. Rep. 662, 17 Ann. Cas. 1051, 26 L. R. A., N. S., 171, 90 N. E. 601; Bradley v. Missouri Pac. R. Co., 51 Neb. 653, 66 Am. St. Rep. 473, 71 N. W. 282; Plume v. Howard Sav. Inst., 46 N. J. L. 211; Van Gaasbeek v. Staples, 85 N. Y. App. Div. 271, 83 N. Y. Supp. 225; In re Mayo, 60 S. C. 401, 54 L. R. A. 660, 38 S. E. 634; Ferrell v. Grigsby (Tenn. Ch. App.), 51 S. W. 114; Waggoner v. Sneed (Tex. Civ. App.), 138 S. W. 219; Abbott v. Coburn, 28 Vt. 663, 67 Am. Dec. 735; Andrews v. Ivory, 14 Gratt. (Va.) 229, 73 Am. Dec. 355; Boston etc. R. v. Hurd, 108 Fed. 116, 56 L. R. A. 193, 47 C. C. A. 615. If the jurisdictional defects appear on the face of the record, they can, of course, be collaterally attacked: Griffith v. Wright, 18 Ga. 173; Record v. Howard, 58 Me. 225; Curtis v. Charlevoix etc. Supervisors, 154 Mich. 646, 118 N. W. 618; Davis v. Hudson, 29 Minn. 27, 11 N. W. 136; Elgutter v. Missouri etc. R. Co., 53 Neb. 748, 74 N. W. 255; Flinn v. Chase, 4 Denio

(N. Y.), 85; Brien v. Hart, 6 Humph. (Tenn.) 131; Dayton Coal etc. Co. v. Dodd, 188 Fed. 597, 37 L. R. A., N. S., 456, 110 C. C. A. 395.

⁹⁶ Ruth v. Oberbrunner, 40 Wis. 238; Crosley v. Calhoon, 45 Iowa, 557; Michel v. Hicks, 19 Kan. 578, 27 Am. Rep. 161.

⁹⁷ Waters v. Stickney, 12 Allen (Mass.), 1, 90 Am. Dec. 122; Gaines v. Chew, 2 How. (U. S.) 620, 11 L. Ed. 402; Gaines v. Hennen, 24 How. 553, 16 L. Ed. 770; Estate of Leavens, 65 Wis. 440, 27 N. W. 324. But it is not necessary that all persons interested in the probate of the will should be before the court in order to confer jurisdiction: Bonnemort v. Gill, 167 Mass. 338, 45 N. E. 768.

⁹⁸ Jochumsen v. Suffolk Sav. Bank, 3 Allen (Mass.), 87; Melia v. Simmons, 45 Wis. 334, 30 Am. Rep. 746; Griffith v. Frazier, 8 Cranch (U. S.), 9, 3 L. Ed. 471; Allen v. Dundas, 3 Term Rep. 125, 100 Eng. Reprint, 490; Duncan v. Stewart, 25 Ala. 408, 60 Am. Dec. 527; Fisk v. Norvel, 9 Tex. 13, 58 Am. Dec. 128; Withers v. Patterson, 27 Tex. 491, 86

man says:⁹⁹ "In truth, matters are regarded as jurisdictional in the probate, surrogate, and orphans' courts which are not so regarded in other courts. Thus a court ordering a sale of property is, according to the majority of the authorities, without jurisdiction to do so if the petition therefor was not presented by a person having authority to present it,¹⁰⁰ or was not sufficient in substance to support the order sought,¹ or did not substantially contain a statement of all the matters required by statute to be stated therein."² Under the statutes of New York in a case which has excited much comment, the statutes were construed to extend the jurisdiction so that letters might be issued, not only upon the estates of decedents, but also upon the estates of persons whom the surrogate should determine upon evidence to be dead;³ and that a payment by a debtor to an administrator, so appointed, was valid, and a bar to an action to compel a second payment, though the supposed decedent was alive and the letters had been revoked.⁴ But in a new trial, it was proved that the clerk of surrogate had issued the letters without evidence or authority, and that, since the letters were without jurisdiction and void, they afforded no protection to the debtor for his payment to the person named as administrator. In-

Am. Dec. 643; *Beckett v. Selover*, 7 Cal. 215, 68 Am. Dec. 237.

⁹⁹ 1 Freeman, Judgm., § 319b.

¹⁰⁰ *Washington v. McCaughan*, 34 Miss. 304; *Pryor v. Downey*, 50 Cal. 389, 19 Am. Rep. 656; *Long v. Burnett*, 13 Iowa, 28, 81 Am. Dec. 40; *Withers v. Patterson*, 27 Tex. 491, 86 Am. Dec. 643.

¹ *Wilson v. Armstrong*, 42 Ala. 168, 94 Am. Dec. 635; *Pryor v. Downey*, 50 Cal. 389, 19 Am. Rep. 656; *Morris v. Hogle*, 37 Ill. 150, 87 Am. Dec. 243; *Farrar v. Dean*, 24 Mo. 16; *Bloom v. Burdick*, 1 Hill (N. Y.), 130, 37 Am. Dec. 299; *Newcomb v. Smith*, 5 Ohio, 448; *Spencer v. Jennings*, 114 Pa. 618, 8 Atl. 2;

Withers v. Patterson, 27 Tex. 499, 86 Am. Dec. 643.

² *Arnett v. Bailey*, 60 Ala. 435; *Gregory v. Taber*, 19 Cal. 397, 79 Am. Dec. 219; *Wilson v. Hastings*, 66 Cal. 243, 5 Pac. 217; *Hayes v. McNealy*, 16 Fla. 409; *Bree v. Bree*, 51 Ill. 367; *Guy v. Pierson*, 21 Ind. 18; *Tenny v. Poor*, 14 Gray (Mass.), 502, 77 Am. Dec. 340; *Ryder v. Flanders*, 30 Mich. 336; *Wright v. Edwards*, 10 Or. 298; *Young v. Young*, 12 Lea (Tenn.), 335; *Freeman on Void Judicial Sales*, §§ 11, 12.

³ *Roderigas v. East River Sav. Inst.*, 63 N. Y. 460, 20 Am. Rep. 555.

⁴ See case last cited.

stances of want of jurisdiction over the subject matter are found more frequently in probate proceedings than elsewhere.⁵ In every case it ought to appear, *prima facie*, that the court has jurisdiction over the estate. Usually a petition is presented to the court or judge, in which the facts authorizing the assumption of jurisdiction in the particular case are stated. The duty of the court or judge is to investigate and determine the truth of these jurisdictional allegations. Its subsequent grant of letters implies that these allegations have been found to be true.⁶ Hence in a case where a probate court has, upon a petition asserting the essential jurisdictional facts, and after notice to the parties in interest, given in the manner prescribed by law, granted letters testamentary or of administration, the proceedings cannot be avoided collaterally, in the majority of the states, by proof that the deceased did not die within the jurisdiction of the court.⁷ Any other rule would lead to the most embarrassing results.

§ 611 (628). Collateral proof to show want of jurisdiction.—In the preceding section we had occasion incidentally to refer to collateral attacks on judgments in matters of probate, and we have already called attention

⁵ Where the statute made no provision for administering estates of those who died prior to its enactment, the court has no jurisdiction to deal with them: *Downer v. Smith*, 24 Cal. 114; *Coppinger v. Rice*, 33 Cal. 408; *Grimes v. Norris*, 6 Cal. 621, 65 Am. Dec. 545; *Adams v. Norris*, 23 How. (U. S.) 353, 16 L. Ed. 539; *Tevis v. Pitcher*, 10 Cal. 465; *McNeil v. First Congregational Society*, 66 Cal. 105, 4 Pac. 1096, 4 West Coast Rep. 421. So where an order is made for sale of property in another state: *Nowler v. Coit*, 1 Ohio, 519, 13 Am. Dec. 640; *Salmond v. Price*, 13 Ohio, 368, 42 Am. Dec. 204; *Watts v. Waddle*, 6 Pet. (U. S.)

389, 8 L. Ed. 437; *Wills v. Cowper*, 2 Ohio, 124; *Latimer v. Union Pac. R. R. Co.*, 43 Mo. 105, 97 Am. Dec. 378; *Price v. Johnston*, 1 Ohio St. 390.

⁶ *Freeman, Judgm.*, § 120.

⁷ *Andrews v. Avery*, 14 Gratt. (Va.) 229, 72 Am. Dec. 355; *Fisher v. Bassett*, 9 Leigh (Va.), 119, 33 Am. Dec. 227; *Barrett v. Carney*, 33 Cal. 530; *Burdett v. Silsbee*, 15 Tex. 604; *Monell v. Dennison*, 17 How. Pr. (N. Y.) 422; *Abbott v. Coburn*, 28 Vt. 663, 67 Am. Dec. 735; *Rarborg v. Hammond*, 2 Har. & G. (Md.) 42. See, also, *Riley v. McCord*, 24 Mo. 265; *Wight v. Wallbaum*, 39 Ill. 554.

to the *presumption in favor of the jurisdiction* of courts.⁸ But in this section we will discuss more fully the effect of such presumption in respect to domestic judgments. It is a rule, generally admitted, that nothing is presumed to be out of the jurisdiction of superior courts of general jurisdiction, but that which specially appears to be so.⁹ It is also generally conceded that, if the want of jurisdiction *appear on the face of the proceedings*, expressly or by necessary implication, whether as to the subject matter or as to the parties, the judgment is void and will be so treated even in a collateral proceeding.¹⁰ But in the case of domestic judgments, there has been much discussion and no little

⁸ See § 31, *ante*. See notes to *Shirmway v. Stillman*, 15 Am. Dec. 378; *Hahn v. Kelly*, 94 Am. Dec. 765-770.

⁹ See § 31, *ante*.

¹⁰ *Wightman v. Karsner*, 20 Ala. 446; *Grimmett v. Askew*, 48 Ark. 151, 2 S. W. 707; *Aldrich v. Barton*, 153 Cal. 488, 95 Pac. 900; *Mortgage Trust Co. v. Redd*, 38 Colo. 458, 120 Am. St. Rep. 132, 8 L. R. A., N. S., 1215, 88 Pac. 473; *Venner v. Denver Ry.*, 15 Colo. App. 495, 63 Pac. 1061; *Frankel v. Satterfield*, 9 Houst. (Del.) 201, 19 Atl. 898; *Tenney v. Taylor*, 1 App. Cas. (D. C.) 223; *Torrey v. Bruner*, 60 Fla. 365, 53 South. 337; *Bedingfield v. First Nat. Bank*, 4 Ga. App. 197, 61 S. E. 30; *Desnoyer's Shoe Co. v. First Nat. Bank of Litchfield*, 89 Ill. App. 579; *Eddy v. People*, 15 Ill. 386; *Zinstmaster v. Aiken*, 173 Ind. 269, 88 N. E. 509, 90 N. E. 82; *Babbitt v. Doe*, 4 Ind. 355; *Beeman v. Kitzman*, 124 Iowa, 86, 99 N. W. 171; *Tunis v. Withrow*, 10 Iowa, 305, 77 Am. Dec. 117; *Ewing v. Mallisom*, 65 Kan. 484, 93 Am. St. Rep. 299, 70 Pac. 369; *Kennedy v. Terrill*, Hard. (Ky.) 490; *Smith v. Rice*, 11 Mass. 507; *Curtis v. Board of Supervisors*, 154 Mich. 646, 118 N. W. 618; *Thelen v.*

Thelen, 75 Minn. 433, 78 N. W. 108; *State v. Mitchell* (Mo. App.), 115 S. W. 1098; *Caffery v. Choctaw Coal & Min. Co.*, 95 Mo. App. 174, 68 S. W. 1049; *Banking House v. Dukes*, 70 Neb. 648, 97 N. W. 805; *Hess v. Cole*, 23 N. J. L. 116; *Gillespie v. Armstrong*, 58 Misc. Rep. 310, 109 N. Y. Supp. 672; *Jackson v. Brown*, 3 Johns. (N. Y.) 459; *Balk v. Harris*, 122 N. C. 64, 45 L. R. A. 257, 30 S. E. 318; *Spoors v. Coen*, 44 Ohio St. 497, 9 N. E. 132; *Moore v. Starks*, 1 Ohio St. 369; *Paine v. Mooreland*, 15 Ohio, 435, 45 Am. Dec. 585; *Taylor v. Taylor*, 54 Or. 560, 103 Pac. 524; *McKee v. McKee*, 14 Pa. 231; *Ragan's Estate*, 7 Watts (Pa.), 438; *Turner v. Malone*, 24 S. C. 398; *Withers v. Patterson*, 27 Tex. 491, 86 Am. Dec. 643; *Tichout v. Cilley*, 3 Vt. 425; *Lemmon v. Herbert*, 92 Va. 653, 24 S. E. 249; *Hembree v. McFarland*, 55 Wash. 605, 104 Pac. 837; *O'Malley v. Fricke*, 104 Wis. 280, 80 N. W. 436; *Abrams v. Jones*, 4 Wis. 806. For a general discussion of the impeachment of judgments for want of jurisdiction, see notes to *Marx v. Fore*, 11 Am. Rep. 435, and *Hood v. State*, 26 Am. Rep. 27.

confusion in the authorities as to whether any evidence can be received to show want of jurisdiction when no defect appears on the face of the proceedings. But undoubtedly the great weight of authority sustains the proposition that, *in the case of a domestic judgment of a court of general jurisdiction, want of jurisdiction cannot be shown by extrinsic evidence in a collateral proceeding.*¹¹ Very great consideration has been given by eminent jurists to the conflict between principles of policy which require the judgment to be preserved from collateral attack and the principles of natural justice which call for it being disregarded whenever brought in question upon allegation and proof that the party, for instance, had no notice or opportunity of being heard. The principles on which the rule rests are clearly and ably stated by Gholson, J., in a well-known Ohio case.¹² The learned judge said: "As to

¹¹ Roman v. Morgan, 162 Ala. 133, 50 South. 273; Barron v. Tart, 18 Ala. 668; Baldwin v. Foster, 157 Cal. 643, 108 Pac. 714; Clark v. Sawyer, 48 Cal. 133; Evans v. Young, 10 Colo. 316, 3 Am. St. Rep. 583, 15 Pac. 424; Coit v. Haven, 30 Conn. 190, 79 Am. Dec. 244; Curtis v. Mansfield, 132 Ga. 441, 64 S. E. 327; Grier v. McLendon, 7 Ga. 362; O'Neill v. Potvin, 13 Idaho, 721, 93 Pac. 20, 257; Wenner v. Thornton, 98 Ill. 156; Warring v. Hill, 89 Ind. 497; Seely v. Reid, 3 Greene (Iowa), 374; Axman v. Dueker, 45 Kan. 179, 25 Pac. 582; Shaefer v. Gates, 2 B. Mon. (Ky.) 453, 38 Am. Dec. 164; Succession of Durnford, 1 La. Ann. 92; Pease v. Whitten, 31 Me. 117; Clark v. Bryan, 16 Md. 171; Cook v. Darling, 18 Pick. (Mass.) 393; Gulickson v. Bodkin, 78 Minn. 33, 79 Am. St. Rep. 352, 80 N. W. 783; Cannon v. Cooper, 39 Miss. 784, 80 Am. Dec. 101; Cooper v. Gunter, 215 Mo. 558, 114 S. W. 943; Wingate v. Haywood, 40 N. H. 437; McDewitt v. Connell, 71 N. J. Eq. 119, 63 Atl.

504; Hendrick v. Biggar, 66 Misc. Rep. 576, 122 N. Y. Supp. 162; Ferguson v. Crawford, 70 N. Y. 253, 26 Am. Rep. 589; Cleveland Co-operative Stove Co. v. Mehling, 21 Ohio C. C. 60, 11 Ohio C. D. 400; Callen v. Ellison, 13 Ohio St. 446, 82 Am. Dec. 448; Bank of Colfax v. Richardson, 34 Or. 518, 75 Am. St. Rep. 664, 54 Pac. 359; Sloan v. McKinstry, 18 Pa. 120; Selin v. Snyder, 7 Serg. & R. (Pa.) 166; Parr v. Lindler, 40 S. C. 193, 18 S. E. 636; Stearns v. Wright, 13 S. D. 544, 83 N. W. 587; Brockerborough v. Melton, 55 Tex. 493; Guilford v. Love, 49 Tex. 715; Létney v. Marshall, 79 Tex. 513, 15 S. W. 586; Hoagland v. Hoagland, 19 Utah, 103, 57 Pac. 20; Parks v. Moore, 13 Vt. 183, 37 Am. Dec. 589; Noerdlinger v. Huff, 31 Wash. 360, 72 Pac. 73; Sommermeyer v. Schwartz, 89 Wis. 66, 61 N. W. 311; Eltonhead v. Allen, 119 Fed. 126, 55 C. C. A. 671.

¹² Callen v. Ellison, 13 Ohio St. 446, 82 Am. Dec. 448.

the judgments of courts of general jurisdiction, the decisions in this state, though perhaps not entirely uniform or consistent, do undoubtedly show a strong inclination to sustain such judgments against indirect or collateral attacks on their validity and effect. It appears to have been thought that natural justice is satisfied when notice is required, and an impartial tribunal established to ascertain and determine whether it has been given. Nor can it properly be said that such a tribunal has jurisdiction because it has so decided. Its decision is binding because it was authorized to make it, and because public policy, and the respect due to the sovereignty it represents, at least in tribunals acting under the same sovereignty, require that the decision should be regarded, while it remains on the record unimpeached and unreversed." In a Connecticut case of equal renown,¹³ the court, dealing with the occasional hardships which the adoption of the rule may entail and answering a suggestion of the possibility of an officer of the court fabricating a record, said: "It will not be denied, and has not been on the argument, that when a court has jurisdiction its record speaks absolute verity, because it is the record of the court's doings; and being a court of final jurisdiction, there must be an end to the matter in dispute, if it be possible to reach that end at all. And it is so necessary that confidence should be reposed in courts of a high character, as well as in the records of such courts, that on the whole, and in view of all the considerations affecting the subject, it is the only safe rule to give the decisions of courts of general jurisdiction full effect so long as they remain in force, rather than to leave them open to be attacked in every way and on all occasions. Being domestic judgments, they can, if erroneous, be reviewed by proceedings instituted directly for the purpose, and reversed on error, or by a new trial; and if the danger is imminent and special, relief can be

¹³ *Cold v. Haven*, 30 Conn. 190, 79 Am. Dec. 244. See, also, 1 Freeman, *Judgm.*, § 180.

temporarily, if not finally, obtained by application to a court of equity. Any other rule with regard to judgments of such courts would be attended in its application with very great embarrassment, and would be very dangerous in its general operation. The general good clearly requires, and has therefore established the rule, that domestic judgments of courts of general jurisdiction cannot be attacked collaterally." The fact of jurisdiction appearing on the record, it cannot be controverted.¹⁴

§ 612 (629). Silence of the record—Contrary views—Qualifications of general rule.—A great many of the decisions supporting the rule are in cases where the service of process appeared distinctly or by necessary implication upon the record. The authorities, however, all concede that the mere fact that the *record is silent* respecting the existence of some jurisdictional fact cannot create the presumption that such fact did not exist. On the contrary, its existence will be presumed.¹⁵ The only question is, whether the presumption may be overcome by extrinsic evidence. The preponderance of the decisions upon this question supports the doctrine that "it is a matter of no consequence whether the jurisdiction of the court affirmatively appears upon the judgment-roll or not; if it does not, it will be conclusively presumed."¹⁶ There are, how-

¹⁴ 1 Freeman, Judgm., § 131.

¹⁵ Acklen v. Goodman, 77 Ala. 521; Luco v. Commercial Bank, 70 Cal. 339, 11 Pac. 650; Evans v. Young, 10 Colo. 316, 3 Am. St. Rep. 583, 15 Pac. 424; Benefield v. Albert, 132 Ill. 665, 24 N. E. 634; Cavanaugh v. Smith, 84 Ind. 380; Treat v. Maxwell, 82 Me. 76, 19 Atl. 98; Nye v. Swan, 42 Minn. 243, 44 N. W. 9; Adams v. Cowles, 95 Mo. 501, 6 Am. St. Rep. 74, 8 S. W. 711; Clyburn v. Reynolds, 31 S. C. 91, 9 S. E. 973; Pope v. Harrison, 16 Lea (Tenn.), 82; Ferguson v. Teel, 82 Va. 690.

¹⁶ Lawler's Heirs v. White, 27 Tex. 250; Coit v. Haven, 30 Conn. 190, 79 Am. Dec. 244; McClanahan v. West, 100 Mo. 309, 13 S. W. 674; Williams v. Haynes, 77 Tex. 283, 19 Am. St. Rep. 752, 13 S. W. 1029; Littleton v. Smith, 119 Ind. 230, 21 N. E. 886; Crim v. Kessing, 89 Cal. 478, 23 Am. St. Rep. 491, 26 Pac. 1074; Wilkerson v. Schoonmaker, 77 Tex. 615, 19 Am. St. Rep. 803, 14 S. W. 223. If the judgment or decree is silent upon the subject of the service of summons, and the service shown by the return upon

ever, numerous decisions which are often cited as not being in harmony with this view. Some of these maintain that the jurisdiction of the courts under discussion may be attacked collaterally by extrinsic evidence. A large number of these cases will be found cited in a New York decision in which this question is fully discussed.¹⁷ Although it was there freely admitted that the weight of authority is otherwise, it was held that the recital of jurisdictional facts in the record of the judgment of any court is not conclusive, and may be disproved by extrinsic evidence. This decision is based in part on the fact that, under the New York Code of Procedure, equitable defenses are allowable; and it is claimed that there is no reason why the defendant in an action on the judgment should not be allowed to set up, by way of defense, any facts which would be ground for relief in equity. Other cases which hold judgments open to collateral attack for want of jurisdiction will be found cited in the notes.¹⁸ Domestic judgments cannot be questioned collaterally, although errors or irregularities may appear on the face of the proceeding, unless the errors are such as to show want of jurisdiction.¹⁹ The rule that, when a court has once acquired jurisdiction, it has a right to decide every question which arises in the case, and that

the summons is not such as will give the court jurisdiction, no doubt the judgment is void: *Swearengen v. Gulick*, 67 Ill. 208; *Bannon v. People*, 1 Ill. App. 496. This, however, does not present a case wherein the record is silent, but rather illustrates the proposition that while one part of the record is silent another part may bear witness to a jurisdictional infirmity, destructive of the life and validity of the judgment: 1 *Freeman, Judgm.*, § 132.

¹⁷ *Ferguson v. Crawford*, 70 N. Y. 253, 26 Am. Rep. 589.

¹⁸ *Williamson v. Berry*, 8 How. (U. S.) 495, 12 L. Ed. 1170; *Shriver v. Lynn*, 2 How. (U. S.) 43, 11 L.

Ed. 172; *Hickey v. Stewart*, 3 How. (U. S.) 750, 11 L. Ed. 814; *Enos v. Smith*, 7 Smedes & M. (15 Miss.) 85; *Shaefer v. Gates*, 2 B. Mon. (Ky.) 453, 38 Am. Dec. 164; *Bloom v. Burdick*, 1 Hill (N. Y.), 130, 37 Am. Dec. 299; *Wilcox v. Jackson*, 13 Pet. (U. S.) 498, 10 L. Ed. 264; *Demerit v. Lyford*, 27 N. H. 541; *Ferguson v. Crawford*, 70 N. Y. 253, 26 Am. Rep. 589; *Risley v. Phoenix Bk.*, 83 N. Y. 318, 38 Am. Rep. 421; *Galpin v. Page*, 18 Wall. (U. S.) 350, 21 L. Ed. 959. As to the rule where the jurisdictional facts do not appear in the record, see § 31, *ante*.

¹⁹ *Falkner v. Guild*, 10 Wis. 563.

its judgment, however erroneous, cannot be collaterally assailed is subject to *qualifications* in its application. "It is only correct when the court proceeds, after acquiring jurisdiction of the cause according to established modes governing the class to which the case belongs, and does not transcend, in the extent or character of its judgment, the law which is applicable to it."²⁰

§ 613 (630). Inferior courts—Jurisdiction to appear on record.—Where the judgment of a court of limited and special jurisdiction is sought to be enforced, its organization is open to inquiry, and its jurisdiction must be established by the party seeking to enforce the judgment. Thus where one, who was a captain in the militia, was deposed by the sentence of a court martial, and afterward was prosecuted by the ensign for not performing military duty, he has a right to inquire into the legality of the pro-

20 Windsor v. McVeigh, 93 U. S. 274, 23 L. Ed. 914; United States v. Walker, 109 U. S. 258, 27 L. Ed. 927, 3 Sup. Ct. Rep. 277. The statement of the doctrine by Mr. Justice Swayne, in the case of Cornett v. Williams, *sub nom.* Nash v. Williams, reported in 20 Wall. (U. S.) 226, 22 L. Ed. 254, is more accurate. "The jurisdiction," says the justice, "having attached in the case, everything done within the power of that jurisdiction, when collaterally questioned, is held conclusive of the rights of the parties, unless impeached for fraud." The utterance of Mr. Justice Field, in Windsor v. McVeigh, *supra*, was evoked by the special circumstances of that case where the party's property had been confiscated during the Civil War, and a notice to all claiming title to it having been published, the party appeared, but was denied the right as he was a rebel. The illustrations as to the necessity of the court not

"transcending" the power conferred by the law are apt. He said: "If, for instance, the action be upon a money demand, the court, notwithstanding its complete jurisdiction over the subject and parties, has no power to pass judgment of imprisonment in the penitentiary upon the defendant. If the action be for libel or personal tort, the court cannot order in the case a specific performance of a contract. If the action be for the possession of real property, the court is powerless to admit in the case the probate of a will. Instances of this kind show that the general doctrine stated by counsel is subject to many qualifications. The judgments mentioned, given in the cases supposed, would not be merely erroneous; they would be absolutely void; because the court in rendering them would transcend the limits of its authority in those cases."

ceedings of the court martial.²¹ The distinction between judgments of inferior courts and those of general jurisdiction is well marked. No presumption is to be made in favor of an inferior tribunal. The true line of distinction has been laid down in many decisions between courts whose decisions are conclusive if not removed to an appellate court, and those whose proceedings are nullities if their jurisdiction does not appear on their face. A court which is competent by its constitution to decide on its own jurisdiction, and to exercise it to a final judgment, without setting forth in its proceedings the facts and evidence on which it is rendered, whose record is absolute verity, not to be impugned by averment or proof to the contrary, is of the first description; there can be no judicial inspection behind the judgment save by appellate power. A court which is so constituted that its judgment can be looked through for the facts and evidence which are necessary to sustain it, whose decision is not evidence of itself to show jurisdiction and its lawful exercise, is of the latter description; every requisite for either must appear on the face of the proceedings, or they are nullities.²² While the

²¹ Crawford v. Howard, 30 Me. 422.

²² Grignon v. Astor, 2 How. (U. S.) 319, 11 L. Ed. 283. See, also, State v. Ely, 43 Ala. 568; In re Central Irr. Dist., 117 Cal. 382, 49 Pac. 354; Hartford v. Poindexter, 84 Conn. 121, 79 Atl. 79; McGehee v. Wilkins, 31 Fla. 83, 12 South. 228; Rutherford v. Crawford, 53 Ga. 138; Shufeldt v. Buckley, 45 Ill. 223; Newman v. Manning, 89 Ind. 422; Crown Real Est. Co. v. Rogers' Committee, 132 Ky. 790, 136 Am. St. Rep. 202, 117 S. W. 275; Crawford v. Howard, 30 Me. 422; Baltimore v. Porter, 18 Md. 284, 79 Am. Dec. 686; Clark v. Bryan, 16 Md. 171; Henry v. Estes, 127 Mass. 474; Chase v. Hathaway, 14 Mass. 222; Chaddock

v. Barry, 93 Mich. 542, 18 L. R. A. 337, 53 N. W. 785; Martin v. Williams, 42 Miss. 210, 97 Am. Dec. 456; Enos v. Smith, 15 Miss. 85; Ruckert v. Richter, 127 Mo. App. 664, 106 S. W. 1081; Tebbetts v. Tilton, 31 N. H. 273; Graham v. Whitely, 26 N. J. L. 254; Matter of Norton, 32 Misc. Rep. 224, 66 N. Y. Supp. 317; Bigelow v. Stearns, 19 Johns. 39, 10 Am. Dec. 189; Williams v. Whitaker, 110 N. C. 393, 14 S. E. 924; Adams v. Jeffries, 12 Ohio, 253, 40 Am. Dec. 477; Dick v. Wilson, 10 Or. 490; Coekley v. Rehr, 12 Pa. Co. Ct. 343; Harvey v. Huggins, 2 Bail. (S. C.) 252; Anderson v. Binford, 2 Baxt. (Tenn.) 310; Wilkerson v. Schoonmaker, 77 Tex. 615, 19 Am. St. Rep. 803, 14 S. W. 223; Nye v. Kellam,

recital of jurisdictional facts in the proceedings of inferior courts is *prima facie* evidence of such jurisdiction, there is no conclusive presumption of the truth of such recitals, and they may be contradicted by extrinsic evidence.²³ When the powers of such a court "are limited as it regards the cause of action, its locality or amount, the restriction cannot be evaded by a finding or allegation which is contrary to the truth; and if such an averment is made of record, it may be disproved, and the judgment set aside collaterally."²⁴ Whoever relies upon the judgment of a court of special jurisdiction must establish every fact necessary to confer jurisdiction upon the court.²⁵ The proceedings of all courts not of record must be shown to be within the powers granted to them by law, or such proceedings will be entirely disregarded.²⁶

§ 614 (631). Merits of foreign judgments—Not open to inquiry.—The term "foreign judgment" should be employed only to denote a judgment rendered by a court of some other nation. Sometimes the judgment of the courts of another state within the United States or of a national

18 Vt. 594; *Bryan v. Nash*, 110 Va. 329, 66 S. E. 69; *Kempe v. Kennedy*, 5 Cranch (U. S.), 173, 3 L. Ed. 70; *Harris v. Willis*, 15 Com. B. 710, 24 L. J. C. P. 93, 3 Wkly. Rep. 238, 3 C. L. R. 609. See § 36, *ante*. In some states the presumption is created by statute for both classes of courts: *In re Head*, 141 Iowa, 651, 118 N. W. 884. In others extrinsic evidence is admitted to supply jurisdictional facts: *Jolley v. Foltz*, 34 Cal. 321; *Beaudrias v. Hogan*, 23 App. Div. 83, 48 N. Y. Supp. 468.

²³ *Jenks v. Stebbins*, 11 Johns. 224; *Barber v. Winslow*, 12 Wend. 102; *Denning v. Corwin*, 11 Wend. 647; *Borden v. Fitch*, 15 Johns. 121, 8 Am. Dec. 225; *People v. Cassels*, 5

Hill (N. Y.), 164; *Clark v. Holmes*, 1 Doug. (Mich.) 390; *Willis v. Sproule*, 13 Kan. 257; *Comstock v. Crawford*, 3 Wall. (U. S.) 396, 18 L. Ed. 34.

²⁴ 1 *Smith's Lead. Cas.*, 8th ed., 1120; *Harriott v. Van Cott*, 5 Hill (N. Y.), 285; *Bowne v. Mellor*, 6 Hill (N. Y.), 496.

²⁵ *Smith v. Finley*, 52 Ark. 373, 12 S. W. 782; *Tucker v. Harris*, 13 Ga. 1, 58 Am. Dec. 488; *Cooper v. Sunderland*, 3 Iowa, 114, 66 Am. Dec. 52; *Lowry v. Erwin*, 6 Rob. (La.) 192, 39 Am. Dec. 556; *Palmer v. Oakley*, 2 Doug. (Mich.) 433, 47 Am. Dec. 41; *Horan v. Wahrenberger*, 9 Tex. 313, 58 Am. Dec. 145.

²⁶ 2 *Freeman, Judgm.*, § 517.

court held in another state than that in which it is presented for consideration has been inaccurately, though perhaps inadvertently, spoken of as foreign, but it is not a foreign judgment, and the rules of law applicable to it differ very substantially from those applicable to foreign judgments.²⁷ That some degree of respect should be paid by the courts of one country to the judgments of the courts of foreign countries is universally conceded. The obligation to give credit to foreign judgments does not depend upon any rule of international law.²⁸ It has sometimes been said to rest on grounds of international comity. But, according to other authorities, such credit is given on the principle "that the judgment of the court of competent jurisdiction over the defendant imposes a duty or obligation on the defendant to pay the sum for which judgment is given, which the courts of this country are bound to enforce."²⁹ As will appear, it is conceded on all hands that there are certain reasons on account of which a foreign judgment may be impeached. The question whether such judgments may be impeached upon the merits has given rise to an interesting and long continued controversy. The respective arguments are thus clearly stated by Smith in his note to the *Duchess of Kingston's Case*: "Upon one side, it is said that the tribunals of this country are not bound to enforce the judgments of a foreign court; that,

²⁷ U. S. Rev. Stats., § 905; *Coughran v. Gilman*, 81 Iowa, 442, 46 N. W. 1005; *Ehregren v. Gronland*, 19 Utah, 411, 57 Pac. 268; *Pennoyer v. Neff*, 95 U. S. 714, 24 L. Ed. 565; *Chase v. Curtis*, 113 U. S. 452, 28 L. Ed. 1038, 5 Sup. Ct. Rep. 554; *Embry v. Palmer*, 107 U. S. 3, 27 L. Ed. 346, 2 Sup. Ct. Rep. 25; *United States v. Cox*, 18 How. (U. S.) 100, 15 L. Ed. 299; *Standley v. Roberts*, 59 Fed. 836, 19 U. S. App. 407, 8 C. C. A. 305; *Mehlin v. Ice*, 56 Fed. 12, 12 U. S. App. 305, 5 C. C. A. 403.

²⁸ *Wheat. Int. L.*, § 147; *Hilton v. Guyot*, 159 U. S. 113, 40 L. Ed. 95, 16 Sup. Ct. Rep. 139. See notes to *Dunstan v. Higgins*, 20 L. R. A. 668-682, and *Tremblay v. Aetna Life Ins. Co.*, 94 Am. St. Rep. 532-559, for a general discussion of foreign judgments. As to the effect of judgments of Confederate courts, see note to *Freeman v. Bass*, 89 Am. Dec. 261.

²⁹ *Godard v. Gray*, L. R. 6 Q. B. 139; *Williams v. Jones*, 13 Mees. & W. 633.

when they do so, it is *de gratia*, and from a wish to extend the limits of justice, *ampliare justitiam*. But that it would be to amplify injustice, not justice, were they to enforce a sentence which ought never to have been pronounced, because against the party with whom right was. On the other side, it is answered with great force that invariable experience shows that facts can never be inquired into so well as on the spot where they arose; laws never administered so satisfactorily as in the tribunals of the country governed by them; that, if our courts were to allow matters judicially decided upon to be again opened at any distance of time or place, the consequences would be, in ninety-nine cases out of a hundred, that they would be deceived by the concoction of testimony, or by the abstraction of it, or by the want of it; and that injustice and mistakes, instead of being amended, would be generated."³⁰ We shall now proceed to consider these conflicting views and to arrive at a conclusion of how the law on the subject stands at the present time.

§ 615 (632). **Same—Conflicting views.**—In the earlier English cases, considerable latitude was given in admitting evidence as to the foreign law, and in ascertaining whether the judgment was warranted by that law; in other words, the foreign judgment was treated as little more than *prima facie* evidence in behalf of the one who offered it.³¹ But the more recent decisions have settled the doctrine that foreign judgments, even in actions *in personam*, are *conclusive*, and prevent any retrial on the merits.³² The cases

³⁰ 2 Smith's Lead. Cas., 847; Story Conf. L., § 607. See note to Tremblay v. Aetna Life Ins. Co., 94 Am. St. Rep. 538 et seq.

³¹ Phillips v. Hunter, 2 H. Bl. 410, 2 R. R. 146; Walker v. Witter, 1 Doug. 1, 99 Eng. Reprint, 1; Houl-ditch v. Donegal, 8 Bligh, N. S., 301, 5 Eng. Reprint, 955. See notes to Lazier v. Westcott, 82 Am. Dec.

413; Tremblay v. Aetna Life Ins. Co., 94 Am. St. Rep. 538.

³² Ferguson v. Mahon, 11 Ad. & E. 179, 113 Eng. Reprint, 383; Bank of Australasia v. Nias, 16 Q. B. 717, 117 Eng. Reprint, 1055; Henderson v. Henderson, 6 Q. B. 288, 115 Eng. Reprint, 111; Godard v. Gray, L. R. 6 Q. B. 139; Pemberton v. Hughes, [1899] 1 Ch. 781, 68 L. J. Ch. 281,

last cited also overrule the former doctrine of the English courts that the court would disregard a foreign judgment, if it appeared to have been rendered under a mistake of the English law.³³ Its bearing as a final settlement of the question is so important that we refer to the expressions of the opinions of Blackburn and Mellor, JJ., in the case last cited: "It is not an admitted principle of the law of nations that a state is bound to enforce within its territories the judgment of a foreign tribunal. . . . But in England and in those states which are governed by the common law, such judgments are enforced, not by virtue of any treaty, nor by virtue of any statute, but upon a principle very well stated by Parke, B.: 'Where a court of competent jurisdiction has adjudicated a certain sum to be due from one person to another, a legal obligation arises to pay that sum, on which an action of debt to enforce the judgment may be maintained. It is in this way that the judgments of foreign and colonial courts are supported and enforced.'"³⁴ Recent decisions³⁵ "seem to us to leave it no longer open to contend, unless in a court of error, that a foreign judgment can be impeached on the ground that it was erroneous on the merits; or to set up as a defense to an action on it, that the tribunal mistook either the facts or the law. . . . But the doctrine as laid down by Mr. Smith³⁶ does apply here; and we must ex-

80 L. T. 369. As to the distinction between actions *in personam* and *in rem*, see § 606, *ante*. For an extensive treatment of the question of the conclusiveness of a decree rendered in a foreign country, see notes to *Dunstan v. Higgins*, 20 L. R. A. 668, and *Fisher, Brown & Co. v. Fielding*, 32 L. R. A. 236.

³³ *Godard v. Gray*, L. R. 6 Q. B. 139.

³⁴ *Williams v. Jones*, 13 Mees. & W. 633.

³⁵ *Bank of Australasia v. Nias*, 16 Q. B. 717, 20 L. J. C. P. 284, 117

Eng. Reprint, 1055; *Bank of Australasia v. Harding*, 9 Com. B. 661, 19 L. J. C. P. 345; *De Cosse Brissac v. Rathbone*, 6 Hurl. & N. 301, 30 L. J. Ex. 238.

³⁶ In the note to *Doe v. Oliver*, 2 Smith's Lead. Cas., 2d ed., p. 148, the learned author says: "It is clear that if the judgment appear on the face of the proceedings to be founded on a mistaken notion of the English law," it would not be conclusive. In the 5th and 6th editions of Smith's Lead. Cas., by Maude & Chitty, at pp. 683 and 726, respec-

press an opinion on it, and we think it cannot be supported, and that the defendant can no more set up as an excuse, relieving him from the duty of paying the amount awarded by the judgment of a foreign tribunal having jurisdiction over him and the cause, that the judgment proceeded on a mistake as to English law, than he could set up as an excuse that there had been a mistake as to the law of some third country incidentally involved, or as to any other question of fact. It can make no difference that the mistake appears on the face of the proceedings. That, no doubt, greatly facilitates the proof of the mistake; but if the principle be to inquire whether the defendant is relieved from a *prima facie* duty to obey the judgment, he must be equally relieved, whether the mistake appears on the face of the proceedings or is to be proved by extraneous evidence." The conclusions of English jurists have now to be considered in their bearing on American decisions. The majority of the reported *American cases* were decided prior to those English decisions which have resulted in enhancing the dignity of foreign judgments in that country. It will accordingly be found that the greater number of the American courts at one time declared in favor of the law by which any foreign judgment was regarded as examinable on the merits.³⁷ Perhaps the first

tively, this has been modified to "be founded on an incorrect view of the English law, knowingly or perversely acted on."

³⁷ See *Story's Conflict of Laws*, § 608; *Williams v. Preston*, 3 J. J. Marsh. (Ky.) 600, 20 Am. Dec. 179; *Rankin v. Goddard*, 54 Me. 28, 89 Am. Dec. 718; *Jordan v. Robinson*, 15 Me. 167; *Tremblay v. Aetna L. Ins. Co.*, 97 Me. 547, 94 Am. St. Rep. 521, 55 Atl. 509; *Bissell v. Briggs*, 9 Mass. 462, 6 Am. Dec. 88; *Bartlet v. Knight*, 1 Mass. 401, 2 Am. Dec. 36; *Buttrick v. Allen*, 8 Mass. 273, 5 Am. Dec. 105; *Taylor v. Barron*, 30 N. H. 78, 64 Am. Dec. 281; *Smith v.*

Lewis, 3 Johns. (N. Y.) 157, 3 Am. Dec. 469; *Pelton v. Platner*, 13 Ohio, 209, 42 Am. Dec. 197; *Benton v. Burgot*, 10 Serg. & R. (Pa.) 240; *Boston etc. Co. v. Hoit*, 14 Vt. 92; *Hohner v. Gratz*, 50 Fed. 369. See notes to *Lazier v. Westcott*, 32 Am. Dec. 413, and *Tremblay v. Aetna Life Ins. Co.*, 94 Am. St. Rep. 539 et seq. A very strong expression of opinion will be found in *Burnham v. Webster*, Fed. Cas. No. 2178, 2 Ware (Dav. 236), 240. In Canada, the effect of foreign judgments is by statute declared to be *prima facie* only: *Manning v. Thompson*, 17 U. C. C. P. 606.

signs of the trend of the *American decisions* are to be discerned in the utterances of the great jurists Kent and Story, who advanced good reasons in favor of the conclusiveness of foreign judgments.³⁸ "To try over again as of course every matter of fact which had been duly decided by a competent tribunal, would be disregarding the comity which we justly owe to the courts of other states, and would be carrying the doctrine of re-examination to an oppressive extent. It would be the same as granting a new trial in every case and upon every question of fact. . . . I much doubt whether the rule can ever go to this length. The general language of the books is, that the defendant must impeach the judgment by showing affirmatively that it was unjust, by being irregularly or unfairly procured."³⁹ Freeman, in his great work on Judgments, foresaw the ultimate adoption of the rule of recognition. He said: "The considerations which have influenced the adjudications in the English courts will no doubt make themselves felt in America. No prediction in regard to future decisions is more likely to be realized than that our courts will in time place foreign judgments on the same footing which they now occupy in the mother country."⁴⁰ And there is in the later authorities a decided tendency toward the adoption of the rule which has come to prevail in England. After discussing the subject fully, the court of appeals of New York uses the following language: "We think the rule adopted in England, holding the same doctrine as to foreign judgments, and recognized in this state should be adopted and adhered to here in respect to such foreign judgments; and that the same principles and decisions which we have made as to judgments from the courts of the other states of the Union, should be applied to foreign judgments."⁴¹ The United States supreme

³⁸ Story, *Conflict of Laws*, § 607.

³⁹ Taylor v. Bryden, 8 Johns. (N. Y.) 173.

⁴⁰ 2 Freeman, *Judgm.*, § 597.

⁴¹ Lazier v. Westcott, 26 N. Y. 116, 82 Am. Dec. 404, and elaborate note. See, also, *Christian etc. Co. v. Coleman*, 125 Ala. 158, 27 South.

court has now practically adopted the English rule, and from their well-known decision⁴² the following excerpt clearly displays the present position in America: "In view of all the authorities upon the subject, and of the trend of judicial opinion in this country and in England, following the lead of Kent and Story, we are satisfied that where there has been opportunity for full and fair trial abroad before a court of competent jurisdiction conducting a trial upon regular proceeding after due citation or voluntary appearance of the defendant, and under a system of jurisprudence likely to secure an impartial administration of justice between the citizens of its own country and those of other countries, and there is nothing to show either prejudice in the court or in the system of laws under which it was sitting, or fraud in procuring the judgment, or any other special reason why the comity of this nation should not allow it full effect, the merits of the case should not, in an action brought in this country upon the judgment, be tried afresh, as on a new trial or an appeal upon the mere

786; *Glass v. Blackwell*, 48 Ark. 50, 2 S. W. 257; *McGrew v. Mutual Life Ins. Co.*, 132 Cal. 85, 84 Am. St. Rep. 20, 64 Pac. 103; *Fisher v. Fielding*, 67 Conn. 91, 52 Am. St. Rep. 270, 32 L. R. A. 236, 34 Atl. 714; *Baker v. Palmer*, 83 Ill. 568; *Cincinnati etc. R. Co. v. Wynne*, 14 Ind. 385; *Coughran v. Gilman*, 81 Iowa, 442, 46 N. W. 1005; *State v. Orleans R. Co.*, 38 La. Ann. 312; *Barrow v. West*, 23 Pick. (Mass.) 270; *Krolik v. Curry*, 148 Mich. 214, 111 N. W. 761; *Wernse v. McPike*, 100 Mo. 476, 13 S. W. 809; *MacDonald v. Grand Trunk R. Co.*, 71 N. H. 448, 93 Am. St. Rep. 550, 59 L. R. A. 448, 52 Atl. 982; *Elasser v. Haines*, 52 N. J. L. 10, 18 Atl. 1095; *Newton v. Hunt*, 59 Misc. Rep. 633, 112 N. Y. Supp. 573; *Monroe v. Douglas*, 4 Sand. Ch. (N. Y.) 126; *Konitzky v. Meyer*, 49 N. Y.

571; *Dunstan v. Higgins*, 138 N. Y. 70, 34 Am. St. Rep. 431, 20 L. R. A. 668, 33 N. E. 729; *Atlanta Co. v. Andrews*, 120 N. Y. 58, 23 N. E. 987; *Edwards v. Jones*, 113 N. C. 453, 18 S. E. 500; *Silver Lake Bank v. Harding*, 5 Ohio, 545; *Low v. Mussy*, 41 Vt. 393; *Griggs v. Becker*, 87 Wis. 313, 58 N. W. 396; *Hilton v. Guyot*, 159 U. S. 113, 40 L. Ed. 95, 16 Sup. Ct. Rep. 139; *Gioe v. Westervelt*, 116 Fed. 1017; *Strauss v. Conried*, 121 Fed. 199; *Ritchie v. McMullen*, 159 U. S. 235, 40 L. Ed. 133, 16 Sup. Ct. Rep. 171. See discussion of this subject in note to *Tremblay v. Aetna Life Ins. Co.*, 94 Am. St. Rep. 539 et seq.; *Black, Judg.*, 2d ed., §§ 828-830.

⁴² *Hilton v. Guyot*, 159 U. S. 113, 40 L. Ed. 95, 16 Sup. Ct. Rep. 139.

assertion of the party that the judgment was erroneous in law or in fact."⁴³

§ 616 (633). **Foreign judgments—May be impeached for fraud or want of jurisdiction—As res judicata.**—The general rule as to the conclusiveness of foreign judgments is not affected by the fact that mistake or *irregularity may appear on the face of the proceedings*,⁴⁴ although the judgment cannot be held conclusive, if the proceedings are so defective that the point decided does not clearly appear.⁴⁵ On a familiar principle, the foreign judgment may always be impeached by extrinsic evidence showing *want of jurisdiction*. If the party was not subject to the authority of the court, or no proper steps were taken to obtain service, there could be no presumption that the merits of his case have once been adjudicated. Ordinarily, the presumption indulged will be that the foreign court which pronounced judgment had jurisdiction both of the parties and the subject matter, and he who seeks to escape the effect of the judgment must assume the burden of proving and showing that jurisdiction did not in fact exist in the particular case.⁴⁶ Of his right to assail the jurisdiction there is no doubt, and he may do this by any competent evidence tending to show that the courts did not have jurisdiction of the subject matter or over the party against whom judgment was pronounced.⁴⁷ On the same principle, the judgment

⁴³ Kessler v. Armstrong Cork Co., 158 Fed. 744, 85 C. C. A. 642.

⁴⁴ 2 Smith's Lead. Cas. 841. See notes to Marx v. Fore, 11 Am. Rep. 435-440, and Lazier v. Westcott, 82 Am. Dec. 412.

⁴⁵ Obicini v. Bligh, 8 Bing. 335, 131 Eng. Reprint, 423; Callander v. Dittrich, 4 Man. & G. 82, 134 Eng. Reprint, 29, 4 Scott N. R. 682.

⁴⁶ Bruckman v. Taussig, 7 Colo. 561, 5 Pac. 152; Horton v. Critchfield, 18 Ill. 133, 65 Am. Dec. 701; Butcher v. Bank of Brownsville, 2

Kan. 70, 83 Am. Dec. 446; Gunn v. Peakes, 36 Minn. 177, 1 Am. St. Rep. 661, 30 N. W. 466; Addams v. Worden, 6 L. C. Rep. 237; McLean v. Shields, 9 Ont. 699; Montreal etc. Co. v. Cuthbertson, 9 U. C. Q. B. 78; Cowan v. Braidwood, 1 Man. & G. 882, 133 Eng. Reprint, 589, 2 Scott N. R. 138, 9 Dowl. Pr. 27; Reynolds v. Fenton, 3 Com. B. 187, 10 Jur. 668, 16 L. J. C. P. 15.

⁴⁷ Foster v. Glazener, 27 Ala. 391; Thorn v. Salmonson, 37 Kan. 441, 15 Pac. 588; Wood v. Wood, 78 Ky.

does not bind persons who were *not residents* or present in the country when the suit began,⁴⁸ although a voluntary appearance would cure the defect.⁴⁹ So the effect of the judgment may be avoided by *proof of fraud* in its procurement.⁵⁰ But the usual *presumption as to the regularity of proceedings*, and the jurisdiction of regularly constituted tribunals applies.⁵¹ It is generally held that a foreign judgment, unlike that of a sister state, *does not involve a merger* of the original cause of action.⁵² And if the plaintiff chooses to sue upon his original cause of action, instead

624; *Middlesex Bank v. Butman*, 29 Me. 19; *Long v. Hammond*, 40 Me. 204; *Rankin v. Goddard*, 54 Me. 28, 89 Am. Dec. 718, 55 Me. 389; *Bissell v. Briggs*, 9 Mass. 462, 6 Am. Dec. 88; *Folger v. Columbia etc. Co.*, 99 Mass. 267, 96 Am. Dec. 747; *McEwan v. Zimmer*, 38 Mich. 765, 31 Am. Rep. 332; *Corby v. Wright*, 4 Mo. App. 443; *Nat. Exch. Bank v. Wiley*, 3 Neb. (Unof.) 716, 92 N. W. 582; *Kerr v. Kerr*, 41 N. Y. 272; *Shepard v. Wright*, 113 N. Y. 582, 21 N. E. 724; *De Meli v. De Meli*, 120 N. Y. 485, 17 Am. St. Rep. 652, 24 N. E. 996; *Battle v. Jones*, 6 Ired. Eq. (N. C.) 567; *Wernet's Appeal*, 91 Pa. 319; *Banco Minero v. Ross* (Tex. Civ. App.), 138 S. W. 224; *Putnam v. McDougall*, 47 Vt. 478; *Smith v. Grady*, 68 Wis. 215, 31 N. W. 477; *St. Sure v. Lindsfelt*, 82 Wis. 346, 33 Am. St. Rep. 50, 19 L. R. A. 515, 52 N. W. 308; *Graham v. Spencer*, 14 Fed. 603; *Bischoff v. Wethered*, 9 Wall. 812, 19 L. Ed. 829; *Burnham v. Webster*, 1 Wood. & M. 172, Fed. Cas. No. 2179; *Ferguson v. Mahon*, 11 Ad. & E. 179, 113 Eng. Reprint, 382; *Don v. Lippman*, 5 Clark & F. 1, 7 Eng. Reprint, 303; *Reynolds v. Fenton*, 3 Com. B. 187, 16 L. J. C. P. 15, 10 Jur. 668; *Schibsbey v. Westenholz*, L. R. 6 Q. B. 155, 40 L. J. Q. B. 73, 24 L. T.

N. S., 93, 19 Wkly. Rep. 587; *Warren v. Kingsmill*, 8 U. C. Q. B. 407; *Burn v. Bletcher*, 23 U. C. Q. B. 28; *Story's Conflict of Laws*, § 608. See notes to *State v. Robertson*, 20 L. R. A. 691, and *Tremblay v. Aetna Life Ins. Co.*, 94 Am. St. Rep. 533.

⁴⁸ 2 Smith Lead. Cas., 847.

⁴⁹ *De Cosse Brissac v. Rathbone*, 6 Hurl. & N. 301.

⁵⁰ *Henderson v. Henderson*, 6 Q. B. 288, 115 Eng. Reprint, 111; *Reimers v. Druce*, 23 Beav. 145, 53 Eng. Reprint, 57; *Abouloff v. Oppenheimer*, 10 Q. B. Div. 295; *Price v. Dewhurst*, 8 Sim. 279, 59 Eng. Reprint, 111; *Lazier v. Westcott*, 26 N. Y. 146, 82 Am. Dec. 404; *Rankin v. Goddard*, 54 Me. 28, 89 Am. Dec. 718, 55 Me. 389. See note to *Tremblay v. Aetna Life Ins. Co.*, 94 Am. St. Rep. 549.

⁵¹ *Henderson v. Henderson*, 6 Q. B. 288, 115 Eng. Reprint, 111. See § 31, *ante*.

⁵² *Bank of Australasia v. Harding*, 9 C. B. 661; *Bank of Australasia v. Nias*, 16 Q. B. 717, 117 Eng. Reprint, 1055; *Bank v. Beebe*, 53 Vt. 177; *New York, L. E. & W. Ry. Co. v. McHenry*, 17 Fed. 414, 21 Blatchf. 400. See note to *Tremblay v. Aetna Life Ins. Co.*, 94 Am. St. Rep. 546.

of resorting to his judgment, it would seem that the defendant would have the right to dispute the cause of action.⁵³ It is to be noted that whatever the differences of opinion have been with regard to the effect of judgments as causes of action, there is no conflict with regard to their use for the purpose of establishing *res judicata*. It has always been admitted that full force and effect must be accorded them, and hence that they were available when pleaded in bar to prevent the parties thereto from disputing or relitigating the issues determined by them.⁵⁴ "In all other cases," said Lord Chief Justice Eyre in the well-known English case,⁵⁵ "we give entire faith and credit to the sentences of foreign courts and consider them as conclusive upon us."⁵⁶

§ 617 (634). Judgments of sister states—Want of jurisdiction may be shown.—It is elementary that neither a judgment nor a decree can be directly enforced beyond the state in which it was entered. The effect of process thereon is restricted to the state in which it was issued; and the benefit of a judgment or decree, outside of the state by

⁵³ *Smith v. Nicolls*, 5 Bing. N. C. 208, 132 Eng. Reprint, 1084; *Doe v. Huddart*, 2 Crompt., M. & R. 316, 5 Tyr. 846, 4 D. P. C. 437. Still the judgment in such a case would be *prima facie* evidence of the plaintiff's right: *Phillips v. Hunter*, 2 H. Bl. 402, 2 R. R. 146; *Hall v. Odber*, 11 East 118, 103 Eng. Reprint, 949.

⁵⁴ *Griswold v. Pitcairn*, 2 Conn. 65; *Williams v. Preston*, 3 J. J. Marsh. (Ky.) 600, 20 Am. Dec. 179; *Taylor v. Phelps*, 1 Har. & G. (Md.) 492; *Wood v. Gamble*, 11 Cush. (Mass.) 8, 59 Am. Dec. 135; *Konitzky v. Meyer*, 49 N. Y. 571; *MacDonald v. Grand Trunk etc. Co.*, 71 N. H. 448, 93 Am. St. Rep. 550, 59 L. R. A. 448, 52 Atl. 982; *Lea v. Deakin*, Fed. Cas. No. 8154, 11 Biss. 23; *Hamilton*

v. Dutch East India Co., 8 Bro. P. C. 264, 3 Eng. Reprint, 573; *Ricardo v. Garcias*, 12 Clarke & F. 368, 8 Eng. Reprint, 1450; *Messina v. Petrocochino*, L. R. 4 P. C. 144; *Castrique v. Imrie*, L. R. 4 H. L. 414; *Pemberton v. Hughes*, [1899] 1 Ch. 781, 80 L. T. 369, 47 Wkly. Rep. 354, 68 L. J. Ch. 281.

⁵⁵ *Phillips v. Hunter*, 2 H. Bl. 410, 2 R. R. 146.

⁵⁶ This opinion, says Freeman, (2 Judgm., § 592), so far as it treats the judgments as conclusive when called in question incidentally or by a plea in bar (except as a merger of a cause of action), is well supported by both English and American decisions.

whose court it was pronounced, can be secured only by some action thereon, or by presenting it as a defense in some action, or by offering it in evidence to control the determination of some issue upon which it is relevant.⁵⁷ We do not purpose to deal, except by reference, with the old conflict as to the conclusiveness of the judgments of sister states. It is well preserved in the text-books on the subject of judgments generally. Our object is rather to discuss the present day state of the law. The following instructive reference, however, calls for attention in this section. The nature of the former controversy as to the effect of judgments of sister states and the present prevailing doctrine are thus clearly stated by Clifford, J., in a case in the supreme court of the United States: "Cases may be found in which it is held that the judgments of a state court, when introduced as evidence in the tribunals of another state, are to be regarded in all respects as domestic judgments. On the other hand, another class of cases might be cited in which it is held that such judgments in the courts of another state are foreign judgments, and that, as such, the judgment is open to every inquiry to which other foreign judgments may be subjected under the rules of the common law. Neither class of these decisions is quite correct. They are not foreign judgments under the constitution and laws of Congress in any proper sense, because they shall have such faith and credit given to them in every other court within the United States as they have by law and usage in the courts of the state from whence they were taken. Nor are they domestic judgments in every sense, because they are not the proper foundation for final process, except in the state where they were rendered. Besides, they are open to inquiry as to the jurisdiction of the court and notice to the defendant. But in all other respects, they have the same

⁵⁷ *Elizabethtown S. I. v. Gerbér*, 34 N. J. Eq. 130; *McClure v. Bennen*, 37 N. C. (2 Ired. Eq.) 513, 40 Am. Dec. 437; *Turley v. Dreyfus*, 35

La. Ann. 510; *Weaver v. Cressman*, 21 Neb. 675, 33 N. W. 478; *Carter v. Bennett*, 6 Fla. 214.

faith and credit as domestic judgments.'"⁵⁸ The question then has at last been finally settled, and the result is

⁵⁸ *Memphis & Charlestown R. Co. v. Grayson*, 88 Ala. 572, 16 Am. St. Rep. 69, 7 South. 122; *Barkman v. Hopkins*, 11 Ark. 157; *Matter of Hancock*, 156 Cal. 804, 134 Am. St. Rep. 177, 106 Pac. 58; *Coit v. Haven*, 30 Conn. 190, 79 Am. Dec. 244; *Mitchell v. Garrett*, 5 Houst. (Del.) 34; *Sammis v. Wightman*, 31 Fla. 10, 12 South. 526; *Drake v. Granger*, 22 Fla. 348; *McCauley v. Hargroves*, 48 Ga. 50, 15 Am. Rep. 660; *Thum v. Pyke*, 8 Idaho, 11, 66 Pac. 157; *Harvey v. Drew*, 82 Ill. 606; *Welch v. Sykes*, 3 Gilm. (Ill.) 197, 44 Am. Dec. 689; *Citizens' State Bank v. Read*, 45 Ind. App. 158, 90 N. E. 492; *Wescott v. Brown*, 13 Ind. 83; *Raymond v. Raymond*, 1 Ind. Ter. 334, 37 S. W. 202; *O'Rourke v. Chicago etc. R. Co.*, 55 Iowa, 332, 7 N. W. 582; *Harshey v. Blackmarr*, 20 Iowa, 161, 89 Am. Dec. 520; *Chicago etc. R. Co. v. Campbell*, 5 Kan. App. 423, 49 Pac. 321; *Davis v. Connelly*, 4 B. Mon. (Ky.) 136; *Walworth v. Henderson*, 9 La. Ann. 339; *Endicott v. Morgan*, 66 Me. 456; *Sweet v. Brackley*, 53 Me. 346; *Bank of U. S. v. Merchants' Bank*, 7 Gill (Md.), 415; *Rothrock v. Dwelling-House Ins. Co.*, 161 Mass. 423, 42 Am. St. Rep. 418, 23 L. R. A. 863, 37 N. E. 206; *McDermott v. Clary*, 107 Mass. 501; *Bissell v. Briggs*, 9 Mass. 462, 6 Am. Dec. 88; *O'Dell v. Goff*, 153 Mich. 643, 117 N. W. 59; *Mutual Fire Ins. Co. v. Phoenix Ins. Co.*, 108 Mich. 170, 62 Am. St. Rep. 693, 34 L. R. A. 694, 66 N. W. 1095; *Bryan v. Farnsworth*, 19 Minn. 239; *Miller v. Ewing*, 8 Smedes & M. (Miss.) 421; *Bradley v. Welch*, 100 Mo. 258, 12 S. W. 911; *Marx v. Fore*, 51 Mo. 69, 11 Am. Rep. 432;

Fall v. Fall, 75 Neb. 104, 106 N. W. 412, 113 N. W. 175; *Snyder v. Critchfield*, 44 Neb. 66, 62 N. W. 306; *Russell v. Perry*, 14 N. H. 152; *Moulin v. Trenton Mut. L. etc. Ins. Co.*, 24 N. J. L. 222; *Smith v. Oliver*, 65 Misc. Rep. 487, 120 N. Y. Supp. 73; *Atlanta Hill Co. v. Andrews*, 120 N. Y. 58, 23 N. E. 987; *Kinnier v. Kinnier*, 45 N. Y. 535, 6 Am. Rep. 132; *Mottu v. Davis*, 151 N. C. 237, 65 S. E. 969; *McLure v. Benceni*, 2 Ired. Eq. (N. C.) 513, 40 Am. Dec. 437; *Spier v. Corll*, 33 Ohio St. 236; *De Vail v. De Vail*, 57 Or. 128, 109 Pac. 755, 110 Pac. 705; *Guthrie v. Lowry*, 84 Pa. 533; *Frothingham v. Barnes*, 9 R. I. 474; *McCreery v. Davis*, 44 S. C. 195, 51 Am. St. Rep. 794, 28 L. R. A. 655, 22 S. E. 178; *Barrett v. Oppenheimer*, 12 Heisk. (Tenn.) 298; *Redus v. Burnett*, 59 Tex. 576; *Wood v. Augustins*, 70 Vt. 637, 41 Atl. 583; *Crumlish's Admr. v. Central Imp. Co.*, 38 W. Va. 390, 45 Am. St. Rep. 872, 23 L. R. A. 120, 18 S. E. 456; *Parker v. Stoughton Mill Co.*, 91 Wis. 174, 51 Am. St. Rep. 881, 64 N. W. 751; *Bank of Chadron v. Anderson*, 6 Wyo. 518, 48 Pac. 197; *Davis v. Davis*, 174 Fed. 786, 98 C. C. A. 494; *Christmas v. Russell*, 5 Wall. 305, 18 L. Ed. 475; *Mills v. Duryee*, 7 Cranch, 481, 3 L. Ed. 411; *D'Arcy v. Ketchum*, 11 How. 165, 13 L. Ed. 648; *Thompson v. Whitman*, 18 Wall. 457, 21 L. Ed. 897. The courts of the various states are bound by the construction of a state statute given by the highest court of that state: *Glos v. Sankey*, 148 Ill. 536, 39 Am. St. Rep. 196, 23 L. R. A. 665, 36 N. E. 628. The same rule applies as to judgments in federal courts: *Sandwich*

that the judgments of courts of sister states are always subject to attack on jurisdictional grounds.⁵⁹ A defendant sued upon a judgment recovered against him in a court of record of another state, in which it is recited that he was served with process or appears by attorney, may controvert such recital, and show that he was not served with process, was not in any manner brought into court, had not submitted himself to its jurisdiction, or appeared therein by attorney or otherwise.⁶⁰ The rule is the same when, instead of contradicting a mere jurisdictional recital, the defendant undertakes to show that the return of service indorsed on the summons is false.⁶¹ These propositions have the authority of the United States supreme court. In one case⁶² the court said that the judgments of the state court "are open to inquiry as to the jurisdiction of the court and notice to the defendant." Where the *want of jurisdiction* appears from the record itself, clearly the judgment is inadmissible, and can have no effect.⁶³ The courts have gone far beyond this, and have held, not only that the jurisdiction of the court of another state may be attacked, when the want of jurisdiction appears upon the face of the proceedings, but also that it may be attacked in other cases, and even that *evidence* may be received to *contradict the record as to the jurisdictional facts* asserted

Mfg. Co. v. Earl, 56 Minn. 390, 57 N. W. 938; Ocean S. Nav. Co. v. Compania Transatlantica Espanola, 134 N. Y. 461, 30 Am. St. Rep. 685, 31 N. E. 987. As to the general subject, see notes to Hood v. State, 26 Am. Rep. 27, Bartlet v. Knight, 2 Am. Dec. 42, and Montgomery v. Consolidated etc. Co., 103 Am. St. Rep. 304-330. As to attacking state judgment in federal court, see Swift v. Meyers, 37 Fed. 37, 13 Saw. 583.

⁵⁹ 2 Freeman, Judgm., § 562.

⁶⁰ Kingsbury v. Yniestra, 59 Ala. 320; People v. Dawell, 25 Mich. 247, 12 Am. Rep. 260; Bowler v.

Huston, 30 Gratt. (Va.) 266, 32 Am. Rep. 673.

⁶¹ Webster v. Hunter, 50 Iowa, 215; Lowe v. Lowe, 40 Iowa, 220.

⁶² Christmas v. Russell, 5 Wall. (U. S.) 305, 18 L. Ed. 475.

⁶³ Shumway v. Stillman, 6 Wend. 447; Middlesex Bank v. Butman, 29 Me. 19; Tessier v. Englehart, 18 Neb. 167, 24 N. W. 734; Bissell v. Wheelock, 11 Cush. 277; Renier v. Hurlbut, 81 Wis. 24, 29 Am. St. Rep. 850, 14 L. R. A. 562, 50 N. W. 783; Rothrock v. Dwelling-House Ins. Co., 161 Mass. 423, 42 Am. St. Rep. 418, 23 L. R. A. 863, 37 N. E. 206.

therein,⁶⁴ and also as to such facts, though stated to have been passed upon by the court.⁶⁵ There have been numer-

⁶⁴ Thompson v. Whitman, *supra*.

⁶⁵ Kingsbury v. Yniestra, 59 Ala. 320; Matter of Hancock, 156 Cal. 804, 134 Am. St. Rep. 177, 106 Pac. 58; Mitchell v. Garrett, 5 Houst. (Del.) 34; Sullivan v. Kenney, 148 Iowa, 361, 126 N. W. 349; Baltzell v. Nosler, 1 Iowa, 588, 63 Am. Dec. 466; Wood v. Wood, 78 Ky. 624; Wright v. Andrews, 130 Mass. 149; Carleton v. Bickford, 13 Gray (Mass.), 591, 74 Am. Dec. 652; Gleason v. Dodd, 4 Met. (Mass.) 333; People v. Dawell, 25 Mich. 247, 12 Am. Rep. 260; Napton v. Leaton, 71 Mo. 358; Downer v. Shaw, 22 N. H. 277; Jardine v. Reichert, 39 N. J. L. 167; White v. Glover, 116 N. Y. Supp. 1059; Harris v. Hardeman, 14 How. 334, 14 L. Ed. 444; Mottu v. Davis, 151 N. C. 237, 65 S. E. 969; Kingsborough v. Tousley, 56 Ohio St. 450, 47 N. E. 541; Pennywit v. Foote, 27 Ohio St. 600, 22 Am. Rep. 340; Splane v. Splane, 29 Pa. Sup. Ct. 185; Frothingham v. Barnes, 9 R. I. 474; State v. Westmoreland, 76 S. C. 145, 8 L. R. A., N. S., 842, 56 S. E. 673; Chaney v. Bryan, 15 Lea (Tenn.), 589; Norwood v. Cobb, 24 Tex. 551; Bowler v. Huston, 30 Gratt. (Va.) 206, 32 Am. Rep. 673; Aultman v. Mills, 9 Wash. 68, 36 Pac. 1046; Ritchie v. Carpenter, 2 Wash. 512, 26 Am. St. Rep. 877, 28 Pac. 380; Rape v. Heaton, 9 Wis. 328, 76 Am. Dec. 269; Burt & Brabb Lumber Co. v. Bailey, 175 Fed. 131. Evidence has been received to show that an attorney who appeared had no authority to appear: Baltzell v. Nosler, 1 Iowa, 588, 63 Am. Dec. 466; Lawrence v. Jarvis, 32 Ill. 304; Price v. Ward, 25 N. J. L. 225; Gilman v. Gilman,

126 Mass. 26, 30 Am. Rep. 646; Ferguson v. Crawford, 70 N. Y. 253, 26 Am. Rep. 589; Koonce v. Butler, 84 N. C. 221; Sherrard v. Nevius, 2 Ind. 241, 52 Am. Dec. 508; Harshey v. Blackmarr, 20 Iowa, 161, 89 Am. Dec. 520; that an allegation in the record as to *appearance* or *personal service* on defendant was *untrue*: Finneran v. Leonard, 7 Allen, 54, 83 Am. Dec. 665; McDermott v. Clary, 107 Mass. 501; Easley v. McClinton, 33 Tex. 288; Rape v. Heaton, 9 Wis. 328, 76 Am. Dec. 269; Starbuck v. Murray, 5 Wend. 148, 21 Am. Dec. 172; Hoffman v. Hoffman, 46 N. Y. 30, 7 Am. Rep. 299; Kane v. Cook, 8 Cal. 449; Pollard v. Baldwin, 22 Iowa, 328; Marx v. Fore, 51 Mo. 69, 11 Am. Rep. 432; Aldrich v. Kinney, 4 Conn. 380, 10 Am. Dec. 151; Kingsbury v. Yniestra, 59 Ala. 320; People v. Dawell, 25 Mich. 247, 12 Am. Rep. 260; Bowler v. Huston, 30 Gratt. (Va.) 266, 32 Am. Rep. 673; Brown v. Eaton, 98 Ind. 591; Wood v. Wood, 78 Ky. 624; Thorn v. Salmonson, 37 Kan. 441, 15 Pac. 588; Aultman, Miller & Co. v. Mills, 9 Wash. 68, 36 Pac. 1046; that the *return* of service on the summons was *untrue*: Knowles v. Gas Light Co., 19 Wall. 58, 22 L. Ed. 70; Webster v. Hunter, 50 Iowa, 215; Lowe v. Lowe, 40 Iowa, 220; Carleton v. Bickford, 13 Gray, 591, 74 Am. Dec. 652; that a *recital* as to any other jurisdictional fact is *erroneous*: Ferguson v. Crawford, 70 N. Y. 253, 26 Am. Rep. 589; Kelley v. Kelley, 161 Mass. 111, 42 Am. St. Rep. 389, 25 L. R. A. 806, 36 N. E. 837; and in an action on a judgment rendered in another state on confession on power of attorney that the

ous decisions to the effect that *recitals* in the judgment of another state as to jurisdictional facts cannot be contradicted,⁶⁶ but in view of the general current of authority, as shown by the cases cited, and especially the decisions in the supreme court of the United States, there can be little doubt but that the other rule will prevail. The cases referred to were soon followed by the ruling of the same court that parol evidence was admissible to contradict the return of service indorsed by a sheriff on the summons in the case.⁶⁷

§ 618 (635). Same—Regularity presumed — Proof of fraud.—Although the want of jurisdiction may be proved, the usual *presumption as to the jurisdiction* and the regularity of proceedings of courts of general jurisdiction exists until overthrown.⁶⁸ Under the constitutional provision, the courts of the state where a judgment is offered

defendant never executed the *power of attorney* nor had any *notice* of the suit: *Wilson v. Bank of Mt. Pleasant*, 6 Leigh (Va.), 570.

⁶⁶ *Zepp v. Hager*, 70 Ill. 223; *Treharne v. Matson*, 46 Ind. App. 705, 93 N. E. 553; *Wetherill v. Stillman*, 65 Pa. 105; *Semple v. Glenn*, 91 Ala. 245, 24 Am. St. Rep. 894, 6 South. 46, 9 South. 265; *Lapham v. Briggs*, 27 Vt. 26; *Caughran v. Gilman*, 72 Iowa, 570, 34 N. E. 423; *Wilson v. Jackson*, 10 Mo. 330; *Griggs v. Becker*, 87 Wis. 313, 58 N. W. 396; *Hall v. Mackay*, 78 Tex. 248, 14 S. W. 615.

⁶⁷ *Knowles v. Gaslight etc. Co.*, *supra*. See, also, as to the admission of evidence *dehors* the judgment, *American Tube etc. Co. v. Crafts*, 156 Mass. 257, 30 N. E. 1024; *Mottu v. Davis*, 151 N. C. 237, 65 S. E. 969; *Russell v. Butler* (Tex. Civ. App.), 47 S. W. 406.

⁶⁸ *Hassell v. Hamilton*, 33 Ala. 280; *Latterett v. Cook*, 1 Iowa, 1,

63 Am. Dec. 428; *Glos v. Sankey*, 148 Ill. 536, 39 Am. St. Rep. 196, 23 L. R. A. 665, 36 N. E. 628; *Nunn v. Sturges*, 22 Ark. 389; *Scott v. Coleman*, 5 Litt. (Ky.) 349, 15 Am. Dec. 71; *Shumway v. Stillman*, 4 Cow. 292, 15 Am. Dec. 374; *Dodge v. Coffin*, 15 Kan. 277; *Bailey v. Martin*, 119 Ind. 103, 21 N. E. 346; *Buffum v. Stimson*, 5 Allen, 591, 81 Am. Dec. 767; *Stewart v. Stewart*, 27 W. Va. 167; *Mink v. Shaffer*, 124 Pa. 280, 16 Atl. 805; *Horton v. Critchfield*, 18 Ill. 133, 65 Am. Dec. 701; *Freem. Judg.*, 4th ed., § 565; *Wells, Res. Adj.*, § 538. See extended discussion in 1 *Smith's Lead. Cas.* 1086–1158. See, also, § 31 et seq., *ante*. Errors or irregularities in procedure do not affect the validity of the judgment: *Howland v. Chicago etc. Ry. Co.*, 134 Mo. 474, 36 S. W. 29; *Teel v. Yost*, 128 N. Y. 387, 13 L. R. A. 796, 28 N. E. 353.

have the right to inquire how far the judgment would be conclusive in the state where rendered; and the effect which it has there is precisely the effect which it has in every other state.⁶⁹ The presumptions indulged in support of such judgments are, however, limited to jurisdiction over persons within their territorial limits, persons who can be reached by their process, and also over those proceedings which are in accordance with the course of the common law.⁷⁰ Although it may be regarded as well settled that the subject of jurisdiction is open to inquiry, it is not so clear to what extent the judgment of a sister state may be attacked for *fraud in its procurement*. On the principle that no defenses are available which might have been proved in the original action, it would seem clear that *fraud in the cause of action* which might have been pleaded as a defense would not be available. Fraud anterior to the entry of the judgment, which is not admissible as a ground for relief in the state wherein a judgment is rendered, is equally inadmissible elsewhere. Hence relief cannot be had in another state on the ground of perjury and conspiracy in prosecuting the action in which the judgment was given,⁷¹ nor because of any fraud which might have been urged against the maintenance of the former action.⁷² It has frequently been declared that *fraud in the procurement*

⁶⁹ *Hampton v. McConnel*, 3 Wheat. 235, 4 L. Ed. 378; *McLaren v. Kahler*, 23 La. Ann. 80, 8 Am. Rep. 592, and note; *Sanborn v. Perry*, 86 Wis. 361, 56 N. W. 337; *Simmons v. Clark*, 56 Ill. 96; *Bauserman v. Blunt*, 147 U. S. 647, 37 L. Ed. 316, 13 Sup. Ct. Rep. 466; *French v. Pease*, 10 Kan. 51; *Hanley v. Donoghue*, 116 U. S. 1, 29 L. Ed. 535, 6 Sup. Ct. Rep. 242; *Renaud v. Abbott*, 116 U. S. 277, 29 L. Ed. 629, 6 Sup. Ct. Rep. 1194. See § 38, *ante*.

⁷⁰ *Galpin v. Paige*, 18 Wall. 350, 21 L. Ed. 959; *Kelley v. Kelley*, 161 Mass. 111, 42 Am. St. Rep. 389,

25 L. R. A. 806, 36 N. E. 837, where a court in Massachusetts refused to presume that a court in New York had equitable jurisdiction of a suit to annul a marriage, because of the fact that one of the parties had a husband by a former marriage living at the time.

⁷¹ *Metcalf v. Gilmore*, 59 N. H. 417, 47 Am. Rep. 217; *McDonald v. Drew*, 64 N. H. 547, 15 Atl. 148; *Engstrom v. Sherburne*, 137 Mass. 153; *Riley v. Murray*, 8 Ind. 354.

⁷² *Weir v. Vail*, 65 Cal. 466, 4 Pac. 422; *Packer v. Thompson*, 25 Neb. 688, 41 N. W. 650; *Jeter v. Fellowes*, 32 Pa. 465.

of the judgment cannot be proved as a defense, but that one seeking to avoid the effect of such a judgment must attack it directly, not collaterally, as in the case of a domestic judgment.⁷³ But in his work on Judgments, Freeman expresses the view that in bringing an action in another state, the judgment creditor must submit to the law of the forum, and must meet the charge of fraud in its procurement when presented in any form in which fraud might be urged in an action on a domestic judgment. If, in the state in which the action is pending, fraud can be pleaded to an action on a domestic judgment, it is equally available and equally efficient in actions on judgments of other states. But if, to avoid a domestic judgment for fraud, proceedings must be instituted in equity, then like proceedings, and those only, must be resorted to as against a judgment of another state.⁷⁴ It is true that two of the decisions of the supreme court of the United States contain the general statement that the plea of fraud is not available as an answer to an action on a judgment.⁷⁵ The learned author says that this depends upon the form of practice in the state where the action is brought, and that such decisions as those above cited are inapplicable in those states in which equitable, as well as legal, defenses may be pleaded and proved.⁷⁶ "Certainly," he continues, "the defendant ought, when sued in a state acting under the reformed Code of Procedure, to be permitted to assert his equitable defense in that action, instead of being required to resort

⁷³ *Christmas v. Russell*, 5 Wall. 290, 18 L. Ed. 475; *Maxwell v. Stewart*, 22 Wall. 77, 22 L. Ed. 564; *Anderson v. Anderson*, 8 Ohio, 108; *Benton v. Burgot*, 10 Serg. & R. (Pa.) 240; *Granger v. Clark*, 22 Me. 128; *Sanford v. Sanford*, 28 Conn. 6; *McDonald v. Drew*, 64 N. H. 547, 15 Atl. 148. Cannot be impeached even for *perjury* in procuring the judgment: *United States v. Throckmorton*, 98 U. S. 61, 25 L. Ed. 93 (leading case).

See next section. On the "Right to Resist Judgment of Sister State on the Ground of Fraud," see note to *Levin v. Gladstein*, in 32 L. R. A., N. S., 905.

⁷⁴ Am. Lead. Cas., 5th ed., 58, 59.

⁷⁵ *Christmas v. Russell*, 5 Wall. 290, 18 L. Ed. 475; *Maxwell v. Stewart*, 22 Wall. 77, 22 L. Ed. 564.

⁷⁶ *Freem. Judgm.*, 4th ed., § 576. See, also, *Black. Judg.*, 2d ed., § 918.

to a separate and independent suit.”⁷⁷ In other words, the judgment cannot be of greater force or more immune from attack in a sister state than it would be in its own, and, if it were procured by fraud and under circumstances which would impel the courts of the state wherein it was rendered to arrest its enforcement, then the sister state in which the action upon it is brought will sanction a similar proceeding, either, as we have said, by separate process or by permitting the defense where the statute so allows.⁷⁸

§ 619 (636). Domestic judgments not impeachable by parties for fraud.—In the opinion of the author, the weight of authority sustains the proposition that domestic judgments cannot be collaterally attacked by extrinsic evidence

⁷⁷ The note to *Levin v. Gladstein*, 32 L. R. A., N. S., 905, above referred to, contains the following useful summary: “An examination of the cases leads to the conclusion that the right to resist in one state, on the ground of fraud, a judgment rendered in another state, is no longer disputed, but that only frauds of certain kinds are adequate to make resistance effective. The frauds which hitherto have been recognized as sufficient to impeach judgments of sister states have been such as (1) went to the jurisdiction (either with respect of the subject matter or of the person) of the court to render the questioned judgment; or (2) constituted a fraud upon the law of the forum; or (3) operated to deprive the party against whom the judgment was rendered of an opportunity to defend the suit when he had a meritorious defense to it. Fraud, no matter how gross (forgery and perjury, for examples), in the conduct of the litigation, or fabrication of the cause of action, which the defendant might have met and coun-

teracted, are unavailable. The manner of resisting, on the ground of fraud, judgments of sister states, is necessarily governed by the law and practice of the forum; but whether law and equity are or are not there separately administered, it is always to the equity side of the courts that a litigant should apply, either by original direct bill or equitable defense to his adversary's action, for relief against a fraudulent judgment.”

⁷⁸ *Roberts v. Pratt*, 152 N. C. 731, 68 S. E. 240, citing *Mottu v. Davis*, 151 N. C. 237, 65 S. E. 969, where the subject is well discussed. See, also, *Sanford v. Sanford*, 28 Conn. 6; *Richmond etc. R. Co. v. Gorman*, 7 App. Cas. (D. C.) 91; *Ambler v. Whipple*, 139 Ill. 311, 32 Am. St. Rep. 202, 28 N. C. 841; *Granger v. Clark*, 22 Me. 128; *Smedes v. Ilsley*, 68 Miss. 590, 10 South. 75; *McDonald v. Drew*, 64 N. H. 547, 15 Atl. 148; *Hazen v. Lyndonville Nat. Bank*, 70 Vt. 543, 67 Am. St. Rep. 680, 41 Atl. 1046; *Bank of Chadron v. Anderson*, 6 Wyo. 518, 48 Pac. 197.

of fraud or collusion, when rendered by a court having competent jurisdiction, except by those who are not parties or privies.⁷⁹ The *remedy* of parties, *in such cases*, is by writ of error or new trial, or by a motion or proceeding in equity to set aside the judgment.⁸⁰ There are doubtless numerous authorities which are not in harmony with the foregoing propositions. Wharton says: "Whenever a party seeks to avail himself of a former judgment, fraudulently entered, the opposite party may show the fraud, and thus avoid the judgment."⁸¹ The learned author cites many cases to maintain this proposition, but some of them are not in point, and others relate to judgments of sister states. Mr. Wharton, however, qualifies his proposition by the statement that "fraud cannot be collaterally set up by a party to a judgment in any case in which he is either directly or constructively, either by action or by want of vigilance, when he was bound to be vigilant, a party to the

⁷⁹ Logan v. Central Iron etc. Co., 139 Ala. 548, 36 South. 729; Bonner v. Gorman, 71 Ark. 480, 77 S. W. 602; Carpentier v. Oakland, 30 Cal. 439; Porter v. Rountree, 111 Ga. 369, 36 S. E. 761; Kirby v. Kirby, 142 Ind. 419, 41 N. E. 809; Edmundson v. Ind. School Dist. Jackson, 98 Iowa, 639, 60 Am. St. Rep. 224, 67 N. W. 671; Smith v. Smith, 22 Iowa, 516; Gaines v. Johnston, 12 Ky. Law Rep. 779, 15 S. W. 246; Smith v. Henderson, 23 La. Ann. 649; Granger v. Clark, 22 Me. 128; Davis v. Davis, 61 Me. 395; James Clark Co. v. Colton, 91 Md. 195, 49 L. R. A. 698, 46 Atl. 386; Boston etc. R. Corp. v. Sparhawk, 1 Allen (Mass.), 448, 79 Am. Dec. 750; Haven v. Owen, 121 Mich. 51, 80 Am. St. Rep. 477, and note, 79 N. W. 938; Hennessy v. City of St. Paul, 54 Minn. 219, 55 N. W. 1123; In re Ellis, 55 Minn. 401, 43 Am. St. Rep. 514, 23 L. R. A. 287, 56 N.

W. 1056; State v. Ross, 118 Mo. 23, 23 S. W. 196; Blanchard v. Webster, 62 N. H. 467; Ross v. Wood, 70 N. Y. 8; Krekeler v. Ritter, 62 N. Y. 372; Christmas v. Russell, 5 Wall. 290, 18 L. Ed. 475; Simms v. Slacum, 3 Cranch, 300, 2 L. Ed. 446; Smith v. Lewis, 3 Johns. (N. Y.) 157, 3 Am. Dec. 469; Steph. Ev., art. 46; Freem. Judgm., 4th ed., § 334.

⁸⁰ Dugan v. McGlann, 60 Ga. 353; Ogden v. Larrabee, 57 Ill. 389; Cowin v. Toole, 31 Iowa, 513; Hayden v. Hayden, 46 Cal. 332; Carington v. Holabird, 17 Conn. 530; Hahn v. Hart, 12 B. Mon. (Ky.) 426; Binsse v. Barker, 13 N. J. L. 263, 23 Am. Dec. 720; Poindexter v. Waddy, 6 Munf. (Va.) 418, 8 Am. Dec. 749; Whittlesey v. Delaney, 73 N. Y. 571; Bresnehan v. Price, 57 Mo. 422; Kemp v. Cook, 18 Md. 130, 79 Am. Dec. 681.

⁸¹ Whart. Ev., § 797.

fraud." And he further says "that, when a party has the opportunity of applying to the court, entering the judgment, to open it, he must do so, and cannot resort to a collateral attack."⁸² The United States supreme court has dealt very fully with the question. In the leading case,⁸³ after treating of the remedies open by writ of error and new trial, the court deals with the exception where, by reason of something done by the successful party to a suit, there has been, in fact, no adversary trial or decision of the issue in the case. "Where the unsuccessful party has been prevented from exhibiting fully his case, by fraud or deception practiced on him by his opponent, as by keeping him away from court, a false promise of a compromise; or where the defendant never had knowledge of the suit, being kept in ignorance by the acts of the plaintiff; or where an attorney fraudulently or without authority assumes to represent a party and connives at his defeat; or where the attorney regularly employed corruptly sells out his client's interest to the other side,—these, and similar cases which show that there has never been a real contest in the trial or hearing of the case, are reasons for which a new suit may be sustained to set aside and annul the former judgment or decree, and open the case for a new and a fair hearing."⁸⁴ On the other hand, the doctrine is equally well settled that the court will not set aside a judgment because it was founded on a fraudulent instrument, or perjured evidence, or for any matter which was actually presented and considered in the judgment assailed.⁸⁵ It

⁸² Whart. Ev., §§ 797, 798.

⁸³ *United States v. Throckmorton*, 98 U. S. 61, 25 L. Ed. 93.

⁸⁴ See *Wells, Res Adjudicata*, § 499; *Peace v. Olney*, 20 Conn. 544; *Wierich v. De Zoya*, 7 Ill. (2 Gilm.) 385; *Kent v. Ricards*, 3 Md. Ch. 392; *Smith v. Lowry*, 1 Johns. Ch. (N. Y.) 320; *De Louis v. Meek*, 2 G. Greene (Iowa), 55, 50 Am. Dec. 491. In all these cases, and many others

which have been examined, relief has been granted, on the ground that, by some fraud practiced directly upon the party seeking relief against the judgment or decree, that party has been prevented from presenting all of his case to the court.

⁸⁵ *United States v. Throckmorton*, *supra*. *Wells*, in his very useful work on *Res Adjudicata*, says, § 499: "Fraud vitiates everything, and a

should be added that, in those jurisdictions where, by reason of the mode of procedure, *equitable defenses* may be proven *in legal actions*, it may be competent to allege and prove as a defense that the judgment relied upon has been procured by fraud.⁸⁶ There is no principle which precludes *strangers to a judgment*, who would otherwise be prejudiced in their rights, from impeaching a judgment collaterally by showing that it was obtained by the fraud of the parties or either of them, or that it was secured for the purpose of defrauding others.⁸⁷ It must not, however, be understood that *all* strangers are entitled to impeach a judgment. It is only those strangers who, if the judgment were given full credit and effect, would be prejudiced in regard to some pre-existing right, that are permitted to impeach the judgment. Being neither parties to the action, nor entitled to manage the cause nor appeal from the judgment, they are by law allowed to impeach it whenever it is attempted to be enforced against them.⁸⁸

judgment equally with a contract; that is, a judgment obtained directly by fraud, and not merely a judgment founded on a fraudulent instrument; for, in general, the court will not go again into the merits of an action for the purpose of detecting and annulling the fraud. . . . Likewise, there are few exceptions to the rule that equity will not go behind the judgment to interpose in the cause itself, but only when there was some hindrance besides the negligence of the defendant, in presenting the defense in the legal action." For cases in which the leading case has been cited and applied, see 9 Notes on U. S. Reports, 605-608, and Supplement II thereto, 190, 191.

⁸⁶ *Mandeville v. Reynolds*, 68 N. Y. 528.

⁸⁷ *Atkinson v. Allen*, 12 Vt. 619, 36 Am. Dec. 361; *Caldwell v. Walters*, 18 Pa. 79, 55 Am. Dec. 592; *De Armond v. Adams*, 25 Ind. 455;

Faris v. Durham, 5 T. B. Mon. (Ky.) 397, 17 Am. Dec. 77; *Sidensparker v. Sidensparker*, 52 Me. 481, 83 Am. Dec. 527; *Bridgeport Fire etc. Ins. Co. v. Wilson*, 34 N. Y. 275; *Second Nat. Bank's Appeal*, 85 Pa. 528; *Murchison v. White*, 54 Tex. 78; *Downs v. Fuller*, 2 Met. (Mass.) 135, 35 Am. Dec. 393; *Smith v. Cuyler*, 78 Ga. 654, 3 S. E. 406; *Shallcross v. Deats*, 43 N. J. L. 177; *Williams v. Lancaster*, 113 Ga. 1020, 39 S. E. 471; *Johnson v. Stebbins-Thompson Realty Co.*, 167 Mo. 325, 66 S. W. 933; *Hackett v. Manlove*, 14 Cal. 85; *Smith v. Henderson*, 23 La. Ann. 649; *Great Falls Mfg. Co. v. Worster*, 45 N. H. 110; *Bank of Hampton v. Fennell*, 55 S. C. 379, 33 S. E. 485; *Safe Deposit etc. Co. v. Wright*, 105 Fed. 155, 44 C. C. A. 421.

⁸⁸ 2 Freem. Judgm., § 335. And they are still further limited to frauds upon them, in that they can-

§ 620 (637). **Judgments—How proved—Should be complete.**—The best evidence of a judgment is, of course, the judgment itself.⁸⁹ As this, however, would be often found impracticable or difficult to produce, it may be proved otherwise, and we shall deal later on with the mode of proof by copies certified or exemplified. If the party offering a record does so in support of a plea of *res judicata*, or to show that he has acquired or his adversary has lost some title or right either by the judgment alone or by it and proceedings taken for its enforcement, “the whole record, so far as it concerns the formal stages, must be either produced or exemplified, and if exemplified, the exemplification must show on its face that the record is complete and is regular, nor can the record be patched with parol.”⁹⁰ “Before any document, whether an original or a copy, can be received in evidence of a judicial proceeding, it must, in general, appear that the record or entry of such proceeding has been finally *completed*.”⁹¹ A transcript of minutes extracted from the docket of a court is not admissible to prove a judgment;⁹² nor is a memorandum, not a

not found a collateral attack on the mere fact that a fraud has been practiced upon the judgment debtor: *Meckley's Appeal*, 102 Pa. 536. If it does not affect them, they cannot attack it. If it does, then they have the benefit of the rule that subsequent creditors and plaintiffs in junior judgments may collaterally impeach the senior judgment as having been entered or obtained by collusion between plaintiff and defendant, with intent to defraud or hinder such subsequent creditors. In such case, if the impeachment be successful, the effect is not to vacate the judgment, but only to disallow its interfering lien, so far as such subsequent creditors are concerned, leaving it in force as between the original parties, and for all other

purposes. Fraud, however, cannot be presumed in such a case: *Safe Deposit & Trust Co. v. Wright*, 105 Fed. 155, 44 C. C. A. 421.

⁸⁹ § 200, *ante*.

⁹⁰ Wharton on Evidence, § 824; 2 Freeman, *Judgm.*, § 407; Harper v. Rowe, 53 Cal. 233; Davidson v. Murphy, 13 Conn. 213; Donald v. McKinnon, 17 Fla. 746; Mitchell v. Mitchell, 40 Ga. 11; Muller v. Rhuman, 62 Ga. 332; Miles v. Wingate, 6 Ind. 458; Miller v. Deaver, 30 Ind. 371; Smith v. Smith, 22 Iowa, 516; Ogden v. Walters, 12 Kan. 282; Morrill v. Foster, 33 N. H. 379.

⁹¹ Tayl. Ev., 10th ed., § 1570. As to finality of judgments, see § 595, *ante*.

⁹² Ferguson v. Harwood, 7 Cranch, 408, 3 L. Ed. 386; Pepin v. Lachen-

copy, furnished by the clerk of the court showing the substance of the judgment, competent, although it is the custom of the court to deliver such memoranda as evidence.⁹³ It is not necessary to the admissibility of a judgment that it be contained in the formal judgment-roll of the common law. The record may be contained in the judgment-book or docket, as provided by the local law or custom;⁹⁴ or where a formal record is not required by law to be made up, those entries which are permitted to stand in its place are admissible.⁹⁵ Thus, sworn copies of docket entries were held admissible to show the pendency of an action.⁹⁶ "If the *record is lost*, and is ancient, its existence and contents may sometimes be presumed; but whether it be ancient or recent, after proof of the loss, its contents may be proved, like any other document, by any secondary evidence, where the case does not, from its nature, disclose the existence of other and better evidence."⁹⁷ The authorities are almost unanimous in affirming that if a judgment record is lost, its contents may be proved by the best

meyer, 45 N. Y. 27; Gibson v. Holmes, 78 Vt. 110, 4 L. R. A., N. S., 451, 62 Atl. 11.

⁹³ Wade v. Odeneal, 3 Dev. L. (N. C.) 423; Lamar v. Pearre, 90 Ga. 377, 17 S. E. 92; Billingsley v. Hiles, 6 S. D. 445, 61 N. W. 687; Thompson & Lively v. Mann, 53 W. Va. 432, 44 S. E. 246. A judgment cannot be proved by the mere *certificate of the clerk*: Lansing v. Russell, 3 Barb. Ch. (N. Y.) 325; or that of an *attorney* in the case: Tuthill v. Davis, 20 Johns. (N. Y.) 285; or by the *entries of the judge*: Miller v. Wolf, 63 Iowa, 233, 18 N. W. 889; Moore v. Bruner, 31 Ill. App. 400; or by the *collateral statement of the witnesses of the adverse party*: Seaton v. Cordray, 1 Wright (Ohio), 102.

⁹⁴ Den v. Downam, 13 N. J. L. 135; Penn v. Meeks, 2 N. J. L. 151; Harvey v. Brown, 1 Ohio, 268.

⁹⁵ Philadelphia, W. & B. Ry. Co. v. Howard, 13 How. 307, 14 L. Ed. 157.

⁹⁶ Philadelphia, W. & B. Ry. Co. v. Howard, 13 How. 307, 14 L. Ed. 157; Read v. Sutton, 2 Cush. (Mass.) 115.

⁹⁷ 1 Greenl. Ev., §§ 84, 509. Mr. Greenleaf's rule is, beyond a doubt, sustained by the weight of the authorities: Ames v. Hoy, 12 Cal. 11; In re Warfield's Will, 22 Cal. 51, 83 Am. Dec. 49; Stockbridge v. West Stockbridge, 12 Mass. 400; Jackson v. Crawfords, 12 Wend. (N. Y.) 533; Newcomb v. Drummond, 4 Leigh (Va.), 57; Jackson v. Cullum, 2 Blackf. (Ind.) 228, 18 Am. Dec. 158; Davies v. Pettit, 11 Ark. 349; Mason v. Bull, 26 Ark. 164; Parry v. Walser, 57 Mo. 169; McQueen v. Fletcher, 4 Rich. Eq. (S. C.) 152.

secondary evidence which can be obtained, and hence may be established by parol.⁹⁸ But in the absence of the loss or destruction of the record, it cannot be proved otherwise than by the *original*, or by a *duly authenticated copy*.⁹⁹

§ 621 (638). **Proof of parts of record—Verdict.**—There are instances in which but a part of a record is relevant, as where the object is to show that a party made certain admissions in a pleading. When such is the case, only that part of the record containing such admission need be offered in evidence; and if more is offered, it should be excluded.¹⁰⁰ When it is only sought to be proved that a judgment of a given character has been rendered, it is not necessary to the admissibility of the judgment as evidence that all the various proceedings be shown.¹ But if it becomes material to show the *particular issue* on which the judgment was rendered, *the pleadings must be offered*. Frequently it has been held that judgments were inadmissible on the ground that other parts of the record should have been offered as laying the foundation.² If the adverse party can derive benefit by producing the antecedent or subsequent proceedings, he, of course, has the right to do so.³ When one party introduces and reads from a record that which suits his purpose, the other party may

⁹⁸ Foulk v. Colburn, 48 Mo. 225; Parry v. Walser, 57 Mo. 169; Mandeville v. Reynolds, 68 N. Y. 528; Bailey v. Martin, 119 Ind. 103, 21 N. E. 346.

⁹⁹ State v. Rugan, 68 Mo. 214; Rutherford v. Crawford, 53 Ga. 138; Tuttle v. Jackson, 6 Wend. (N. Y.) 213, 21 Am. Dec. 306. A record may be proved by the original as well as by copy: State v. Voight, 90 N. C. 741; 2 Freeman, Judgm., § 407.

¹⁰⁰ Wharton on Evidence, § 832; McGowen v. Young, 2 Stew. (Ala.) 276.

¹ Packard v. Hill, 7 Cow. (N. Y.) 434; Gardere v. Columbia Ins. Co.,

7 Johns. (N. Y.) 514; Watson v. Jones, 41 Fla. 241, 25 South. 678; Stringfellow v. Stringfellow, 112 Ga. 494, 37 S. E. 767; Rainey v. Hines, 121 N. C. 318, 28 S. E. 410; Walker v. Doane, 108 Ill. 236; Chicago & S. E. Ry. Co. v. Grantham, 165 Ind. 279, 75 N. E. 265. See, also, Thomas v. Stewart, 92 Ind. 246.

² Hallum v. Dickinson, 47 Ark. 120, 14 S. W. 477; Kerchner v. Frazier, 106 Ga. 437, 32 S. E. 351; Rule v. State (Miss.), 22 South. 872.

³ Rathbone v. Rathbone, 10 Pick. (Mass.) 1; Walker v. Doane, 108 Ill. 236. See, also, Miller v. Mills, 32 Okl. 388, 122 Pac. 671.

read for his own benefit all that relates to that subject, or require the party introducing the record to do so.⁴ A certificate of the result of the record, by whomsoever made, is not admissible. Hence a certificate, though under the hand of a clerk of a court and attested by its seal, that a divorce was decreed by the court, "as will more fully appear by the record of the proceedings in this office," is inadmissible, because "an official certificate of what is contained in a record, docket, deed, or other instrument is not admissible in evidence, unless made so by statute."⁵ A judgment which has been declared utterly invalid is not admissible for any purpose.⁶ Although the usual method of proving the proceedings of a court is by the record as completed and extended, it has frequently been held that the minutes or memoranda upon the *docket of the clerk* of the court or the magistrate are competent evidence of an order or proceeding in court, in case the extended record has not been made.⁷ The docket is the record, until the record is fully extended; and the same rules of verity apply to it as to the record. Every statement therein is deemed to have

⁴ Tappan v. Beardsley, 10 Wall. 427, 19 L. Ed. 947. See § 171, *ante*.

⁵ Jay v. East Livermore, 56 Me. 107; Oakes v. Hill, 14 Pick. (Mass.) 442; McGuire v. Sayward, 22 Me. 230; English v. Sprague, 33 Me. 440. Nor can a paper be admitted which is certified to be an extract from the record: Jay v. East Livermore, *supra*. An incomplete record of a suit for divorce is not admissible, either to prove a divorce by a court of competent jurisdiction, or that a party thereto "in good faith believed she had been divorced": Davis v. Commonwealth, 13 Bush (Ky.), 318. A record of a judgment is an entire thing, and includes the pleadings forming the issue determined; and to prove the judgment as a cause of action, it is necessary,

at least where objection is made to prove the pleadings. In such cases if the judgment or the judgment and findings are offered in evidence, without producing or offering the other parts of the judgment-roll, they must be excluded: Mason v. Wolff, 40 Cal. 246; Mayo v. Brittan, 34 La. Ann. 984; Brown v. Eaton, 98 Ind. 591; Robertson v. Huffman, 92 Ind. 247.

⁶ Agnew v. Adams, 26 S. C. 101, 1 S. E. 414; Miller v. Barkeloo, 8 Ark. 318.

⁷ Townsend v. Way, 5 Allen (Mass.), 426; McGrath v. Seagrave, 2 Allen (Mass.), 443, 79 Am. Dec. 797; Pruden v. Alden, 23 Pick. (Mass.) 184, 34 Am. Dec. 51; Commonwealth v. Hatfield, 107 Mass. 227.

been made by the direction of the court.⁸ In like manner, the journals and *minutes* of the courts may be evidence;⁹ but not for the purpose of contradicting the record.¹⁰ Although it may sometimes be relevant to show that a *verdict* has been rendered, as an incidental fact or by way of inducement,¹¹ yet it is the general rule that a verdict without the judgment is inadmissible as evidence of the facts found, and that it constitutes no bar.¹² The verdict may have been set aside; and the court will not presume that a judgment was entered on the verdict.¹³ But the general rule does not apply in those courts where the court has no authority to arrest judgment or grant a new trial, as in justice court.¹⁴ *Bills in chancery* were always admissible without other parts of the record. Originally it was held that in order to make the *answer* admissible the bill should also be offered.¹⁵ But under the modern system of pleading the answer or parts of the answer would probably be received as an admission without proof of the bill.¹⁶

§ 622 (639). Proof of judgments in courts where rendered.—As we have already shown, the best evidence is the judgment itself, or, as Greenleaf puts it, “as to the

⁸ Read v. Sutton, 2 Cush. (Mass.) 115; Davis v. Smith, 79 Me. 351, 10 Atl. 55; Gay v. Rodgers, 109 Ala. 624, 20 South. 37.

⁹ Rex v. Browne, 3 Car. & P. 572, M. & M. 315.

¹⁰ Den v. Downam, 13 N. J. L. 135; Mandeville v. Stockett, 28 Miss. 398.

¹¹ Barlow v. Dupuy, 1 Mart., N. S., (La.) 442.

¹² In re Holbert's Estate, 57 Cal. 257; Pearson v. Post, 2 Dak. 220, 9 N. W. 684; Attica State Bank v. Benson, 8 Kan. App. 566, 54 Pac. 1037; Donaldson v. Jude, 2 Bibb (Ky.), 57; Humphreys v. Browne, 19 La. Ann. 158; Schurmeier v. Johnson, 10 Minn. (Gil. 250) 319; Gapen v. Bretternitz, 31 Neb. 302, 47 N.

W. 918; De Forest v. Andrews, 27 Misc. Rep. 145, 58 N. Y. Supp. 358; Dunlap v. Robinson, 12 Ohio St. 530; Ferguson v. Staver, 40 Pa. 213; Ragan v. Kennedy, 1 Overt. (Tenn.) 91; Smith v. McCool, 16 Wall. 560, 21 L. Ed. 324.

¹³ Ragan v. Kennedy, 1 Overt. (Tenn.) 91.

¹⁴ Felter v. Mulliner, 2 Johns. (N. Y.) 181.

¹⁵ Gilbert, Ev. 55.

¹⁶ In Edwards v. Mattingly, 107 Ky. 332, 53 S. W. 1032, it was held that an answer signed and sworn was competent evidence against the party making it, and that the trial court erred in refusing to admit it without the rest of the pleadings.

proof of *records*, this is done either by mere production of the records, without more, or by a copy."¹⁷ The judgment itself may be produced for the inspection of the court when such judgment becomes relevant in another action in the same court. Such a judgment requires no authentication when produced by the clerk, as the court takes judicial notice of its own records.¹⁸ At common law, office copies of records in the same cause were also admissible in such cases.¹⁹ In this country, office copies are seldom used; and the mode of proof of judgments in the same court is by the original records, or by an exemplified, certified or examined copy. We have dealt with the proof by copies in the preceding chapter.²⁰

§ 623 (640). Proof of records of courts in the same state—Inferior courts.—The propositions dealt with in the preceding section apply with all force to the proof of records of other courts in the same state. The records of other courts within the same state are generally proved by the production of *copies, certified or exemplified* by the clerk of the court having their custody.²¹ Statutes are generally enacted prescribing the substance of the certificate in such cases, and providing that the copy, when properly certified with the seal of the court affixed, shall have the same effect as the original.²² In other states, copies of the records,

¹⁷ 1 Greenleaf, Ev., § 501.

¹⁸ Peck v. Land, 2 Ga. 1, 46 Am. Dec. 368; Prescott v. Fisher, 22 Ill. 390; Harrison v. Kramer, 3 Iowa, 543; Odiorne v. Bacon, 6 Cush. (Mass.) 185; Sutcliffe v. State, 18 Ohio, 469, 51 Am. Dec. 459; Ward v. Saunders, 6 Ired. L. (N. C.) 382; Adams v. State, 11 Ark. 466; Wallis v. Beauchamp, 15 Tex. 303; Larco v. Casaneuava, 30 Cal. 560.

¹⁹ Denn v. Fulford, 2 Burr. 1177, 97 Eng. Reprint, 775; Jack v. Kiernan, 2 Jebb & S. 231. As to office copies, see § 523, *ante*.

²⁰ See §§ 523, 524, *ante*.

²¹ Turnbull v. Payson, 95 U. S. 418, 24 L. Ed. 437; Fitzpatrick v. Simonson Bros. Mfg. Co., 86 Minn. 140, 90 N. W. 378; Burge v. Gandy, 41 Neb. 149, 59 N. W. 359. See the late cases: Wynkoop v. Shoemaker, 37 App. D. C. 258; McKinnon v. Lewis, 64 Fla. 378, 60 South. 223; Weaver v. Tuten, 138 Ga. 101, 74 S. E. 835; James v. Midland Grocery etc. Co. (Tex. Civ. App.), 146 S. W. 1073.

²² See the statutes of the jurisdiction.

attested by the clerk, have been received in evidence in other courts by immemorial usage.²³ The *original records* of the proceedings of other courts within the same state are also admissible, when identified by the oath of the proper custodian.²⁴ The *original* is, of course, *admissible* whenever a copy would be competent.²⁵ It is not sufficient that a witness identifies certain papers as those which were formerly filed by him when he was clerk of the court, nor that another witness testifies that he received the papers from the present clerk of the court;²⁶ nor is it sufficient for an attorney to produce such records without other authentication.²⁷ But the court may take judicial notice of the clerk's signature, although from another district.²⁸ Owing to the inconvenience of the removal of public records, the practice generally prevails of proving such records by copies certified by the clerk of the court or by the judge,²⁹ or by *sworn copies* of the same.³⁰ The certificate should, of course, explicitly state that the document is a true copy of the original, and, if based upon a statute, should substantially comply therewith. *Statutes* prescribing the mode of authenticating

²³ Ladd v. Blunt, 4 Mass. 402; Commonwealth v. Phillips, 11 Pick. (Mass.) 28; Chamberlin v. Ball, 15 Gray (Mass.), 352.

²⁴ Odiorne v. Bacon, 6 Cush. (Mass.) 185 (by statute); Hart v. Stone, 30 Conn. 94; State v. Hunter, 94 N. C. 829; Rogers v. Tillman, 72 Ga. 479; Hardin v. Blackhear, 60 Tex. 132; People v. Alden, 113 Cal. 264, 45 Pac. 327.

²⁵ Davidson v. State, 68 Ala. 356; McAllister v. People, 28 Colo. 156, 63 Pac. 308; Gray v. Davis, 27 Conn. 447; Sellers v. Page, 127 Ga. 633, 56 S. E. 1011; Iles v. Watson, 76 Ind. 359; Blocker v. City of Owensboro, 129 Ky. 75, 33 Ky. Law Rep. 478, 110 S. W. 369; Folsom v. Cressey, 73 Me. 270; Carp v. Queen Ins. Co., 203 Mo. 295, 101 S. W. 78; Blair v. Kingman Implement Co.,

87 Neb. 736, 128 N. W. 632; State v. Hunter, 94 N. C. 829; Morgan v. Burnett, 18 Ohio, 535; Manning v. State, 46 Tex. Cr. 326, 3 Ann. Cas. 867, 81 S. W. 957; Paul v. Slason, 22 Vt. 231, 54 Am. Dec. 75; Bradley Timber Co. v. White, 121 Fed. 779, 58 C. C. A. 55; Mumford v. Powder Co., 37 Nova Scotia, 375.

²⁶ Lyon v. Bolling, 14 Ala. 753, 48 Am. Dec. 122; Darden v. Neuse & T. Co., 107 N. C. 437, 125 S. E. 46.

²⁷ Bigham v. Coleman, 71 Ga. 176.

²⁸ Sherrerd v. Frazer, 6 Minn. 572.

²⁹ Brackett v. Hoitt, 20 N. H. 257; Metzger v. Burnett, 5 Kan. App. 374, 48 Pac. 599.

³⁰ White v. Burnley, 20 How. 235, 15 L. Ed. 886; Harvey v. Cummings, 68 Tex. 599, 5 S. W. 513; Karr v. Jackson, 28 Mo. 316.

domestic records or those from sister states vary in form, of course, but they generally provide that the seal of the court shall be annexed to the copy which shall be certified by the clerk or judge to have been carefully compared by him with the original, and to be a true copy thereof.³¹ These statutes not only relate to judgments but to other parts of the record. "The judgments of *inferior courts* are usually proved by producing from the proper custody the book containing the proceedings; and as the proceedings in these courts are not usually made up in form, the minutes, or examined copies of them, will be admitted, if they are perfect. If they are not entered in books, they may be proved by the officer of the court, or by any other competent person. In either case, resort will be had to the best evidence to establish the tenor of the proceedings; and therefore, where the course is to record them, which will be presumed until the contrary is shown, the record, or a copy properly authenticated, is the only competent evidence. The caption is a necessary part of the record; and the record itself, or an examined copy, is the only legitimate evidence to prove it."³²

§ 624 (641). Mode of proof of foreign records.—The best evidence of a foreign record is the record itself.³³ As, however, it would be impracticable to produce the original records, they are invariably proved by copies which require to be authenticated with great care and precision. In an early case in the supreme court of the United States it was determined that foreign judgments may be authen-

³¹ See the statute of jurisdiction. As to authentication of foreign judgments, see § 624 et seq., *post*. On secondary evidence to identify record of justice of the peace, see note to *Junior v. State*, 2 L. R. A., N. S., 652.

³² 1 Greenl. Ev., § 513. In an action in Canada on a judgment rendered by a justice of the peace

in Michigan, the judgment was proved by introducing the book in which the judgment was recorded, and by proving that the handwriting was that of the justice, and that the witness remembered the rendition of the judgment: *Kerby v. Elliott*, 13 U. C. Q. B. 367.

³³ *Spaulding v. Vincent*, 24 Vt. 501.

ticated in the following modes: (1) By an exemplification under the great seal; (2) by a copy proved to be a true copy; (3) by the certificate of an officer authorized by law, which certificate itself must be properly authenticated. These are the usual, and appear to be the most proper, if not the only, modes of verifying foreign judgments. If they be all beyond the reach of the party, other testimony, inferior in its nature, may be received.³⁴ It is evident that this includes the common-law method of proof by a sworn copy.³⁵ And the rule generally prevailing in the United States is, that a foreign judgment may be proved by a copy thereof, duly authenticated by the duly authenticated certificate of an officer properly authorized by law to give a copy. The clerk or prothonotary of a court is presumed to possess authority to make and certify copies of the records of the court in his keeping, and such copies are duly authenticated by his certificate over his official signature, and by the seal of the court. His official signature and the seal are duly authenticated by the great seal of the state or government in which the court is found, affixed to the certificate of the keeper thereof. The great seal proves itself.³⁶ A judgment rendered at Havana was held admissible on proof that the copy was signed by the clerk of the court, the keeper of its records, whose duty it was to certify them; and on further proof that the court had no seal; that the signature of the clerk validated its proceedings; that the seal annexed was that of the Royal College of Notaries, and that the document was authenticated in the customary way in which records were authenticated to be

³⁴ *Church v. Hubbart*, 2 Cranch. 238, 2 L. Ed. 249. See note to *Lazier v. Westcott*, 82 Am. Dec. 411. See, also, the late cases: *Cruz v. O'Boyle*, 197 Fed. 824 (Mexican judgment); *Thompson v. Fitz Gerald*, 233 Pa. 242, 82 Atl. 212 (British judgment).

³⁵ *Lincoln v. Battelle*, 6 Wend. (N. Y.) 475; *Hill v. Packard*, 5

Wend. 375; *Condit v. Blackwell*, 19 N. J. Eq. 193.

³⁶ *Knox v. Silloway*, 10 Me. 201; *Pose v. Manly*, 19 Me. 331; *Day v. Moore*, 13 Gray (Mass.), 522; *Gunn v. Peakes*, 36 Minn. 177, 1 Am. St. Rep. 661, 30 N. W. 466; *Mahurin v. Bickford*, 6 N. H. 567; *Brooks v. Daniels*, 22 Pick. (Mass.) 498; *Dozier v. Joyce*, 8 Port. (Ala.) 303.

sent to foreign countries.³⁷ A record with the attestation of the clerk, with the seal of the court and the certificate of the chief justice that the person attesting the record is the clerk and that his signature is genuine, and with the certificate of the assistant Secretary of State of the province, accompanied by that of the governor in charge of the province, attested by the great seal, and certifying that such court is lawfully and duly constituted, and specifying its jurisdiction, and which also verifies the signature of the clerk and of the chief justice, is a sufficient exemplification.³⁸ The admission of a record of a foreign court is authorized, if the proceeding has the attestation of the clerk of such court, with the certificate of the chief justice that the person attesting is such clerk and that his signature is genuine, and with the further certificate of the Secretary of State, or other officer holding the great seal, purporting that the court is duly constituted, specifying generally the nature of its jurisdiction, and verifying the seal and signature of the clerk and of the chief justice; and if it be admitted that the person signing as clerk was in fact such clerk, the certificates of the chief justice and of the Secretary of State are superfluous.³⁹

§ 625 (642). **Same—Mode of authentication.**—We have now to consider how the copy of a foreign record shall be verified to be admissible, so that the best possible evidence that it is a copy may be furnished by the party desiring to use it. As often happens, the illustration of what has been held to be insufficient verification is a material aid in considering what requirements are essential. The authentication is sufficient if application was made to the reputed clerk of the court for a copy, and if the witness assisted the clerk in comparing the copy with the record and in

³⁷ Packard v. Hill, 7 Cow. (N. Y.) 434; Hill v. Packard, 5 Wend. (N. Y.) 375.

³⁸ Lazier v. Westcott, 26 N. Y. 146, 82 Am. Dec. 404.

³⁹ Capling v. Herman, 17 Mich. 524.

affixing the seal of the court to the copy and saw the clerk attest the same.⁴⁰ So it is sufficient to show by an expert that the record is authenticated in the manner authorized in the country whence it came, the signature of the judge of the court and the seal affixed being proved genuine.⁴¹ Copies of foreign records are not proved by the mere fact that they purport to be under the hands and seals of the officers of such courts. There must, in such cases, be some *extrinsic proof of the genuineness of the signatures and seals*.⁴² But as we have stated in the last preceding section, the clerk or prothonotary of a court is presumed to possess authority to make and certify copies of the records of the court in a certificate over his official signature, together with the seal of the court. His official signature and the seal must be duly authenticated in the manner therein set forth.⁴³ But a copy of a Portuguese decree, certified by the signing of a name, with the addition to it of "secretary of state of foreign affairs," with a private seal, is neither sufficient as an authentication nor admissible as secondary evidence.⁴⁴ "It has been held that an exemplification may be admitted on proof by an expert of the genuineness of the seal of the court and of the signature of the judge; and when the court has no seal, by proof of the handwriting of the clerk, and of the regularity of the exemplification."⁴⁵ The record of a judgment rendered in a court of the kingdom of Denmark under the Great Seal of the king has been held sufficient. "The Seal,"

⁴⁰ Buttrick v. Allen, 8 Mass. 273, 5 Am. Dec. 105; Pickard v. Bailey, 26 N. H. 152.

⁴¹ Owings v. Nicholson, 4 Har. & J. (Md.) 66.

⁴² Delafield v. Hand, 3 Johns. (N. Y.) 310; Griswold v. Piteairn, 2 Conn. 85; Word v. McKinney, 25 Tex. 258. Evidently parol evidence is insufficient: Tharpe v. Pearce, 89 Ga. 194, 15 S. E. 647.

⁴³ Gunn v. Peakes, 36 Minn. 177,

1 Am. St. Rep. 661, 30 N. W. 466; Lazier v. Westcott, 26 N. Y. 146, 82 Am. Dec. 404, and note. See § 624, *ante*.

⁴⁴ Church v. Hubbard, 2 Cranch, 187, 2 L. Ed. 249; Vandervoort v. Columbian Ins. Co., 2 Caines (N. Y.), 155.

⁴⁵ Wharton, Ev., § 110; Owings v. Nicholson, 4 Har. & J. (Md.) 66; Packard v. Hill, *supra*.

said the court in a Connecticut case, "proves itself, and the court is bound to take judicial notice of it. This is all the evidence required by our law to prove a foreign judgment, and the record was properly admitted."⁴⁶ The seal of a court of admiralty, like a national seal, proves itself. Accordingly, the record of a court of vice-admiralty in Bermuda, purporting to be certified by the deputy registrar, under the seal of the court, is admissible in evidence without other proofs of authenticity.⁴⁷ The practitioner will find statutes in some states regulating the mode of authenticating foreign judgments.⁴⁸ These in some cases dispense with proof of the genuineness of the signature of the certifying officer and of the seal of the court, making the mode of proof similar to that of judgments of sister states.⁴⁹ Other cases illustrating mode of proof of foreign records will be found in the notes.⁵⁰

§ 626 (643). Proof of records of sister states—Federal statutes.—For the reasons already given, we have endeavored to keep distinct the discussion of "foreign" records and those of sister states. It is clearly beyond the province of this work to discuss or set forth the statutes of the

⁴⁶ *Griswold v. Piteairn*, 2 Conn. 85.

⁴⁷ *Thompson v. Stewart*, 3 Conn. 171, 8 Am. Dec. 168.

⁴⁸ See the statutes of the jurisdiction. As to authentication of records of sister states, see next sections.

⁴⁹ See the statutes of the jurisdiction.

⁵⁰ *Russel v. Union Ins. Co.*, 4 Dall. 421, 1 L. Ed. 892; *Yeaton v. Fry*, 5 Cranch, 335, 3 L. Ed. 117; *Stein v. Bowman*, 13 Pet. 209, 10 L. Ed. 129; *Slaughter v. Cunningham*, 24 Ala. 260, 60 Am. Dec. 463; *Smith v. Redden*, 5 Harr. (Del.) 321; *United States v. Delespine*, 12 Pet. 654, 9 L. Ed. 1232; *James v. Kerby*, 29

Ga. 684; *Atwood v. Buck*, 113 Ill. 268; *Elmondorff v. Carmichael*, 3 Litt. (Ky.) 472, 14 Am. Dec. 86; *De Sobry v. De Laistre*, 2 Har. & J. (Md.) 191, 3 Am. Dec. 535; *Stewart v. Swanzy*, 23 Miss. 502; *Clarke v. Diggs*, 6 Ired. L. (N. C.) 159, 44 Am. Dec. 73; *Stanglein v. State*, 17 Ohio St. 453; *Spaulding v. Vincent*, 24 Vt. 501; *Hadfield v. Jameson*, 2 Munf. (Va.) 53; *Succession of Lorenz*, 41 La. Ann. 1091, 7 L. R. A. 265, 6 South. 886; *Capling v. Herman*, 17 Mich. 524; *Linton v. Baker*, 1 Neb. (Unof.) 896, 96 N. W. 251; *Gunn v. Peakes*, 36 Minn. 177, 1 Am. St. Rep. 661, 30 N. W. 466. As to foreign nonjudicial documents, see § 538, *ante*.

several states respecting the authentication of records. But there is a *federal statute* on the subject which furnishes a rule of universal application in this country which should be carefully examined. The statute provides that the records and judicial proceedings of any state or territory, or of any country subject to the jurisdiction of the United States, "shall be proved or admitted in any other court within the United States by the attestation of the clerk and the seal of the court annexed, if there be a seal, together with the certificate of the judge, chief justice or presiding magistrate that the said attestation is in due form."⁵¹ And the said records and judicial proceedings, so authenticated, shall have such faith and credit given to them in every court within the United States as they have by law or usage in the courts of the state from which they are taken."⁵² It is well settled that, while a compliance with this statute is sufficient in any jurisdiction, the statute does not prevent the several states from prescribing other modes of authentication, less formal, or from using the common-law modes. *The statute is not exclusive.*⁵³ But while the states may dispense with part of the formalities required by Congress, they *cannot compel a more formal or detailed mode of authentication, or one inconsistent with the act.* So long as the mode of authentication is in substantial

⁵¹ See *Gundry v. Hancock*, 147 Ill. App. 49. See, also, § 628, *post*.

⁵² U. S. Rev. Stats., § 905 (U. S. Comp. Stats. 1901, p. 677; 3 Fed. Stats. Ann., p. 37). See 2 *Freeman, Judgm.*, § 411, for history of this statute. On the admissibility of official records of foreign and sister states in evidence, see *Miller v. Northern Pacific R. Co.*, 19 Ann. Cas. 1219, and note thereto. On the admissibility of copies of records of other states, see elaborate note to *Wilcox v. Bergman*, 5 L. R. A., N. S., 938.

⁵³ *Hanrick v. Andrews*, 9 Port. (Ala.) 9; *Parke v. Williams*, 7 Cal.

247; *Sloan v. Wolfsfeld*, 110 Ga. 70, 35 S. E. 344; *Goodwyn v. Goodwyn*, 25 Ga. 203; *People v. Miller*, 195 Ill. 621, 63 N. E. 504; *English v. Smith*, 26 Ind. 445; *Railroad Bank v. Evans*, 32 Iowa, 202; *Tomlin v. Woods*, 125 Iowa, 367, 101 N. W. 135; *Willock v. Wilson*, 178 Mass. 68, 59 N. E. 757; *Kingman v. Cowles*, 103 Mass. 283; *In re Ellis' Estate*, 55 Minn. 401, 43 Am. St. Rep. 514, 23 L. R. A. 287, 56 N. W. 1056; *Karr v. Jackson*, 28 Mo. 316; *Kean v. Rice*, 12 Serg. & R. (Pa.) 203; *Pryor v. Moore*, 8 Tex. 250; *Hackett v. Bonnell*, 16 Wis. 471.

accord with the federal statute, it is receivable in evidence.⁵⁴ A record is admissible which conforms either to the provisions of the act of Congress or of the state where offered.⁵⁵ It has been held in some jurisdictions that

⁵⁴ Thrasher v. Ingram, 32 Ala. 645; Parke v. Williams, 7 Cal. 247; Barber v. Mexico International Co., 73 Conn. 587, 48 Atl. 758; Mason v. Nashville etc. R. Co., 135 Ga. 741, 33 L. R. A., N. S., 280, 70 S. E. 225; Britton v. Chamberlain, 234 Ill. 246, 84 N. E. 895; Garden City Sand Co. v. Miller, 157 Ill. 225, 41 N. E. 753; McMillan v. Lovejoy, 115 Ill. 498, 4 N. E. 772; Horner v. Spelman, 73 Ill. 206; Old Wayne Mut. L. Assn. v. McDonough, 164 Ind. 321, 73 N. E. 703; Sullivan v. Kenney, 148 Iowa, 361, 126 N. W. 349; Taylor v. Runyan, 9 Iowa, 522; Ayres v. Wm. Deering Co., 76 Kan. 149, 90 Pac. 794; Friend v. Miller, 52 Kan. 139, 39 Am. St. Rep. 340, 34 Pac. 397; Caulfield v. Bullock, 18 B. Mon. (Ky.) 494; Helm v. Shackelford, 5 J. J. Marsh. (Ky.) 390; A. Lehmann & Co. v. Rivers, 110 La. 1079, 35 South. 296; Van Wyck v. Hills, 4 Rob. (La.) 140; Wells v. Wells, 209 Mass. 282, 35 L. R. A., N. S., 561, 95 N. E. 845; Willock v. Wilson, 178 Mass. 68, 59 N. E. 757; Kingman v. Cowles, 103 Mass. 283; Wilcox v. Bergman, 96 Minn. 219, 5 L. R. A., N. S., 938, 104 N. W. 955; In re Ellis' Estate, 55 Minn. 401, 43 Am. St. Rep. 514, 23 L. R. A. 287, 56 N. W. 1056; McLin & Co. v. Worden, 99 Miss. 547, 55 South. 358; Taylor v. Heitz, 87 Mo. 660; Barlow v. Steel, 65 Mo. 611; Comstock v. Kerwin, 57 Neb. 1, 77 N. W. 387; Huie v. Devore, 138 App. Div. 677, 123 N. Y. Supp. 12; Talamo v. Ermano, 62 N. Y. Supp. 246; Lee v. Gause, 24 N. C. 440; Dunlap v. Douthet, 15 Ohio C. C. 181, 8 Ohio C. D. 259; Wadsworth

v. Letson, 2 Speers (S. C.), 277; Edwards v. Smith (Tex. Civ. App.), 137 S. W. 1161; Ferguson v. Harwood, 7 Cranch (U. S.), 408, 3 L. Ed. 386; Taylor v. Carpenter, 23 Fed. Cas. No. 13,785, 2 Wood. & M. 1; Seymour v. DuBois, 145 Fed. 1003; O'Hara v. Mobile etc. R. Co., 76 Fed. 718, 22 C. C. A. 512.

⁵⁵ Ordway v. Conroe, 4 Wis. 45; Pryor v. Moore, 8 Tex. 250. The provisions of the act apply to the proceedings of courts of records, to decrees in *chancery*: Barbour v. Watts, 2 A. K. Marsh. (Ky.) 290; Patrick v. Gibbs, 17 Tex. 275; proceedings in probate court: Settle v. Alison, 8 Ga. 201, 52 Am. Dec. 393; Case v. McGee, 8 Md. 9; Houze v. Houze, 16 Tex. 598; Melvin v. Lyons, 18 Miss. 78; Morgan v. Gaines, 3 A. K. Marsh. (Ky.) 613; Abercrombie v. Stillman, 77 Tex. 589, 14 S. W. 196; such as those relating to the probate of *wills*: Keith v. Keith, 80 Mo. 125; First Nat. Bank v. Kidd, 20 Minn. 234; Walton v. Hall's Estate, 66 Vt. 455, 29 Atl. 803; Long v. Patton, 154 U. S. 573, 19 L. Ed. 881, 14 Sup. Ct. Rep. 1167; and to guardians' and administrators' *bonds*, if part of the record: Carlisle v. Tuttle, 30 Ala. 613; Pickett v. Bates, 3 La. Ann. 627; and to all proceedings in other states which by the laws and usage of that state are entitled to the faith and credit of a judgment: Taylor v. Runyan, 9 Iowa, 522. See, also, Sullivan v. Kenney, *supra*; Davis v. Davis, 24 S. D. 474, 124 N. W. 715; Goss v. Herman, 20 N. D. 295, 127 N. W. 78; Heatley v. Long, 135 Ga. 153, 68 S. E. 783.

proceedings in justice courts are within the meaning of the act. Such decisions, however, generally related only to those justice courts which, by the laws of their state, were courts of record.⁵⁶ But it is the general rule that a judgment of a justice of the peace from a sister state cannot be proved in the mode prescribed by the act. Such judgments must be proved according to the rules of the common law, or as prescribed by the statutes of the several states;⁵⁷ and a transcript of a justice's judgment, authenticated by the certificate of a clerk of the county or district court, is not admissible under the statute.⁵⁸ The judgments which may be authenticated under the acts of Congress are those only which have been pronounced by courts of record, in which classification, however, are included proceedings in chancery, "as well as of orphans' courts and courts of probate."⁵⁹ The ordinary rules for the identification of the parties named in the judgment apply to judgments from sister states.⁶⁰

§ 627 (644). Proof of judgments in federal courts.—Records of state courts, in order that they may be admissible in the courts of other states, must be authenticated as we have shown is required; but the act of Congress does not apply to the courts of the United States, nor to the public acts, records or judicial proceedings of a state court

⁵⁶ Bissell v. Edwards, 5 Day (Conn.), 363, 5 Am. Dec. 166; Sloan v. Wolfsfeld, 110 Ga. 70, 35 S. E. 344; Belton v. Fisher, 44 Ill. 32; Draggoo v. Graham, 9 Ind. 212; Scott v. Cleveland, 3 T. B. Mon. (Ky.) 62; Brown v. Edson, 23 Vt. 435; Mahurin v. Bickford, 6 N. H. 567; Lawrence v. Gaultney, Cheves (S. C.), 7; Pelton v. Platner, 13 Ohio, 209, 42 Am. Dec. 197.

⁵⁷ Kean v. Rice, 12 Serg. & R. (Pa.) 203; Robinson v. Prescott, 4 N. H. 450; Silver Lake Bank v. Harding, 5 Ohio, 545; Collier v. Col-

lier, 150 Ind. 276, 49 N. E. 1063; Smith v. Petrie, 70 Minn. 433, 73 N. W. 155; Huie v. Devore, 123 N. Y. Supp. 12, 138 App. Div. 677; Hinman v. Missouri etc. R. Co., 83 Kan. 35, 21 Ann. Cas. 1152, 110 Pac. 102.

⁵⁸ McElfatriek v. Taft, 10 Bush (Ky.), 160; Thomas v. Robinson, 3 Wend. (N. Y.) 267; Mahurin v. Bickford, 6 N. H. 567.

⁵⁹ Wharton, Ev., § 99; 2 Freeman, Judgm., § 411.

⁶⁰ See Coakley v. Rickard, 136 App. Div. 489, 121 N. Y. Supp. 280.

to be used as evidence in another court of the same state. Conclusive support to that proposition is found in many decided cases in addition to those to which reference has been made in the note.⁶¹ It has accordingly been held by the supreme court of the United States, after full discussion, that it is not absolutely necessary that the record of a judgment in the district court of the United States should be authenticated in the mode prescribed by the act of Congress referred to, in order to render the same admissible in the courts of the United States; that the district court of the United States, even out of the state composing the district, is to be regarded as a domestic and not a foreign court, and that the records of such court may be proved by the certificate of the clerk under the seal of the court, without the certificate of the judge that the same is in due form.⁶² But it has been held that, if the record of a judgment of a state court is offered in the federal court, it must be attested as provided by the statute.⁶³ The records of the federal courts are admissible in the state courts, if authenticated as provided by the statute.⁶⁴ When the

⁶¹ *Turnbull v. Payson*, 95 U. S. 418, 424, 24 L. Ed. 437; *Jenkins v. Kingsley*, 3 Johns. Cas. (N. Y.) 474; *Adams v. Lisher*, 3 Blackf. (Ind.) 241, 25 Am. Dec. 102; *Murray v. Marsh*, 2 Hayw. (3 N. C.) 290, Fed. Cas. No. 9965, See, also, *United States v. Lew Poy Dew*, 119 Fed. 786.

⁶² *Turnbull v. Payson*, *supra*; *Adams v. Way*, 33 Conn. 419; *Mason v. Lawrason*, 1 Cranch C. C. 190, Fed. Cas. No. 9242. Circuit and district courts of the United States certainly cannot be considered as foreign in any sense of the term, either in respect to the state courts in which they sit or as respects the circuit or district courts of another circuit or district. On the contrary, they are domestic tribunals, whose proceedings all other courts of the

country are bound to respect, when authenticated by the certificate of the clerk under the seal of the court, the rule being that the circuit court of one circuit or the district court of one district is presumed to know the seal of the circuit or district court of another circuit or district, in the same manner as each court within a state is presumed to know and recognize the seal of any other court within the same state: *Womack v. Dearman*, 7 Port. (Ala.) 513.

⁶³ *United States v. Biebusch*, 1 Fed. 213, 1 McCrary, 42. See note to *Wilcox v. Bergman*, 5 L. R. A., N. S., 946.

⁶⁴ *Redman v. Gould*, 7 Blackf. (Ind.) 361; *Tappan v. Norvell*, 3 Sneed (Tenn.), 570; *Helm v. Shackelford*, 5 J. J. Marsh. (Ky.) 390;

record of a judgment of a state court is offered in evidence in the United States circuit court sitting within that state, the certificate of the clerk and seal of the court are sufficient authentication.⁶⁵ But a transcript of a state record, if authenticated as required by the acts of Congress, is, of course, admissible in United States courts, although the copy may not be such as is used in the courts of the state in which the record is, nor such as is usual at common law.⁶⁶

§ 628 (645). Authentication — Attestation by clerk.— There must be compliance with the statute in its various requirements. Thus, the clerk must be the clerk of the court in which the judgment was rendered,⁶⁷ or, if the constitution of the court has changed, he must be a successor of that clerk.⁶⁸ If the record has been transferred from one court to another, the certificate of the clerk, having custody of the records, as to the fact is sufficient,⁶⁹ or such

United States v. Bank of United States, 11 Rob. (La.) 418; Miller v. Pitts, 152 N. C. 629, 68 S. E. 171; Cain v. Seaboard etc. R. Co., 7 Ga. App. 461, 67 S. E. 127, in which a certified copy of the order of the United States circuit court appointing receivers was held admissible to establish the fact of the receivership. See note to Wilcox v. Bergman, 5 L. R. A., N. S., 947.

⁶⁵ Mewster v. Spalding, 6 McLean (U. S.), 24, Fed. Cas. No. 9513.

⁶⁶ Taylor v. Carpenter, 2 Wood. & M. 1, Fed. Cas. No. 13,785. And in White v. Burnley, 20 How. 235, 15 L. Ed. 886, a copy of a deed in the archives of a notary of Louisiana, duly authenticated according to the act of Congress of 1804, was held properly admitted in evidence in a United States court in Texas as a record from another state. It

was also admitted on common-law proofs. (From note to Wilcox v. Bergman, 5 L. R. A., N. S., 946, referred to.)

⁶⁷ Kirkland v. Smith, 2 Mart., N. S., (La.) 497; Scott v. Blanchard, 8 Mart., N. S., (La.) 303; Moyer v. Lyon, 38 Mo. App. 635. For a useful collection of illustrations, see note to Wilcox v. Bergman, 5 L. R. A., N. S., 955.

⁶⁸ Thomas v. Tanner, 6 T. B. Mon. (Ky.) 52; Capen v. Emery, 5 Met. (Mass.) 436; Manning v. Hogan, 26 Mo. 570.

⁶⁹ Thomas v. Tanner, 6 T. B. Mon. (Ky.) 52; McRae v. Stokes, 3 Ala. 401, 37 Am. Dec. 698; Hatcher v. Rocheleau, 18 N. Y. 86; Darrah v. Watson, 36 Iowa, 116; Capen v. Emery, 5 Met. (Mass.) 436; Manning v. Hogan, 26 Mo. 570; Gatling v. Robbins, 8 Ind. 184.

fact may be stated in the certificate of the judge.⁷⁰ The certificate of a deputy or substitute is not sufficient,⁷¹ although the judge certifies that the attestation is in due form and according to the laws of the state.⁷² But if the record is certified by the clerk through his deputy, this has been held to be a compliance with the law.⁷³ The *certificate* or attestation made by the clerk must be *according to the form used in the state from which the record comes*; and the only evidence of this fact is the certificate of the presiding judge. No form of attestation is prescribed by the act, and whether it is in due form or not can only be shown by the certificate of the presiding judge.⁷⁴ It has been held in several cases that the certificate of the clerk need not state in express terms that the transcript is a copy of the whole proceedings, but where he certifies that the copy is a true one, taken from the record of proceedings of the court, and the certificate of the judge complies with the statute, the document will be presumed to be a true copy.⁷⁵ Thus, it has been held sufficient if the clerk cer-

⁷⁰ Capen v. Emery, 5 Met. (Mass.) 436; Gatlin v. Robbins, 8 Ind. 184.

⁷¹ Morris v. Patchin, 24 N. Y. 394, 82 Am. Dec. 311; Lothrop v. Blake, 3 Pa. 483; Sampson v. Overton, 4 Bibb (Ky.), 409; Donohoo v. Bran-non, 1 Overt. (Tenn.) 327; Willock v. Wilson, 178 Mass. 68, 59 N. E. 757. See note to Wilcox v. Bergman, 5 L. R. A., N. S., 957.

⁷² Morris v. Patchin, 24 N. Y. 394, 82 Am. Dec. 311; Kansas Pac. Ry. Co. v. Cutter, 19 Kan. 83; Willock v. Wilson, 178 Mass. 68, 59 N. E. 757.

⁷³ Greasons v. Davis, 9 Iowa, 219; Steinke v. Graves, 16 Utah, 293, 52 Pac. 386; Williams v. Williams, 53 Mo. App. 617. There are, however, several weighty decisions to the contrary (Kansas Pac. Ry. Co. v. Cutter, 19 Kan. 83; Willock v. Wilson, 178 Mass. 68, 59 N. E. 757), in

which the court said that the certificate of the judge as prescribed by the statute was that the attestation of the clerk was in due form, but he was not authorized to certify that the certificate of the deputy clerk was of equal validity with that of the clerk in the state where made: Morris v. Patchin, 24 N. Y. 394, 82 Am. Dec. 311; Ensign v. Kindred, 163 Pa. 638, 30 Atl. 274.

⁷⁴ Schoonmaker v. Lloyd, 9 Rich. (S. C.) 173; Craig v. Brown, Pet. C. C. 352, Fed. Cas. No. 3328; Ducommun v. Hysinger, 14 Ill. 249; Gundry v. Hancock, 147 Ill. App. 49; White v. Strother, 11 Ala. 720; Andrews v. Flack, 88 Ala. 294, 6 South. 907; Edwards v. Jones, 113 N. C. 453, 18 S. E. 500.

⁷⁵ Mudd v. Beauchamp, Litt. Sel. Cas. (Ky.) 142; Reber v. Wright, 68 Pa. 471; Lee v. Gause, 2 Ired. (N.

tifies that the transcript is a true transcript of the record, as fully as it now exists in the office;⁷⁶ that the copy is exemplified;⁷⁷ that the exemplification is a transcript of the proceedings,⁷⁸ and that the transcript is a true copy of the whole judgment-roll.⁷⁹ A certificate as follows: "I hereby certify that the foregoing is *truly taken* from the record of proceedings of Prince George's county court," and being otherwise in due form and properly attested, was held to be sufficiently certified and attested to entitle it to be received in evidence.⁸⁰ A certificate of a clerk certifying the transcript to be a "full, true, and complete transcript of all the proceedings had in the above case as now remains of record and on file in my office," accompanied by the certificate of the judge that "the certificate is in due form of law," is a sufficient authentication.⁸¹ And in Pennsylvania a certificate that "the foregoing copy of records is truly taken and correctly copied from the records of judgments of said court remaining in my office" has frequently been taken and presumed to be a copy of the *whole* record.⁸² Where the clerk certified that the instrument contained "a full, complete, true, and exact copy of the proceedings in the cause of record in the office of said court in favor of Arnold Hat Company against A. T. Woodham and W. W. Varn, defendants,"

C.) 440. See *Shilling v. Seigle*, 207 Pa. 381, 56 Atl. 957. The copy of the record or judicial proceeding ought to be complete, and not a mere transcript from the minutes or some part thereof: *Pepin v. Lachenmeyer*, 45 N. Y. 27. See, also, *Hallum v. Dickinson*, 54 Ark. 311, 15 S. W. 775; *Taylor v. Runyon*, 3 Iowa, 474; *Montgomery v. Consolidated Boat Store Co.*, 115 Ky. 156, 103 Am. St. Rep. 302, 72 S. W. 816; *Gunn v. Peakes*, 36 Minn. 177, 1 Am. St. Rep. 661, 30 N. W. 466; *Missouri Glass Co. v. Gregg* (Tex. Civ. App.), 16 S. W. 174.

⁷⁶ *McCormick v. Deaver*, 22 Md. 187.

⁷⁷ *Taylor v. Carpenter*, 2 Wood. & M. (U. S.) 1, Fed. Cas. No. 13,785.

⁷⁸ *Lee v. Gause*, 2 Ired. (N. C.) 440.

⁷⁹ *Clark v. Depew*, 25 Pa. 409, 64 Am. Dec. 717.

⁸⁰ *Ferguson v. Harwood*, 7 Cranch, 408, 3 L. Ed. 386.

⁸¹ *Blair v. Caldwell*, 3 Mo. 353.

⁸² *Rober v. Wright*, 68 Pa. 471, and cases there cited. We are indebted for this and the two preceding illustrations to 2 *Freeman, Judgm.*, § 412.

and attested it by the seal of the court, the judgment was sufficiently identified, even though it did not have the style of the case at its head.⁸³ The judge may certify that he acts as his own clerk, and that the certificate is in due form.⁸⁴ In such case, he should certify first as clerk and then as judge in the same manner as if there were two officers.⁸⁵ But the certificate of the judge alone, though under the great seal of the state, is not sufficient.⁸⁶ In an Illinois case,⁸⁷ objection was made to a Missouri transcript that it was not shown by the certificate of the clerk of the Missouri court that the person certifying as clerk was the clerk of the court. The court properly held that no authority was produced holding that the clerk himself must certify that he is the clerk. This forms matter for the certificate of the judge, which is discussed in the next section.

§ 629 (646). Same—Certificate of the judge.—The certificate of the judge is absolutely indispensable.⁸⁸ It is clear that, under the act of Congress there should be a certificate of *the judge* of the court in which the judgment was rendered.⁸⁹ It is not sufficient that he is merely acting as

⁸³ Varn v. Arnold Hat Co. (Tex. Civ. App.), 124 S. W. 693.

⁸⁴ Roop v. Clark, 4 G. Greene (Iowa), 294; Pagett v. Curtis, 15 La. Ann. 451; State v. Hinchman, 27 Pa. 479; Wilson v. Phoenix etc. Co., 40 W. Va. 413, 52 Am. St. Rep. 890, 21 S. E. 1035. In Melius etc. v. Houston, 41 Miss. 59, and in Rowe v. Barnes, 101 Iowa, 302, 70 N. W. 197, it was held a single certificate by the judge was insufficient. He should have attested as clerk and certified as judge. In Bissell v. Edwards, 5 Day (Conn.), 363, 5 Am. Dec. 166, the certificate did not disclose whether or not there was a clerk of the court. The same defect

was fatal in Catlin v. Underhill, 4 McLean, 199, Fed. Cas. No. 2523.

⁸⁵ Catlin v. Underhill, 4 McLean (U. S.), 199, Fed. Cas. No. 2523; Duvall v. Ellis, 13 Mo. 203; Bissell v. Edwards, 5 Day (Conn.), 363, 5 Am. Dec. 166; Keith Bros. & Co. v. Stiles, 92 Wis. 15, 64 N. W. 860, 65 N. W. 860.

⁸⁶ Tarlton v. Briscoe, 1 A. K. Marsh. (Ky.) 67.

⁸⁷ Gundry v. Hancock, 147 Ill. App. 49.

⁸⁸ Hutchins v. Gerrish, 52 N. H. 205, 13 Am. Rep. 19.

⁸⁹ Huff v. Campbell, 1 Stew. (Ala.) 543; Arnold v. Frazier, 5 Strob. L. (S. C.) 33; Smith v.

judge; though, if the judges are appointed from the state at large, the certificate may be by the one presiding in his place.⁹⁰ That the certificate is made by the judge of the court should appear on its face;⁹¹ for example, it should appear affirmatively that the judge is the judge of the county or district where the judgment was rendered.⁹² But it is sufficient if the certificate describes the judge certifying as the judge of the court in question, as it is the presumption that he holds the position which he professes to hold.⁹³ If there are *several judges* constituting the court, the certificate should be by the chief justice or presiding judge. "It cannot be admitted that under this act any judge of any court of the state may certify a record."⁹⁴ A certificate that he is the judge that presided at the trial, or that he is the senior judge of the

Brockett, 69 Conn. 492, 38 Atl. 57; Westerman v. Sheppard, 52 Neb. 124, 71 N. W. 950. The certificate by the governor of the state does not suffice: Harrison v. Weatherly, 180 Ill. 418, 54 N. E. 237. The following conclusions are taken from the valuable note to Wilcox v. Bergman, 5 L. R. A., N. S., 938, on the "Admissibility in Evidence of Copies of Records of Other States," and which has covered the whole difficult ground with patient accuracy. The author of it says: "The authentication would, of course, be incomplete without the certificate of the judge. Technical objections to the form of the certificate, or mere clerical errors in the certificate, may be disregarded. If the judge certifies on a separate sheet of paper it must clearly appear that the certificate belongs to the transcript offered in evidence. No more proof is required that the person certifying as judge is in fact judge than what is contained in the certificate itself, except in authentication under the

act of 1804, where the official character of the judge must be certified by the clerk. Finally, it should be noticed that the judge's certificate need set forth only one fact—that is, that the clerk's attestation is in due form. As in the case of the clerk, the judge cannot certify the effect of a record, or what a record contains."

⁹⁰ Taylor v. Kilgore, 33 Ala. 214.

⁹¹ Washabaugh v. Entriiken, 34 Pa. 74; Stewart v. Gray, Hempst. (U. S.) 94, Fed. Cas. No. 13,428a; Hudson v. Daily, 13 Ala. 722; Settle v. Alison, 8 Ga. 201, 52 Am. Dec. 393.

⁹² Phelps v. Tilton, 17 Ind. 423.

⁹³ Gavit v. Snowhill, 26 N. J. L. 76; Hatcher v. Rocheleau, 18 N. Y. 86.

⁹⁴ Stephenson v. Bannister, 3 Bibb (Ky.), 369; Hudson v. Daily, 13 Ala. 722; Settle v. Alison, 8 Ga. 201, 52 Am. Dec. 393; Lothrop v. Blake, 3 Pa. 483. See note to Wilcox v. Bergman, 5 L. R. A., N. S., 960.

courts of law in the state, has been held insufficient.⁹⁵ The judge certifying must, *at that time*, be the judge, *chief justice*, or *presiding judge*. Hence where the judges act as chief justice by rotation, the authentication cannot be made by any one of them, but only by the one who, for the time being, is *chief*.⁹⁶ If the judge is also *ex-officio* clerk of the court, he must certify first as clerk and second as judge, in the same form and substance as when the two offices are not united in one person.⁹⁷ If there are several of the same rank, all may unite,⁹⁸ although one may certify alone if he certifies that each judge has equal authority and power to sign certificates of this character.⁹⁹ If the certificate is made by one who styles himself the judge, it need not add that there are no others constituting the court.¹⁰⁰ Since the certificate of the judge affords the only evidence that the certificate of the clerk is correct, the judge must certify that the *attestation of the clerk is in due form*;¹ and this certificate of the judge is conclusive on that subject, although the attestation by the clerk may on its face seem to be defective.² This certificate of the

⁹⁵ Van Storch v. Griffin, 71 Pa. 240; Lothrop v. Blake, 3 Barr (3 Pa.), 483; State v. Hinchman, 3 Casey (27 Pa.), 479; 1 Greenl. Ev., § 506; Pratt v. King, 1 Or. 49; Brown v. Johnson, 42 Ala. 208; Settle v. Alison, 8 Ga. 201, 52 Am. Dec. 393. It is insufficient if made by an associate judge presiding at a trial or by a "senior" judge: 2 Freeman, Judgm., § 413.

⁹⁶ Shaw v. Hurd, 3 Bibb (Ky.), 371.

⁹⁷ Catlin v. Underhill, 4 McLean, 199, Fed. Cas. No. 2523; Duvall v. Ellis, 13 Mo. 203; Bissell v. Edwards, 5 Day (Conn.), 363, 5 Am. Dec. 166.

⁹⁸ Arnold v. Frazier, 5 Strob. L. (S. C.) 33.

⁹⁹ Orman v. Neville, 14 La. Ann. 392; Huff v. Campbell, 1 Stew.

(Ala.) 543; Van Storch v. Griffin, 71 Pa. 240.

¹⁰⁰ Central Bank v. Veasey, 14 Ark. 671; Willock v. Wilson, 178 Mass. 68, 59 N. E. 757; People v. Smith, 121 N. Y. 578, 24 N. E. 852.

¹ U. S. Rev. Stats., § 905 (U. S. Comp. Stats. 1901, p. 677, 3 Fed. Stats. Ann. 37); Trigg v. Conway, Hempst. (U. S.) 538, Fed. Cas. No. 14,172; Shown v. Barr, 11 Ired. L. (N. C.) 296; Pepin v. Lachenmeyer, 45 N. Y. 27; Burnell v. Weld, 76 N. Y. 103; Brackett v. People, 64 Ill. 170; Washabaugh v. Entriiken, 34 Pa. 74; Hutchins v. Gerrish, 52 N. H. 205, 13 Am. Rep. 19; Westerman v. Sheppard, 52 Neb. 124, 71 N. W. 950. See note to Wilcox v. Bergman, 5 L. R. A., N. S., 965.

² Ferguson v. Harwood, 7 Cranch, 408, 3 L. Ed. 386; Duvall v. Ellis,

judge is also sufficient *prima facie* evidence of the jurisdiction of the court.³ It is no objection to the admission of the copy as evidence that the certificates may contain more than is required, if the essentials of the act are therein contained.⁴ The certificate of the judge need not state that the person certifying the record is the clerk;⁵ and the omission of a date in a certificate may be supplied by that in the certificate of the clerk.⁶ If there are several certificates by the clerk, the single certificate by the judge referring to the "foregoing attestation" only authenticates the one last preceding; and the other copies are not admissible.⁷ It is not necessary under the federal statutes that the official character of the judge, certifying the record, should be evidenced by the certificate of the governor under the great seal of the state; nor that the clerk of the court should certify under his hand and seal of office that the certifying judge is duly commissioned and qualified to act.⁸ In the Illinois case referred to in the last section as to the clerk certifying that he *was* the clerk,⁹ there was the further objection that there was a failure to show by the certificate of the person certifying as judge that he was the judge. The court in dismissing it said that the question of the proper and sufficient certification to a judicial record is not a question controlled by the common law, so that authority thereupon can be found and cited from any state, but the question is controlled by the law of the state "from

13 Mo. 203; Wilburn v. Hall, 16 Mo. 426; Andrews v. Flack, 88 Ala. 294, 6 South. 907.

³ Thomas v. Tanner, 6 T. B. Mon. (Ky.) 52.

⁴ Gavit v. Snowhill, 26 N. J. L. 76; Young v. Chandler, 13 B. Mon. (Ky.) 252; Weeks v. Downing, 30 Mich. 4.

⁵ Ducommun v. Hysinger, 14 Ill. 249; Linch v. McLemore, 15 Ala. 632; Haynes v. Cowen, 15 Kan. 637; Lothrop v. Blake, 3 Pa. 483. Some of the authorities insist that it must

also declare that the clerk who attests is then the clerk of the court: Wharton on Evidence, § 101; Hutchins v. Gerrish, 25 N. H. 205, 13 Am. Rep. 19; Duvall v. Ellis, 13 Mo. 203; Wilburn v. Hall, 16 Mo. 426; Johnson v. Howe, 2 Stew. (Ala.) 27.

⁶ Lewis v. Sutliff, 2 G. Greene (Iowa), 186.

⁷ Burnell v. Weld, 76 N. Y. 103.

⁸ Kinselley v. Rumbough, 96 N. C. 193, 2 S. E. 174.

⁹ Gundry v. Hancock, 147 Ill. App. 49.

whence the record comes.”¹⁰ “That is, the attestation must be such as is used in the state whence the records come for the certification of its own records; not such as in that state, in this instance Missouri, the courts may have held to be sufficient when a record has come from another state there. . . . No authority has been cited us showing that the act of Congress requires the judge’s certificate to show that he is the judge of the court rendering the judgment; neither has any showing been made that the law of Missouri has any such requirement.”¹¹ If a court ceases to exist, and its records are transferred to another court, the clerk and judge of the latter thereby become proper persons to authenticate the records of the former.¹²

§ 630 (647). Same—Seal.—The last but not the least important requisite is that the copy shall bear the impress of the seal of the court it comes from. As will be seen from an examination of the act, the seal must be annexed, if there be one.¹³ If the court has no seal, that fact should be made to appear in one of the certificates.¹⁴ A certificate by the clerk under his private seal, if he certifies that the court has no seal, is sufficient, as the private seal will be treated as mere surplusage; and it has the same effect as if no seal had been used.¹⁵ No statement is necessary that the seal affixed is the seal of the court, as it is presumed to have been attached by the proper officer.¹⁶ The

¹⁰ *Ducommun v. Hysinger*, 14 Ill. 249.

¹¹ *Gundry v. Hancock*, *supra*. In *Horner v. Spelman*, 78 Ill. 206, it is held: “The clerk has certified a transcript of the proceedings under the seal of the court, and the presiding judge of the court has certified that the attestation is in due form. This is all the act of Congress required.”

¹² *Capen v. Emery*, 5 Met. (Mass.) 436; *Manning v. Hogan*, 26 Mo. 570; *Darrah v. Watson*, 36 Iowa, 116; *Thomas v. Tanner*, 6 T. B. Mon. (Ky.) 52; 2 *Freeman, Judgm.*, § 413.

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¹³ U. S. Rev. Stats., § 905 (U. S. Comp. Stats. 1901, p. 677; 3 Fed. Stats. Ann. 37); *McFarlane v. Harrington*, 2 Bay (S. C.), 555; *Allen v. Thaxter*, 1 Blackf. (Ind.) 399; *Hull v. Webb*, 78 Ill. App. 617.

¹⁴ *Craig v. Brown*, 1 Pet. C. C. 352, Fed. Cas. No. 3328; *Kirkland v. Smith*, 2 Mart., N. S., (La.) 497.

¹⁵ *Strode v. Churchill*, 2 Litt. (Ky.) 75.

¹⁶ *Ducommun v. Hysinger*, 14 Ill. 249; *Hull v. Webb*, *supra*.

seal should be affixed to the record with the certificate of the clerk, and not to the certificate of the judge; and if the seal of the court is annexed only to the certificate of the judge, the record is insufficient.¹⁷ The record has been held admissible, however, where the clerk certified that he annexed his seal of office, instead of the seal of the court.¹⁸ So it is sufficient, if an impression of the seal is made on the paper, as the use of wax is not essential. Formerly wax was the only material used to receive and retain the impression of a seal, and the definition of a seal was "*cera impressa*." But while wax without the "impression" was not a seal, it does not follow that the "impression" without wax was not a seal. It is the seal which authenticates, and not the substance on which it is impressed; and where the court can recognize its identity, they should not be called upon to analyze the material which exhibits it.¹⁹

§ 631 (648). Returns of officers—Not evidence of collateral facts.—A return is defined as a short account in writing made by an officer in respect to the manner in which he has executed a writ or process.²⁰ It is his official statement of the acts done by him under the writ in obedience to its directions and in conformity with the requirements of law.²¹ A return is nothing but the sheriff's answer relative to that which he is commanded to do by the writ; and it is intended to inform the court of the truth of that alone which it concerns them to know. Third persons ought not to be injured by a return because the sheriff has departed from its proper object and mingled with it irrele-

¹⁷ U. S. Rev. Stats., § 905 (U. S. Comp. Stats. 1901, p. 677; 3 Fed. Stats. Ann. 37); *Kirschner v. State*, 9 Wis. 140.

¹⁸ *McLain v. Winchester*, 17 Mo. 49; *Clark v. Depew*, 25 Pa. 509, 64 Am. Dec. 717; *Coffee v. Neely*, 2 Heisk. (Tenn.) 304, by statute.

¹⁹ *Pillow v. Roberts*, 13 How. (U. S.) 472, 14 L. Ed. 229.

²⁰ *Phillips County v. Pillow*, 47 Ark. 404, 1 S. W. 686; *Kingsbury v. Buchanan*, 11 Iowa, 387; *Aultman v. McGrady*, 58 Iowa, 118, 12 N. W. 233; *State v. Melton*, 8 Mo. 417; *Davis v. Reaves*, 7 Lea (75 Tenn.), 585.

²¹ *Hooper v. McDade*, 1 Cal. App. 733; 82 Pac. 1116.

vant matter.²² It is often necessary to use as evidence the official returns of officers made in the discharge of their duty. It is their duty under their oath of office to certify certain official facts, like the service of process and similar acts; and such returns are generally received as evidence.²³ Their effect as evidence must be restricted to those facts concerning which it was the duty of the officer to make return. The return is generally *prima facie* evidence of those matters which the law requires the officer to certify even as between strangers to the suit.²⁴ Hence, where an officer performs an act in pursuance of a duty enjoined on him by law, his official statement of its performance is evidence thereof.²⁵ Where a sheriff levied upon, inventoried, advertised and sold part of the goods as sheriff, his return is *prima facie* evidence that he is a sheriff.²⁶ A return when made is a matter of record, and is admissible in all cases where the execution to which it is attached is.²⁷ An officer's return upon search and seizure process is admissible in evidence as a part of the record.²⁸ It has already been stated that certificates and returns made by officers,

²² Smith v. Kelly, 7 N. C. 507.

²³ Cavendish v. Troy, 41 Vt. 99; Allen v. Gray, 11 Conn. 95; Browning v. Hanford, 5 Denio (N. Y.), 586; Boynton v. Willard, 10 Pick. (Mass.) 166; Perryman v. State, 8 Mo. 208. Parol evidence is not admissible to correct the return: Sanford v. Edwards, 19 Mont. 56, 61 Am. St. Rep. 482, 47 Pac. 212; but such evidence is admissible to support it: Baham v. Stewart Bros. & Co., 109 La. 999, 34 South. 54.

²⁴ Crow v. Hudson, 21 Ala. 560; Tucker v. Bond, 23 Ark. 268; Allen v. Gray, 11 Conn. 95; Butler v. State, 20 Ind. 169; Kingsbury v. Buchanan, 11 Iowa, 387; Bott v. Burnell, 9 Mass. 96; Tullis v. Brawley, 3 Minn. (Gil. 191) 277; Cornell v. Cook, 7 Cow. (N. Y.) 310; Browning v. Han-

ford, 7 Hill (N. Y.), 120; Hathaway v. Goodrich, 5 Vt. 65.

²⁵ Moore v. Bank of Missouri, 6 Mo. 379; Perryman v. State, 8 Mo. 208; Minor v. President etc. of Nat. chez, 4 Smedes & M. (Miss.) 602, 43 Am. Dec. 488; Pool v. Wedemeyer, 56 Tex. 287.

²⁶ Brewster v. Vail, 20 N. J. L. 56, 38 Am. Dec. 547.

²⁷ Creagh v. Savage, 14 Ala. 454; Peebles v. Pate, 90 N. C. 348.

²⁸ State v. Lang, 63 Me. 215. For numerous other illustrations of the admissibility in evidence of an officer's return, see note to Driggers v. United States, 129 Am. St. Rep. 848; Reiger v. Mullins, 124 Am. St. Rep. 756; Malone v. Samuel, 13 Am. Dec. 173.

where no such certificate or return is required by law, are not competent evidence.²⁹ They are unofficial statements, and are mere hearsay, like the unsworn declarations of a private individual.³⁰ On principles already discussed, a certificate or return stating *collateral facts*, facts not required by law to be stated, is not evidence as to such facts. Thus, the return on an execution that the sheriff has paid to the plaintiff the money collected is not evidence of that fact;³¹ nor is it evidence of any facts therein alleged as excuse for failing to return the process or otherwise to do his duty,³² or of other facts which the officer has no right to ascertain or declare.³³ The return of an officer is not competent evidence as to facts which he is not required to certify in the proper execution of his powers.³⁴ The return cannot be used as evidence of acts beyond the territorial jurisdiction of the officer making it.³⁵ Hence the recitals in an officer's return showing the acts of some one other than that of the officer are not admissible in evidence.³⁶ A sheriff is not authorized to make a return that a certain individual is not an inhabitant of the commonwealth, but such a return may be admissible to show that the person was not an inhabitant of as much territory as the officer could officially know, which naturally is limited to the county.³⁷ The return of an officer to a subpoena that the witness named therein is dead, not being authorized and required by law, is clearly not binding on the par-

²⁹ See § 543, *ante*.

³⁰ *Browning v. Hanford*, 7 Hill (N. Y.), 120, 5 Denio, 586; *Obermier v. Core*, 25 Ark. 562.

³¹ *Cator v. Stakes*, 1 Maule & S. 599; *First v. Miller*, 4 Bibb (Ky.), 311. See, also, *Great West Min. Co. v. Woodmas Min. Co.*, 12 Colo. 46, 13 Am. St. Rep. 204, 20 Pac. 771; *Walker v. McKnight*, 15 B. Mon. (Ky.) 467, 61 Am. Dec. 190.

³² *Bruce v. Dyall*, 5 T. B. Mon. (Ky.) 125.

³³ *Schloss v. Inman*, 129 Ala. 424, 30 South. 667; *People v. Lee*, 128 Cal. 330, 60 Pac. 854.

³⁴ *Wickersham v. Reeves*, 1 Iowa, 413; *Barr v. Combs*, 29 Or. 399, 45 Pac. 776.

³⁵ *Arnold v. Tourtellot*, 13 Pick. (Mass.) 172.

³⁶ *Aultman v. McGrady*, 58 Iowa, 118, 12 N. W. 233.

³⁷ *Greenup's Representatives v. Bacon's Exrs.*, 1 T. B. Mon. (Ky.) 108.

ties.³⁸ A return by a sheriff on an execution that he had "sold the within tract of land subject to a deed of trust" is not evidence of the existence of the deed of trust as against the purchaser at the execution sale.³⁹

§ 632 (649). As between parties, the return cannot be collaterally attacked.—A sheriff's return is not traversable, and the court will not permit it collaterally to be attacked, even if the officer is shown to have been guilty of fraud and collusion.⁴⁰ As between the parties or privies to the suit, the general rule is that the return of the officer is con-

³⁸ *Driggers v. United States*, 1 Okl. Cr. 167, 129 Am. St. Rep. 823, 95 Pac. 612; 21 Okl. 60, 17 Ann. Cas. 66, 95 Pac. 612.

³⁹ *Mitchell v. Lipe*, 8 Yerg. (Tenn.) 179, 29 Am. Dec. 116. In *Sheldon v. Comstock*, 3 R. I. 84, the court has well defined the duty of the officer and the effect of the return. It said: "An officer's return on process of every kind should state that he has performed what the mandatory part of the process required of him. It should contain a statement of the acts which he has done under and by virtue of it, and the place and the time when and where they were done. His office is simply ministerial. Hence it is insufficient for him to return that he has duly or legally served the process committed to him. He should set forth what he did, and when and where, and leave the question of the legality of his proceedings to some judicial tribunal. Where the law prescribes any particular forms or proceedings in the service of process, the return of the officer should show that they were specifically complied with. The return should set forth as fully and circumstantially as though they had been

specially required in the mandatory part of the process. All this should be in the return, and as a general thing nothing more. But if more be added, although it may not vitiate the return, it will not be considered as part of it. The facts essential to a return are taken as conclusively proved, if stated in it, except in those cases where express provision to the contrary is made by statute, and except in suits against the officer making it for a false return. The return of the officer is the only proper evidence to prove these facts. If other facts are contained in the return, they are to be rejected. The officer's return is no proper evidence of their truth."

⁴⁰ *Egery v. Buchanan*, 5 Cal. 53; *Higgs v. Huson*, 8 Ga. 317; *Smith v. Noe*, 30 Ind. 117; *Mueller v. Bates*, 2 Disn. 318; *Stoors v. Kelsey*, 2 Paige (N. Y.), 418; *Angell v. Bowler*, 3 R. I. 77; *Love v. Smith*, 4 Yerg. (Tenn.) 117; *Ayres v. Duprey*, 27 Tex. 593, 86 Am. Dec. 657; *United States v. Lotridge*, 1 McLean, 246, Fed. Cas. No. 15,628; *Sewell on Sheriffs*, 387; *Watson on Sheriffs*, 72; 3 *Freeman, Ex.*, § 364.

clusive. It is open to *no collateral attack*, but, as between the parties, stands as a verity, unless vacated or otherwise attacked by a direct proceeding. When an officer makes a false return, it must, as between the parties to the suit, as long as it remains unvacated, be regarded as true. Neither can dispute or impeach it. As to all the facts which the officer had authority to return, it must be treated as unquestionable, and as entirely beyond the reach of any collateral assault.⁴¹ It follows that where a statement is made *not* a necessary part of the return, it may be called in question by a party to the action.⁴² The same rule applies whether the return is upon intermediate or final process, or upon that by which the action is commenced. The usual remedy for a party, if he would show that the return is false, is by action against the officer for making a false

⁴¹ Crow v. Hudson, 21 Ala. 560; Newton v. State Bank, 14 Ark. 9, 58 Am. Dec. 363; Egery v. Buchanan, 5 Cal. 53; Tillman v. Davis, 28 Ga. 494, 73 Am. Dec. 786; Brown v. Way, 28 Ga. 531; Rivard v. Gardner, 39 Ill. 125; Cully v. Shirk, 131 Ind. 76, 31 Am. St. Rep. 414; 30 N. E. 882; Clark v. Shaw, 79 Ind. 164; Smith v. De Kock, 81 Iowa, 535, 46 N. W. 1056; True v. Emery, 67 Me. 28; Hotchkiss v. Hunt, 56 Me. 252; Sawyer v. Harmon, 136 Mass. 414; Flynn v. Kalamazoo Cir. Judge, 136 Mich. 23, 98 N. W. 740; Michels v. Stork, 52 Mich. 260, 17 N. W. 833; Hutchins v. Carver County Commrs., 16 Minn. 13; Frasier v. Williams, 15 Minn. 288; Reynolds v. Ingersoll, 11 Smedes & M. (Miss.) 249, 49 Am. Dec. 57; Mason v. Perkins, 180 Mo. 702, 103 Am. St. Rep. 591, 79 S. W. 683; Heath v. Missouri etc. Ry. Co., 83 Mo. 617; Johnson v. Stone, 40 N. H. 197, 77 Am. Dec. 706; Nash v. Muldoon, 16 Nev. 404; Bolles v. Bowen, 45 N. H. 124; State v. Clerk of Bergen, 1 Dutch. (25 N. J. L.)

209; Cozine v. Walter, 55 N. Y. 304; High Rock R. Co. v. Bronner, 18 Misc. Rep. 631, 43 N. Y. Supp. 684; Walters v. Moore, 90 N. C. 41; Root v. Columbus etc. R. Co., 45 Ohio St. 222, 12 N. E. 812; Phillips v. Elwell, 14 Ohio St. 240, 84 Am. Dec. 373; Hill v. Grant, 49 Pa. 200; Barrows v. National Rubber Co., 13 R. I. 48; Pratt v. Phillips, 1 Sneed (Tenn.), 543, 60 Am. Dec. 162; Flaniken v. Neal, 67 Tex. 629, 4 S. W. 212; Schneider v. Ferguson, 77 Tex. 572, 14 S. W. 154; Yatter v. Pitkin, 72 Vt. 255, 47 Atl. 787; Wood v. Doane, 20 Vt. 612; Taylor v. Dundass, 1 Wash. (Va.) 92; Stewart v. Stewart, 27 W. Va. 167; Irwin v. Smith, 66 Wis. 113, 27 N. W. 35, 28 N. W. 351; Carr v. Commercial Bank of Racine, 16 Wis. 50; Brown v. Kennedy, 15 Wall. 597, 21 L. Ed. 193; Wilson v. Hurst, 1 Pet. C. C. 441, Fed. Cas. No. 17,809; Miller v. United States, 11 Wall. 294, 20 L. Ed. 135; Freem. Ex., § 364.

⁴² Root v. Columbus etc. R. Co., *supra*.

return. This is a *direct attack* upon the return, and the plaintiff is not bound thereby.⁴³ The rule that the return cannot be attacked collaterally by the parties applies, as we have said, although proof is offered that the officer has *acted fraudulently*. But in a proceeding to *vacate the judgment* for want of service, evidence may be received contradicting the return.⁴⁴ It has been held that an *irregular or illegal return* may be inquired into and impugned, as where the sheriff, in violation of his duty, received a note and returned an execution as satisfied.⁴⁵ A return must be treated as correct until it is vacated. Hence, if a writ be returned "satisfied," the clerk has no authority to issue an *alias* on the ground that the return of satisfaction was made by mistake.⁴⁶ The effect of a return must always be restricted to those facts which it was the duty of the officer to state.⁴⁷ In Connecticut and Louisiana returns are never conclusive unless against the officers who made them. They may be disputed and disproved by the parties to the suit as well as by strangers.⁴⁸ In New York a return showing the execution of a writ of possession is not conclusive; and it may be contradicted by proving that the persons in possession were never dispossessed.⁴⁹

§ 633 (650). Same—How far conclusive upon the officer—As to strangers.—It scarcely calls for reasons to support

⁴³ Chamberlin v. Brewer, 3 Bush (Ky.), 561; Andrew v. Parker, 6 Blackf. (Ind.) 461; Briggs v. Green, 33 Vt. 565; Campbell v. Webster, 15 Gray (Mass.), 28; Allen v. Martin, 10 Wend. (N. Y.) 300, 25 Am. Dec. 564; Phillips v. Elwell, 14 Ohio St. 240, 84 Am. Dec. 373.

⁴⁴ Carr v. Commercial Bank, 16 Wis. 50; Knutson v. Davies, 51 Minn. 363, 53 N. W. 646; Crosbey v. Farmer, 39 Minn. 305, 40 N. W. 71.

⁴⁵ Orange Co. Bank v. Wakeman, 1 Cow. (N. Y.) 46; Mumford v. Armstrong, 4 Cow. (N. Y.) 553; Arm-

strong v. Garrow, 6 Cow. (N. Y.) 465.

⁴⁶ Harkins v. Clemens, 1 Port. (Ala.) 30; Haden v. Walker, 5 Ala. 86.

⁴⁷ Shannon v. McMullin, 25 Gratt. (Va.) 211; First v. Miller, 4 Bibb (Ky.), 311; Bruce v. Dyall, 5 T. B. Mon. (Ky.) 125; Cator v. Stakes, 1 Maule & S. 599.

⁴⁸ Sanford v. Nichols, 14 Conn. 324; Grant v. Harris, 16 La. Ann. 323.

⁴⁹ Newell v. Whigham, 102 N. Y. 20, 6 N. E. 673.

it that the return of an officer is, in general, *conclusive* upon him. Parker, C. J., a century ago said:⁵⁰ "The officer's return must be in writing; and when made upon his precept, and regularly returned, it must be presumed to be true, until the falsity of it be proved. He cannot, therefore, justify by a parole return, when it is his duty to return his doings in writing. And it may be further observed that the owner of the goods taken has no regular means of knowing whether the officer has done his duty, other than by inspecting his return; and if the return may be explained, or another return proved by parole, this means may be useless. And it may be added that if parole evidence was admissible, there would be great danger of fraud and perjury. But the officer, by doing his duty, in returning truly his proceedings indorsed on his precept, is liable to no inconvenience, if he has acted legally; and if he has not, he ought not to be protected by a false return, whether in writing or by parole." He cannot, therefore, be heard to gainsay the truth of his return made under his oath of office.⁵¹ But an officer may *explain* a return, if *ambiguous*

⁵⁰ Purrington v. Loring, 7 Mass. 388.

⁵¹ Holt v. Robinson, 21 Ala. 106, 56 Am. Dec. 240; State v. Lawson, 8 Ark. 380, 47 Am. Dec. 728; Harvey v. Foster, 64 Cal. 296, 30 Pac. 849; Williams v. Cheesebrough, 4 Conn. 356; People v. Finch, 19 Colo. App. 512, 76 Pac. 1120; Splahn v. Gillespie, 48 Ind. 397; Lucas v. Cassaday, 2 Greene (Iowa), 208; Sponenbarger v. Lemert, 23 Kan. 55; Murrell v. Smith, 3 Dana (Ky.), 462; Kimball v. Lopez, 7 La. 173; Cowan v. Wheeler, 31 Me. 439; Purrington v. Loring, 7 Mass. 388; Shotwell v. Hamblin, 23 Miss. 156, 55 Am. Dec. 83; Planters' Bank v. Walker, 11 Miss. 409; Hopke v. Lindsay, 83 Mo. App. 85; People v. Reeder, 25 N. Y. 302; Denton v. Livingston, 9 Johns.

(N. Y.) 96, 6 Am. Dec. 264; Walters v. Moore, 90 N. C. 41; Wells v. Benefield, Wright (Ohio), 201; Welsh v. Bell, 32 Pa. 12; Sawyer v. Leard, 8 Rich. (S. C.) 267; Pratt v. Phillips, 1 Sneed (Tenn.), 543, 60 Am. Dec. 162; Cox v. Patten (Tex. Civ. App.), 66 S. W. 64; Mendelson v. Paschen, 71 Wis. 591, 37 N. W. 815. The sheriff cannot be heard to prove that the *amount* of money collected was less than the amount stated in the return, although the act was that of his deputy: Sheldon v. Payne, 7 N. Y. 453; Gardner v. Hosmer, 6 Mass. 325; nor can he deny that an arrest was made at the time stated in the return: Shewel v. Fell, 3 Yeates (Pa.), 17; nor can he prove that he did not in fact sell land returned as sold: Shewel v. Fell, 3 Yeates

or indefinite.⁵² He may also prove *facts not inconsistent* with his return, as that the plaintiff, being the purchaser at the sale, paid his bid by crediting the amount on the execution.⁵³ So where an officer is sued for not making a levy, he may show that the property was not the debtor's, although he has made a return designating the property as belonging to the debtor.⁵⁴ And where the officer has made a return of "levy too late to sell before court," he may show that such late levy was caused by the plaintiff himself and by his direction.⁵⁵ He may prove that an erasure of the return was not made by him nor by his authority.⁵⁶ He may also show that property levied under a prior writ, as that of the defendant, was found to belong to a third person.⁵⁷ Nor is the return of the officer conclusive, as against him, as to those statements which clearly relate to *matters of opinion*, for example, as to value.⁵⁸ On the same principle, it was held that an officer was not bound by the statement that a levy was made at a given hour of the day.⁵⁹ The general rule is that an officer may use his return in *his own favor*, but in such case it is only *prima facie* evidence of its truthfulness, and may be shown to be incorrect by any competent testimony.⁶⁰ Thus, if the officer brings an action against one who has interfered with the goods after his levy, his return is *prima facie* evidence

(Pa.) 17; nor that there were no goods, where he has made return of the levy: *Barney v. Weeks*, 4 Vt. 146.

⁵² *Atkinson v. Cummins*, 9 How. 479, 13 L. Ed. 223; *Chamberlin v. Brewer*, 3 Bush (Ky.), 561; *Susquehannah Boom Co. v. Finney*, 58 Pa. 200.

⁵³ *Evans v. Davis*, 3 B. Mon. (Ky.) 344.

⁵⁴ *Fuller v. Holden*, 4 Mass. 498; *Learned v. Bryant*, 13 Mass. 224; *Tyler v. Ulmer*, 12 Mass. 163; *Whiting v. Bradley*, 2 N. H. 79.

⁵⁵ *Granberry v. Crosby*, 7 Heisk. (Tenn.) 579.

⁵⁶ *Meredith v. Shewall*, 1 Penr. & W. (Pa.) 495.

⁵⁷ *Fuller v. Holden*, 4 Mass. 498; *Learned v. Bryant*, 13 Mass. 224; *Tyler v. Ulmer*, 12 Mass. 163; *Remmett v. Lawrence*, 15 Q. B. 1004, 14 Jur. 1067, 20 L. J. Q. B. 25. See *Forster v. Cookson*, 1 Q. B. 419; *Decker v. Armstrong*, 87 Mo. 316.

⁵⁸ *Williams v. Cheesebrough*, 4 Conn. 356; *Denton v. Livingston*, 9 Johns. (N. Y.) 96, 6 Am. Dec. 264.

⁵⁹ *Williams v. Cheesebrough*, 4 Conn. 356.

⁶⁰ *Andress v. Crawford*, 11 Ala. 853; *Baylor v. Scott*, 2 Port. (Ala.) 315; *State v. Lawson*, 8 Ark. 380, 47

of the levy.⁶¹ So it is *prima facie* evidence in the sheriff's favor in any action he may prosecute against a stranger to the original action, as where he sues the purchaser for the amount of his bid,⁶² or a third person to recover chattels which had been levied upon.⁶³ As between *strangers to the suit*, the general rule is that the return of the officer, as to those matters which the law requires him to certify, is *prima facie* evidence, but not conclusive.⁶⁴ Generally, strangers, who have no right of action against the officer for a false return or no standing in court against a proceeding to amend or set aside the return, may contradict the matters alleged therein.⁶⁵ The reason why the return of an officer is not conclusive on strangers, where their rights are sought to be prejudiced by it, is because, in case it is false, they have no remedy by action against the officer, nor have they any right to control, amend or vacate the return. The purchaser under an execution is not bound by the return,⁶⁶ nor dependent upon it for title.⁶⁷ Thus, although the return states that the property levied on by execution is the property of the judgment debtor, a third person who

Am. Dec. 728; Splahn v. Gillespie, 48 Ind. 397; Chamberlin v. Brewer, 3 Bush (Ky.), 561; Hand v. Grant, 5 Smedes & M. (Miss.) 508, 43 Am. Dec. 528; State v. Ferguson, 13 Mo. 166; Lucier v. Pierce, 60 N. H. 13; Glover v. Whittenhall, 2 Denio (N. Y.), 633; Sanborn v. Baker, 1 Allen (Mass.), 526; Smith v. Emerson, 43 Pa. 456; Nichol v. Ridley, 5 Yerg. (Tenn.) 63, 26 Am. Dec. 254; Barrett v. Copeland, 18 Vt. 67, 44 Am. Dec. 362; Fife v. Bohlen, 22 Fed. 878.

⁶¹ Cornell v. Cook, 7 Cow. (N. Y.) 310; Loftin v. Hugins, 2 Dev. L. (13 N. C.) 10; Stanton v. Hodges, 6 Vt. 64; Lowry v. Cady, 4 Vt. 504, 24 Am. Dec. 628; Earl v. Camp, 16 Wend. (N. Y.) 562.

⁶² Hand v. Grant, 5 Smedes & M. (Miss.) 508, 43 Am. Dec. 528; Nichol

v. Ridley, 5 Yerg. (Tenn.) 63, 26 Am. Dec. 254.

⁶³ Nichols v. Patten, 18 Me. 231, 36 Am. Dec. 713; Chadbourne v. Sumner, 16 N. H. 129, 41 Am. Dec. 720.

⁶⁴ Allen v. Gray, 11 Conn. 95; Bott v. Burnell, 9 Mass. 96; Tullis v. Brawley, 3 Minn. 277; Crow v. Hudson, 21 Ala. 560; Kingsbury v. Buchanan, 11 Iowa, 387; Tucker v. Bond, 23 Ark. 268; Hathaway v. Goodrich, 5 Vt. 65; Cornell v. Cook, 7 Cow. (N. Y.) 310; Browning v. Hanford, 7 Hill (N. Y.), 120; Butler v. State, 20 Ind. 169.

⁶⁵ Bott v. Burnell, 9 Mass. 96; Caldwell v. Harlan, 3 T. B. Mon. (Ky.) 349.

⁶⁶ Wyatt v. Stewart, 34 Ala. 716; Moore v. Martin, 38 Cal. 428.

⁶⁷ 3 Freeman, Ex., § 365.

is the real owner is not bound thereby.⁶⁸ Other persons may, however, sustain such *relations of privity* to the parties as to be concluded by the return. This has been most frequently illustrated in actions against sureties or those who have given bail, as such persons may be deemed to be in privity with those as to whose acts they have given indemnity;⁶⁹ and such persons may bring their actions for false return.⁷⁰ "Returns of officers are usually conclusive as a protection in favor of third persons who are bound to act upon them, and have no other evidence furnished them of their authority."⁷¹ The true principle is that wherever there is sufficient privity to enable a party to sustain an action against an officer for a false return, that return is conclusive in the proceedings under which it was made, and the party injured was driven to his action against the officer; but as to third persons, where no such privity exists, and no such action can be sustained, the return is not conclusive.⁷² We cannot close this section better than with the New Hampshire statement of the law. "The greater portion of the authorities may be reconciled with each other; and the general principle which seems to be fairly deducible from them is, that between the parties to the suit, and those claiming under them as privies, and all

⁶⁸ Whiting v. Bradley, 2 N. H. 79. Defects or irregularities in sheriff's return will not defeat title of purchaser who is not plaintiff in execution, and who receives a good deed. The purchaser depends upon the judgment, levy, and deed, and all other questions are between the parties to the judgment and the officer: Phillips v. Coffee, 17 Ill. 154, 63 Am. Dec. 357. See, also, Clark v. Lockwood, 21 Cal. 220; Brooks v. Rooney, 11 Ga. 423, 56 Am. Dec. 436; Preston v. Wright, 60 Iowa, 351, 14 N. W. 352; Brown v. Union Bank, 11 La. Ann. 543; Hamblen v. Hamblen, 33 Miss. 455, 69 Am. Dec. 358; Hughes v. Helms (Tenn. Ch. App.),

52 S. W. 460; Holmes v. Buckner, 67 Tex. 107, 2 S. W. 452; Vilas v. Reynolds, 6 Wis. 214.

⁶⁹ Cozine v. Walter, 55 N. Y. 304; Boomer v. Laine, 10 Wend. (N. Y.) 525; Bean v. Parker, 17 Mass. 591.

⁷⁰ Cozine v. Walter, 55 N. Y. 304; Whitaker v. Sumner, 7 Pick. (Mass.) 551, 19 Am. Dec. 298.

⁷¹ 2 Cowen & Hill's Notes to Phill. Ev. 797; Thayer v. Stearns, 1 Pick. (Mass.) 109; Saxton v. Nimms, 14 Mass. 315.

⁷² Isham, J., in Witherell v. Goss, 26 Vt. 748. See, also, Phillips v. Elwell, 14 Ohio St. 240, 84 Am. Dec. 373.

others whose rights and liabilities are dependent upon the suit as bail and indorsers, the return of the sheriff, of matters material to be returned, is so far conclusive evidence, that it cannot be contradicted for the purpose of invalidating the sheriff's proceedings, or defeating any right acquired under them. But such return is not conclusive as to third persons whose interests are not connected with the suit, but may be affected by the proceedings of the sheriff, nor as to collateral facts, or matters not necessary or proper to be returned. Should the sheriff return that the property attached was at the time the property of the debtor, this would not preclude a third person from showing a good title to it for both reasons."⁷³

⁷³ Brown v. Davis, 9 N. H. 76; Claggett v. Richards, 45 N. H. 360. In Phillips v. Elwell, *supra*, the subject is well summed up in these words: "Notwithstanding some decisions, the weight of authority clearly is, that an official return, duly made upon process by a sworn officer, in relation to facts which it is his duty to state in it, is, as between

the parties and privies to the suit, and others whose rights are necessarily dependent upon it, conclusive as to the facts stated therein, until vacated or set aside by due course of law; and that, as to all other persons, such return is *prima facie* evidence only of the facts stated in it, and subject to be disproved."

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